

THE INTERNATIONALISATION OF DIRECTORS' DUTIES*

A paper prepared for the Commercial Bar Association of Victoria
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1. With the advent of multinational corporations it is common for directors to be resident in states other than those in which the companies that they serve are incorporated, listed and engaged in business. The traditional common law choice of law rule is that a director's duties are those imposed by the law of the company's place of incorporation;¹ a director should expect to be bound by the law of that place. However, other jurisdictions (including jurisdictions in which the company might be listed, and jurisdictions in which it does business) may also purport to impose duties on directors.
2. Recent decades have seen the evolution of an increasingly co-ordinated global system of cross-border insolvency laws, developed with the needs of the peripatetic modern corporation in mind. Under that system, a single 'main proceeding' is commenced in a debtor's 'centre of main interests', and courts in other jurisdictions can recognise and assist that main proceeding, including by appointing local representatives with a variety of powers which can include the power to commence local legal proceedings in local courts.
3. However, harmonious developments in procedural insolvency laws have not been matched by the emergence of an internationally recognised set of choice of rules law that apply in insolvency.
4. The inexorable increase in global commerce and the spread of cross-border insolvency laws means that the frequency of cross-border insolvency proceedings is increasing. The advent

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¹ See in Australia the *Foreign Corporations (Application of Laws) Act 1989* (Cth), s 7(3)(d), (e) and *Re Douglas Webber Events Pty Ltd* (2014) 104 ACSR 250, 258 [33] (Brereton J) and cases there cited; see generally Martin Davies, Andrew Bell and Paul Brereton, *Nygh's Conflict of Laws in Australia* (9th Ed, 2014) 803 [35.42].

of insolvency naturally leads to closer scrutiny of directors' compliance with their duties, and may also trigger the availability of actions against directors which cannot be brought outside the insolvency process. One consequence of those matters is that a company's directors must be aware of the duties imposed on them by the law of any state with which the company has meaningful contact. There is a real and increasing risk that Australian directors will be subjected to claims under foreign law, whether brought here or overseas, in respect of the overseas operations of foreign companies and even potentially their Australian subsidiaries, especially where the day to day control of the relevant entity is vested overseas such that its 'centre of main interest' is outside Australia. An embryonic model law on the enforcement of insolvency judgments is likely to make local enforcement of foreign judgments quicker and easier. And if current proposals in relation to the recognition of enterprise groups are widely enacted then the centre of main interest of a holding company is likely to become an important factor in determining the standards against which the conduct of its subsidiaries' directors are measured.

5. The purpose of this paper is to illustrate some of the liabilities that Australian directors might be exposed to if insolvency proceedings are commenced in foreign jurisdictions, to contrast them with liabilities that might arise under familiar Australian laws, and to explain how Australian directors might become vulnerable to those liabilities. The lesson that we seek to impart is that Australian directors have to be aware of the real and often unforeseen risks involved in taking on directorships of companies that have international operations and relationships.
6. Obviously, the subject matter that we touch on is broad. We do not purport to set out all of the possible risks faced by directors as a result of international activity. Where we outline duties imposed by foreign law, we do not provide a comprehensive catalogue of any particular jurisdiction. And for the purposes of our comparative analysis, we have focussed only on a subset of the duties imposed on directors by virtue of the office: we have not set out norms that arise from conduct which is not director-specific (such as proscriptions on fraud, theft or corruption, or anti-avoidance provisions directed at the invalidation of transactions merely by reason of some factor inherent in the transactions themselves, such as might arise under local implementations of the Statute of Elizabeth).
7. **Part I** of the paper contains a brief survey of Australian directors' duties for the purpose of providing a baseline against which to compare selected duties imposed by the laws of a few of Australia's major trading partners: the United States, the United Kingdom, New Zealand

and Canada. For each jurisdiction, a subset of directors' duties, together with the law relating to 'informal' directorships – concepts akin to the Australian shadow and de facto directorships – are set out. **Part II** describes the traditional choice of law regime for imposing directors' duties, relates various means by which local directors might be exposed to actions for breaches of duties imposed by foreign law, explains how the traditional regime is supplemented by insolvency laws, describes how foreign judgments under such laws are recognised and enforced in Australia, and sketches the operation of a proposed new model law on the enforcement of insolvency-related judgments. **Part III** sets out the mechanics of a multi-state insolvency proceeding under the UNCITRAL Model Law on Cross-border Insolvency, explains various ways in which it might affect local directors' exposure to risks related to non-compliance with foreign law, and introduces UNCITRAL's work towards a model law on the cross-border insolvency of corporate groups. **Part IV** concludes.

Part I

The Varied Duties of Directors

Australia

8. In Australia we are all familiar with the fact that directors' duties are imposed by both the *Corporations Act 2001* (Cth) (the **Corporations Act**) and the common law. The duties are owed to the company (although a director may take into account the interests of shareholders when dealing with shares),² but where the company is insolvent or close to insolvency, directors are required to take account of the interests and rights of creditors in the execution of their duties.³ The nature of that obligation was defined by the English Court of Appeal as being a duty to ensure that the affairs of the company are properly administered.⁴

Who is a director?

9. Section 9 of the Corporations Act defines a director as a person who is appointed to the position of director or alternate director and includes a person who acts in that position or a

² *Brunninghausen v Glavanics* (1999) 46 NSWLR 538.

³ See *Hooker Investments Pty Ltd v Email Limited* (1986) 10 ACLR 433; *Jeffree v NCSC* (1989) 7 ACLC 556; *Lynford v Commonwealth Bank of Australia* (1995) 130 ALR 267 at 283; *Walker v Wimborne* (1976) 137 CLR 1; *ANZ Executors and Trustee Co Ltd v Qintex Australia Ltd (recs and mgrs apptd)* [1991] 2 Qd R 360.

⁴ *Winkworth v Edward Barton Development Co Limited* [1987] 1 ALL ER 114 at 118.

person on whose instructions a corporation is accustomed to act. It also includes a person not properly appointed as a director but who acts as a *de facto* director.

10. Section 190 provides that if the directors of a company delegate a power under s 198D, the directors are responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves.

Statutory duties

11. A director's statutory duties are to a large extent contained in Div 1 of Ch 2D of the Corporations Act, in particular ss 180 to 185, 187, 189 and 190.
12. Section 180 imposes an obligation on directors and other officers to discharge their duties with the degree of care and diligence of a reasonable person. That duty can be fulfilled by reliance on the 'business judgement rule', which provides that a director who makes a business judgement⁵ is taken to meet the relevant standard (and its equivalents at common law and in equity) if he or she (a) makes the judgement in good faith for a proper purpose; (b) does not have a material personal interest in the subject matter of the judgement; (c) informs him or herself about the subject matter of the judgement to the extent he or she reasonably believes to be appropriate; and (d) rationally believes that the judgement is in the best interests of the corporation. The director's belief that the judgement is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.
13. Section 181 provides that directors must exercise their powers and discharge their duties: (a) in good faith; (b) in the best interests of the company; and (c) for a proper purpose. Section 187 provides that a director of a corporation that it is a wholly owned subsidiary is taken to have acted in good faith in the best interests of the subsidiary if the director acts in good faith and in the best interests of the holding company (so long as the subsidiary's constitution expressly authorises the director to act in the best interests of the holding company and that the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's acts).

⁵ Defined by s 180(3) as "any decision to take or not take action in respect of a matter relevant to the business operations of the corporation".

14. Section 182 provides that a director must not improperly use his or her position to: (a) gain an advantage for him or herself; (b) gain an advantage for someone else; or (c) cause detriment to the corporation.
15. Section 183 provides that a director, secretary other officer or employee must not improperly use information to: (a) gain an advantage for him- or herself; (b) gain an advantage for someone else; or (c) cause detriment to the corporation.
16. Section 184(1) creates a criminal offence if a director acts recklessly or is intentionally dishonest and fails to exercise his or her powers and discharge his or her duties in good faith in the best interests of the company and for a proper purpose.
17. Section 184(2) provides that a director commits a criminal offence if he or she uses his or her position either: (a) dishonestly with the intention of directly or indirectly gaining an advantage for him or herself or someone else, or causing detriment to the company; or (b) recklessly as to whether the use may result in him- or herself or someone else directly or indirectly gaining an advantage, or in causing detriment to the company.
18. Section 184(3) makes it a criminal offence for a person to use information obtained as a result of holding the position of a director: (a) dishonestly with the intention of directly or indirectly gaining an advantage for him or herself or someone else, or causing detriment to the corporation; or (b) recklessly as to whether the use may result in him- or herself or someone else directly or indirectly gaining an advantage or in causing detriment to the corporation.
19. Section 189 provides that a director who relies on information or professional expert advice in good faith and after making an independent assessment of the information or advice is taken to have acted reasonably unless the contrary is proved.
20. Section 588G imposes a duty upon a director to prevent a company from incurring debts when it is insolvent. It is no defence to any such claim that the director did not take part in the management of the company (other than because of illness or some other good reason).⁶ However, a defence is provided by s 588H where at the time of incurring the debt, the director: (a) had reasonable ground for believing the company was solvent (the objective test); and (b) believed that the company was solvent and would remain solvent even it

⁶ Section 588H(4).

incurred the debt and other debt it incurred at that time (the subjective test). Directors are entitled to rely upon the advice of competent and reliable people for the purposes of establishing the defence.⁷ A second defence is available to directors who took all reasonable steps to prevent the company incurring the debt.⁸ What is reasonable will depend upon the circumstances, including any action taken to appoint an administrator. A third defence, known as ‘safe harbour’ applies where the debt was incurred at a time when the director was pursuing a course of action that was reasonably likely to lead to a better outcome for the company, and the debt was incurred directly or indirectly in connection with that course of action (which can include the incurring of ordinary trade debts).

21. Section 1309(1) makes it an offence for a director to make information available to certain persons (including directors, shareholders, debenture holders, auditors and market operators) where such information relates to the affairs of the company and is, to the knowledge of the director, false or misleading (whether by commission or omission).
22. Section 1318 allows the court to relieve a director from liability for a breach of duty if the director has acted honestly and ought fairly be excused for the breach.

General law duties

23. Whilst a number of general law duties have been codified in the Corporations Act, there are still differences between the duties imposed by the general law and those imposed by statute. The general law duties arise out of a director's position as a fiduciary and may be summarised as: (a) a duty to act honestly in the best interests of the company; (b) a duty to avoid conflicts between the company's interests and the directors' personal interests; (c) a duty to exercise the powers for a proper purpose; and (d) a duty to exercise all due care and skill in performance of their obligations as a director.⁹

United States of America

24. In the USA, company law is state-based. In the majority of states, directors' duties have not been codified and remain based upon general law fiduciary duties similar to those described at [23] above. Additional duties are imposed by statute where a company is

⁷ See section 588H(3).

⁸ See section 588H(5).

⁹ *Marchesi v Barnes* [1970] VR 434; *Flavel v Roget* (1990) 1 ACSR 595, 607.

approaching insolvency (fraudulent transfers and trading) and during takeover proceedings. The common law provides for a business judgement rule defence.

25. The American Law Institute defines directors as persons who are designated as a director by the corporation or who act in place of director under the applicable law or standard of the corporation.¹⁰ This does not include persons who act as shadow directors.
26. The American Law Institute, in its Principles of Corporate Governance describes a director's duty of care as being the performance of his or her functions:
 - (a) in good faith;
 - (b) in a manner believed to be in the best interest of the corporation; and
 - (c) with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.¹¹
27. It goes on to state that the duty includes an obligation to ensure that inquiries are made where the circumstances would alert a reasonable director or officer to the need.¹²
28. A director or officer does not violate his or her duty with respect to the consequences of a business judgment if he or she:
 - (a) was informed with respect to the subject of the business judgment to the extent that he or she reasonably believed to be appropriate under the circumstances;
 - (b) was not interested in the subject of the business judgment and made the judgment in good faith; and
 - (c) had a rational basis for believing that the business judgment was in the best interests of the corporation.¹³
29. The ALI Principles of Corporate Governance also set out specific duties in section 5 dealing with duties of fair dealing and avoiding conflicts of interest.

¹⁰ American Law Institute, *Principles of Corporate Governance* (American Law Institute, 1994) (**ALI Principles**) s 1.13.

¹¹ ALI Principles, s 4.01(a).

¹² ALI Principles, s 4.10(b).

¹³ ALI Principles, s 4.01(d).

30. The majority of American states have introduced some form of a 'constituency' statute that allows directors to take into account the interests of all stakeholders and not just shareholders when making decisions, especially in the face of takeover bids. The definition of 'stakeholders' for the purposes of such statutes differs between States. By way of example, in Connecticut, stakeholders include shareholders, employees, creditors and society generally.¹⁴ The extent of these obligations differs between the states.¹⁵ In some states the provisions apply to all decisions taken by the Board, but they are generally not mandatory. In the majority of such states directors have not been found to have acted in breach of their duties if they did not take into account the interest of other stakeholders, as their primary duties were to the companies.
31. On the other hand, in Delaware, where a large number of companies are incorporated, there is no constituency statute such that a director owes his or her duties primarily to the company with some duties owed to shareholders during a takeover.
32. If shareholders (or in limited circumstances other stakeholders) wish to bring proceedings for a breach of duty against a director, they generally do so as a derivative action on behalf of the company, after making demand that the board take action against that director in the name of the company.¹⁶ That approach differs from the obligations imposed in other jurisdictions discussed above and below.¹⁷

New Zealand

33. Directors' duties in New Zealand follow a path familiar to Australian lawyers. Part 8 of the *Companies Act 1993* (NZ) (the **NZ Companies Act**) articulates certain duties. The common law and equity shape those statutory duties, and provide further duties which operate in parallel with the statute.¹⁸

¹⁴ Conn Gen Stat §33-756 (2010).

¹⁵ See e.g. Nathan E Standley 'Lessons Learned from the Capitulation of the Constituency Statute (2012) 4 *Elon Law Review* 209.

¹⁶ Douglas M Branson 'The American Law Institute Principles of Corporate Governance and the Derivative Action: A View From the Other Side' (1986) 43(2) *Washington and Lee Law Review* 399.

¹⁷ For a detailed comparison between the duties owed under US law and those owed under Australian law see Julie Cassidy, 'Standards of Conduct and Standards of Review: Divergence of the Duty of Care in the United States and Australia' (2000) 28 *Australian Business Law Review* 180.

¹⁸ See *Benton v Priore* [2003] 1 NZLR 564, 46 (Heath J); *Internet Traders Ltd v Williams* [2014] NZHC 3407, [20] (Heath J).

34. The NZ Companies Act contains an inclusive definition of ‘director’ which covers (for relevant purposes) ground similar to that covered by the definition found in s 9 of the Corporations Act, and to which is added a person to whom a power or duty of the board has been directly delegated with that person’s consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board.
35. The NZ Companies Act imposes two duties that are perhaps most pertinent for present purposes, which are set out in ss 135 and 136 as follows:

135 Reckless trading

A director of a company must not—

- (a) agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company’s creditors; or
- (b) cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company’s creditors.

136 Duty in relation to obligations

A director of a company must not agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.

36. Further statutory duties include duties to act in good faith and in the best interests of the company;¹⁹ to exercise the director’s powers for proper purposes;²⁰ to comply with the NZ Companies Act and the company’s constitution and not to agree to the company acting in a way that contravenes them;²¹ to exercise the care, diligence and skill of a reasonable director;²² not to use information made available as a result of the director’s position other than as allowed by the Act;²³ not to trade in the company’s shares other than as prescribed;²⁴ to disclose the existence of certain interests in certain transactions or proposed

¹⁹ *Companies Act 1993* (NZ), s 131 (as modified by s 132).

²⁰ *Companies Act 1993* (NZ), s 133.

²¹ *Companies Act 1993* (NZ), s 134.

²² *Companies Act 1993* (NZ), s 137.

²³ *Companies Act 1993* (NZ), s 145.

²⁴ *Companies Act 1993* (NZ), s 149.

transactions of the company;²⁵ to disclose certain interests in shares issued by the company;²⁶ and to ensure that the share register is kept properly.²⁷

37. The latter three duties are owed directly to shareholders, and shareholders can bring actions directly against directors in respect of their breach.²⁸ The remaining statutory duties are owed to the relevant company²⁹ (although, as in Australia, the common law of New Zealand accepts that where a company is or is near to being insolvent, the duties that directors owe to the company require them to consider the interests of the company's creditors).³⁰
38. Breaches of duty are subject to defences including that arising under s 138, which provides (in broad summary) that a director of a company can rely on reports and professional or expert advice given by employees or advisers whom the director believes on reasonable grounds to be reliable and competent, provided that in doing so the director acts in good faith, makes proper enquiry and has no knowledge that reliance is unwarranted. That defence is, in turn, subject to a duty to monitor the actions of persons in day-to-day control of the company.³¹
39. Section 300 of the NZ Companies Act provides that if a company in liquidation is unable to pay all of its debts and has failed to comply with statutory obligations regarding the keeping of accounts and preparation of financial statements, and the court considers that the failure has: (a) contributed to the company's inability to pay its debts; (b) resulted in substantial uncertainty as to its assets or liabilities; or (c) substantially impeded the orderly liquidation, or that 'for any other reason' it is proper to make a declaration, the court may on the application of the liquidator order that a director or former director is personally responsible for any part of the company's debts or liabilities. It is a defence to liability under s 300 if the person took all reasonable steps to secure compliance by the company or had reasonable grounds to (and did) believe that a competent and reliable person was charged with the duty

²⁵ *Companies Act 1993* (NZ), s 140. Relevant interests are defined in s 139. The consequence of a breach of the s 140 duty are set out in ss 140(3), 140(4), 141 and 142. The director's entitlement to vote is regulated by s 144.

²⁶ *Companies Act 1993* (NZ), s 146-148

²⁷ *Companies Act 1993* (NZ), s 90.

²⁸ *Companies Act 1993* (NZ), ss 169(1)-(3).

²⁹ *Companies Act 1993* (NZ), s 169(3).

³⁰ *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242; *Robb v Sojourner* [2008] 1 NZLR 751, [25].

³¹ *See Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, 79-81; *FXHT Fund Managers Ltd v Oberholster* (2009) 10 NZCLC 264,562, [104] (Venning J).

of seeing that the provision was complied with and was in a position to discharge that duty. In *Mason v Lewis* [2006] 3 NZLR 225, 238, the Court of Appeal held that s 300 “is important in its own right. It works in tandem with s 135: a director cannot be heard to say ‘I did not realise we were in such a pickle, because we did not have any, or adequate, books of account’. It is fundamental that such books must be kept, and directors must see to it that they are kept.”

40. Section 301 of the NZ Companies Act is a procedural section³² which allows the court to enquire into the conduct of a director and, if the court forms the view that the director has (among other things) “been guilty of negligence, default, or breach of duty or trust in relation to the company”, order that he or she repay or restore money or property to the company, or compensate the company in such sum as the court thinks just. An application under s 301 can be made by a liquidator, a creditor or a shareholder. If the application is made by a creditor, the court can also order the director to pay or transfer money or property to that creditor.³³ In making an order against a director, the court must take into account any action that the person took for the appointment of an administrator to the company.³⁴ Relief is approached in a ‘broad brush’ fashion³⁵ and may be calculated on a restitutionary or compensatory basis as appropriate.³⁶
41. The duties imposed by ss 135 and 136 differ sufficiently from any imposed by Australian law that they warrant a closer look.

Reckless trading – Section 135

42. The duty created by s 135 is owed to the company but is directed to the protection of creditors.³⁷ Like the duty under s 136, it involves the court in “a reconstruction of the

³² That is, it is a vehicle for prosecuting causes of action that are created by other sections or laws; it creates no cause of action in itself: *Jordan v O’Sullivan* [2008] NZHC 2322, [14] (Clifford J).

³³ *Companies Act 1993* (NZ), s 301(1)(c).

³⁴ *Companies Act 1993* (NZ), s 301(4).

³⁵ Liesle Theron, ‘Liability of Related Companies, Shareholders and Directors’, in Paul Heath and Michael Whale, *Heath and Whale Insolvency Law in New Zealand* (2nd Ed, 2014), 603, citing *Mason v Lewis* [2006] 3 NZLR 225, [118].

³⁶ *Robb v Sojourner* [2008] 1 NZLR 751, 768 [53].

³⁷ *FXHT Fund Managers Ltd v Oberholster* (2009) 10 NZCLC 264,562, [39] (Venning J).

choices made by a director in continuing to trade in difficult circumstances ... when the financial future of the company ought to have been appreciated as being precarious.”³⁸

43. Recklessness must be distinguished from mere negligence.³⁹ In *Mason v Lewis* [2006] 3 NZLR 225, the Court of Appeal held that s 135 requires the court to distinguish between ‘legitimate’ and ‘illegitimate’ risks,⁴⁰ and is concerned “with not mere risk but *substantial risk of serious loss*.”⁴¹ It held that the “essential pillars” of the section are:
- (a) the duty is owed by directors to the company (rather than to any particular creditors);
 - (b) the test it imposes is an objective one;
 - (c) it focuses “not on a director’s belief, but rather on the manner in which a company’s business is carried on, and whether that modus operandi creates a substantial risk of serious loss”; and
 - (d) what is required “when the company enters troubled waters” is a “a sober assessment ... of an ongoing character, as to the company’s likely future income and prospects.”⁴²
44. Quantification of a claim for reckless trading has an ‘equitable’ character and involves the exercise of a ‘broad brush’ discretion.⁴³ The courts begin by looking to the deterioration in the company’s financial position between the ‘breach date’ (the date that inadequate corporate governance became evidence) and the date of liquidation.⁴⁴ They then analyse

³⁸ *H Investments Limited (in liquidation) v Official Assignee* [2018] NZCA 76, [82] (NZCA).

³⁹ *Re South Pacific Shipping Limited (in liq); Traveller v Löwer* (2004) 9 NZCLC 263,570, [126] (William Young J) (upheld on appeal: *Löwer v Traveller* [2005] 3 NZLR 479). 1. For example, in *Duties and Responsibilities of Directors and Company Secretaries in New Zealand*, Silvana Schenone and Igor Drinkovic state at ¶614 “a director who allows a company to trade in the face of clear indications of insolvency — starvation of capital, slow recovery of receivables, hard-core bad debts, growing arrears in accounts payable, etc, or does not implement proper monitoring systems — could be found to have acted recklessly.” But cf *FXHT Fund Managers Ltd (in liq) v Oberholster* (2009) 10 NZCLC 264,562 at [68].

⁴⁰ *Mason v Lewis* [2006] 3 NZLR 225, 233 (NZCA).

⁴¹ *Mason v Lewis* [2006] 3 NZLR 225, 233 (Court of Appeal) (the emphasis is the Court’s); *Goatlands Ltd (in liq) v Borrell* (2007) 23 NZTC 21,107; [2006] NZHC 1576, [45] (Lang J).

⁴² *Mason v Lewis* [2006] 3 NZLR 225, 233 (Court of Appeal). The future prospects of the company include the directors’ own willingness to subscribe further capital in support of the company: see e.g. *Jordan v O’Sullivan* [2008] NZHC 2322, [254].

⁴³ *Mason v Lewis* [2006] 3 NZLR 225, 242 [118].

⁴⁴ *Mason v Lewis* [2006] 3 NZLR 225, 241 [109].

questions of causation, culpability and the duration of the trading in exercising their discretion to determine what is a ‘just contribution’ to be made by the defendant director.⁴⁵

Duty not to incur obligations that the company cannot keep – Section 136

45. Section 136 is concerned with the incurring of specific obligations (even via single transactions⁴⁶), as opposed to s 135 which is directed to a course of conduct over time.⁴⁷ Like s 135 though, it is concerned with the taking of ‘illegitimate’, as opposed to ‘legitimate’ risks.⁴⁸ Particular conduct may breach both sections simultaneously.⁴⁹ A company need not be insolvent at the time that it enters in to the transaction for its directors to contravene s 136.⁵⁰ The section calls for a “mixed, objective-subjective approach.”⁵¹

Canada

46. In Canada directors might find themselves liable under both federal and provincial law. Corporations can be incorporated under either the *Canada Business Corporations Act 1985* (Canada)⁵² (CBCA) or provincial corporations statutes; each statute imposes duties on directors of companies incorporated under it. Additionally, duties are imposed by the two principal insolvency statutes, the *Bankruptcy and Insolvency Act* (Canada)⁵³ (BIA) and the *Companies’ Creditors Arrangement Act* (Canada)⁵⁴ (CCAA) and by a raft of federal and provincial revenue, employment and other statutes.
47. The CBCA applies to corporations incorporated or continued under that Act, but not to cooperative credit associations, banks, insurance companies or trust and loan companies.⁵⁵

⁴⁵ *Mason v Lewis* [2006] 3 NZLR 225, 242 [110] (NZCA); *Shaw v Owens* [2017] NZCA 315, [17] (NZCA).

⁴⁶ *Goatlands Ltd (in liq) & Ors v Borrell & Anor* (2007) 23 NZTC 21,107, [113] (Lang J); *Jordan v O’Sullivan* [2008] NZHC 2322, [212]-[217] (Clifford J).

⁴⁷ *Goatlands Ltd v Borrell* (2007) 23 NZTC 21,107 at [113] (Lang J); *Jordan v O’Sullivan* [2008] NZHC 2322, [61] (Clifford J).

⁴⁸ *Jordan v O’Sullivan* [2008] NZHC 2322, [62] (Clifford J).

⁴⁹ *Jordan v O’Sullivan* [2008] NZHC 2322, [66] (Clifford J), citing as an example *Re Wait Investments Ltd (in liq)* [1997] 3 NZLR 96.

⁵⁰ *Jordan v O’Sullivan* [2008] NZHC 2322, [218] (Clifford J).

⁵¹ *Jordan v O’Sullivan* [2008] NZHC 2322, [218], [55]-[57] (Clifford J).

⁵² *Canada Business Corporations Act*, RSC 1985, c C-44.

⁵³ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

⁵⁴ *Companies Creditors Arrangement Act*, RSC 1985, c C-36.

⁵⁵ *Canada Business Corporations Act*, RSC 1985, c C-44 s 2(5).

It imposes duties on all directors of corporations incorporated under the CBCA and to all persons occupying the position of director by whatever name called.⁵⁶ The definition of ‘officer’ includes “persons who perform functions similar to those performed by a director”⁵⁷ – a provision wider than the Australian concept of ‘shadow director’.

48. Section 15(3) of the CBCA authorises a corporation to carry on its business and conduct its affairs in any jurisdiction outside Canada to the extent that the laws of that jurisdiction allows. It does not seek to limit the duties imposed on directors by that Act in relation to trade outside Canada.
49. Directors and officers in Canada are also generally subject to two general law duties namely:
- (a) A fiduciary duty to act in the best interests of the corporation. In determining whether they are acting in the best interests of the corporation, directors can consider the interests of all stakeholders, including creditors, employees and society as a whole.⁵⁸ This duty is owed to the corporation.
 - (b) A duty of care to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.⁵⁹ A director must employ whatever ability, education, experience and training he or she possesses in the manner in which a reasonably prudent person would employ those skills in comparable circumstances.⁶⁰ This duty is owed to the corporation and to other stakeholders.⁶¹
50. A business judgement rule defence is available to directors who have acted reasonably with due care and good faith and in the best interests of the company.⁶² A similar defence is also available under the CBCA which exempts directors from liability if they exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances including reliance in good faith on (a) financial statements of the corporation

⁵⁶ *Canada Business Corporations Act*, RSC 1985, c C-44 ss 2(1) and 3(4).

⁵⁷ *Canada Business Corporations Act*, RSC 1985, c C-44 s 2(1).

⁵⁸ *Canada Business Corporations Act*, RSC 1985, c C-44 s 122(1)(a); *Re BCE Inc* [2008] 3 SCR 560 [36]-[37], [40].

⁵⁹ *Canada Business Corporations Act*, RSC 1985, c C-44 s 122(1)(b); *Re People’s Department Stores Ltd. (1992) Inc* [2004] 3 SCR 461; *Re BCE Inc* [2008] 3 SCR 560 [36].

⁶⁰ Institute of Corporate Directors, *Directors Responsibilities in Canada* (Osler, Hoskin & Harcott and Institute of Corporate Directors, 2014).

⁶¹ Barry J Reiter, *Directors Duties in Canada* (4th ed, 2009) 64.

⁶² *Re BCE Inc* [2008] 3 SCR 560, [40].

represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or (b) a report of a person whose profession lends credibility to a statement made by the professional person.⁶³

51. It is beyond the scope of this paper to set out every possible source of liability that a director might face under Canadian law, but there are at least a few which are significantly different from any duties imposed under Australian law.
52. Section 118 of the CBCA makes those directors who voted in favour of the issue of a share for other than money and less than market consideration liable for any loss suffered by the company.⁶⁴
53. Section 119(1) of the CBCA is a no-fault provision that makes every director of a company incorporated under that statute liable to employees of the company for up to six months' of wages that fell due but were unsatisfied during the time that the person was a director. Additionally, equivalent legislation in each provincial jurisdiction addresses directors' personal liability for debts owing to employees (in some jurisdictions, including for severance pay).⁶⁵
54. In addition, various acts make directors personally liable for employment insurance premiums and pension plan premiums.⁶⁶ Tax legislation also makes the directors of a corporation personally liable for its obligations to remit income tax⁶⁷ and goods and services tax.⁶⁸ All of those obligations are enforceable by the Canadian Receiver General and under those provisions directors can be liable for the amounts (plus penalties or interest) that the corporation fails to deduct and remit in accordance with those provisions.
55. Directors' duties can be enforced in three main ways:
 - (a) the company can issue proceedings for breach of duty;

⁶³ *Canada Business Corporations Act*, RSC 1985, c C-44 s 123(4) and (5).

⁶⁴ *Canada Business Corporations Act*, RSC 1985, c C-44 s 118(1).

⁶⁵ See Geoffrey Morawetz, James Farley, Janis Sarra, Cathy Costa-Faria and Jesse Mighton, 'Canada' in INSOL International, *Directors in the Twilight Zone V* (2017), 2.6.2.

⁶⁶ *Employment Insurance Act*, SC 1966 c23 s 83(1); *Canada Pension Plan*, RSC 1985, c C-8 s 21.1.

⁶⁷ *Income Tax Act*, RSC 1985, c 1 (5th Supp) ss 227.1, 238(1), 242.

⁶⁸ *Excise Tax Act*, RSC 1985, c E-15, ss. 323, 329, 330.

- (b) shareholders can issue derivative proceedings pursuant to section 239 of the CBCA;
and
- (c) shareholders and other stakeholders (including secured creditors, employees and other directors) can issuing oppression proceedings pursuant to section 241 of the CBCA.

United Kingdom

56. Section 250 of the *Companies Act 2006* (UK)⁶⁹ (the **UK Companies Act**) defines a director as being a person occupying that position by whatever named called. The general duties also apply to shadow directors to the extent that are capable of applying.⁷⁰ Specific provisions also apply in relation to shadow directors.⁷¹ Shadow directors are also treated as officers of the company for the purposes of number of offences.⁷²
57. The United Kingdom has codified its directors duties.⁷³ Chapter 2 of Part 10 of the **UK Companies Act** sets out the duties which are owed by a director to the company⁷⁴, which can be summarised as follows:
- (a) a duty to act within the powers conferred by the company's constitution;⁷⁵
 - (b) a duty to promote the success of the company;⁷⁶
 - (c) a duty to exercise independent judgment;⁷⁷
 - (d) a duty to exercise reasonable care skill and diligence;⁷⁸
 - (e) a duty to avoid conflicts of interest;⁷⁹
 - (f) a duty not to accept benefits from third parties;⁸⁰ and

⁶⁹ *Companies Act 2006*, c 46.

⁷⁰ UK Companies Act s 170(5).

⁷¹ See e.g. UK Companies Act ss 187, 223 and 230.

⁷² See e.g. UK Companies Act ss 63, 68,75, 84 and 156.

⁷³ UK Companies Act s 170(3) and (4) and *Companies Act 2006 Explanatory Notes* [298]-[306].

⁷⁴ UK Companies Act s 170(1)

⁷⁵ UK Companies Act, s 171.

⁷⁶ UK Companies Act, s 172 (1).

⁷⁷ UK Companies Act, s 173.

⁷⁸ UK Companies Act, s 174.

⁷⁹ UK Companies Act, s 175.

⁸⁰ UK Companies Act, s 176.

- (g) a duty to declare interests in proposed transaction or arrangement.⁸¹
58. The duty referred to in paragraph 57(b) above is subject to any enactment or rule of law requiring directors in certain circumstances to consider or act in the interests of creditors of the company.⁸²
59. Chapter 4 of Part 10 of the UK Companies Act sets out a number of transactions for which members' approval must be obtained by directors.
60. Section 259 states that it is immaterial whether the law that governs the arrangement or transaction is UK law or not. This makes it clear that providing the directors are directors of a company registered or recognised under that Act that these duties will continue to apply to those directors.
61. The common law imposes upon directors a duty to protect the interests of creditors as a company is insolvent or nearing insolvency.⁸³ The test of solvency is an objective test.⁸⁴ The duty is owed to the corporation and has been expressed as being to consider not only existing creditors but also future creditors.⁸⁵ This duty continues to apply because of the carve out to the statutory duties by section 172(3).
62. The *Insolvency Act 1986* (UK) (**UK Insolvency Act**) allows a liquidator to sue a director if the company has engaged in fraudulent trading⁸⁶ or has traded when there was no reasonable prospect that the company would avoid going into insolvent liquidation.⁸⁷ The latter provision has a stricter test than the Australian insolvent trading provisions.

PART II

Choice of Law and Sources of Foreign Liability

63. Traditional choice of law rules and the substantive laws that create director liability provide many means by which directors can be found liable in jurisdictions outside their own domicile and that of their company, even without the application of special rules for

⁸¹ *Companies Act 2006*, c 46, s 177.

⁸² UK Companies Act, s 172 (3).

⁸³ *Re MDA Investment Management Ltd* [2004] 1 BCLC 217; *Secretary of State for Business Innovation and Skills v Doffman* [2011] 2 BCLC 541.

⁸⁴ *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62, 74.

⁸⁵ *Winkworth v Edward Baron Development Co Ltd* [1987] 1 All ER 117, 118.

⁸⁶ *Insolvency Act 1986* (UK) c 45 s 213.

⁸⁷ *Insolvency Act 1986* (UK) c 45 s 214.

insolvency. This part deals with those rules and laws. However, the range of liabilities that director might expect to be exposed to in practise are now being affected by principles found in UNCITRAL model laws, most notably via the of ‘centre of main interest’ and ‘establishment’. Those principles will be dealt with in Part III.

64. In common law countries the traditional choice of law rule is *lex corporacionis*, under which the law of the place of incorporation governs the existence and content of the duties of directors of companies incorporated in that place.⁸⁸ In *Base Metal Trading Ltd. v Shamurin* [2005] 1 WLR 1157, Arden LJ held that “*the law of the place of incorporation applies to the duties inherent in the office of director and it is irrelevant that the alleged breach of duty was committed, or the loss incurred, in some other jurisdiction.*”⁸⁹ As Tucker LJ held, delivering the leading judgment in the same case: “*Any other result would create huge uncertainty and hamper the requirement for good corporate governance and proper regulatory control.*”⁹⁰

65. In a number of states the common law has been replaced or amended by statute.⁹¹

66. Despite the general rule, Australian directors should not be surprised to learn that foreign laws can impose responsibilities on the directors of Australian companies that operate overseas; after all, s 186 of the Corporations Act does precisely that, by providing that:

Sections 180 to 184^[92] do not apply to an act or omission by a director or other officer or employee of a foreign company unless the act or omission occurred in connection with:

- (a) the foreign company carrying on business in this jurisdiction; or
- (b) an act that the foreign company does, or proposes to do, in this jurisdiction; or
- (c) a decision by the foreign company whether or not to do, or refrain from doing, an act in this jurisdiction.

67. In *Titchfield Management Ltd v Vaccinoma Inc* (2008) 68 ACSR 448, Barrett J wound up a deregistered Delaware corporation at the suit of a New South Wales creditor on bases including the existence of a clear case for further investigations, including into breaches of

⁸⁸ *Re Douglas Webber Events Pty Ltd* (2014) 104 ACSR 250, 258 [33] (Brereton J) and cases there cited.

⁸⁹ *Base Metal Trading Ltd. v Shamurin* [2005] 1 WLR 1157, [2004] EWCA Civ 1316, [69].

⁹⁰ *Base Metal Trading Ltd. v Shamurin* [2005] 1 WLR 1157, [2004] EWCA Civ 1316, [56].

⁹¹ In Australia the *Foreign Corporations (Application of Laws) Act 1989* (Cth) applies.

⁹² As to which see paragraphs [12] to [19] above.

duty which might have included breaches of directors' duties under the Corporations Act.⁹³ And in *ASIC v MacDonald (No 11)* (2009) 73 ACSR 368, the Australian director of a company incorporated in the Netherlands (but which had its share registry, and carried on business, in Australia) was found to have breached duties owed to that company under s 181 of the Corporations Act by virtue of statements he made at investor presentations in Scotland and London (on the basis that those statements were made in connection with the company carrying on its business in Australia).⁹⁴

68. The fact that Australian law imposes duties on the directors of foreign companies in certain circumstances that have a connection with Australia does not affect the existence of duties that might be imposed on such directors by foreign laws, nor on the Australian courts' ability to give effect to duties arising under foreign laws. Where it is necessary to determine a question of law by reference to law other than Australian law, ss 7(1) and 7(3)(e) of the *Foreign Corporations (Application of Laws) Act 1989* (Cth) dictate that the question is to be determined "by reference to the law applied by the people in the place in which the foreign corporation was incorporated."⁹⁵
69. Foreign law also provides for the possibility of directors of Australian companies being held liable for breaches of obligations imposed on directors by foreign law. We now turn to examine some such possibilities.

United Kingdom

70. In *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1, the Supreme Court of the United Kingdom unanimously held that s 213 of the UK Insolvency Act had extraterritorial effect in the case of the winding up of an English-registered company. In so doing, it recognised that the insolvency law of the United Kingdom presumes that the winding up of a UK-registered company (even one incorporated elsewhere) has extraterritorial effect.⁹⁶ At 45-46 [108], Lord Sumption JSC held:

⁹³ See *Titchfield Management Ltd v Vaccinoma Inc* (2008) 68 ACSR 448, 455-454 [30], 455 [35]-[37]; 456-457 [43]-[44] (Barrett J).

⁹⁴ *ASIC v MacDonald (No 11)* (2009) 71 ACSR 368, 523-524 (Gzell J).

⁹⁵ See *Nicholls v Michael Wilson Partners* (2010) 243 FLR 177, 242 [347] – 244 [359] (Lindgren AJA) (overturned on other grounds: *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; *Motor Vehicles Insurance Ltd v Woodlawn Capital Pty Ltd* (2014) 102 ACSR 636, 650 [87] – [96] (Stevenson J) (conclusion not challenged on the partially-successful appeal).

⁹⁶ *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1, 46 [109] (Lord Sumption JSC) and 74 [213] (Lords Toulson and Hodge JJSC; Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony

Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the loss to the estate for the benefit of creditors. Such powers have been part of the corporate insolvency law of the United Kingdom for many years. In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom.

71. It follows that other provisions directed to similar ends to that of s 213 are likely also to be applied extraterritorially.

72. The power to allow extraterritorial application of the relevant provisions is discretionary.⁹⁷ The editors of *Palmer's Company Law* summarise the factors that courts have taken into account in the exercise of the discretion as follows:⁹⁸

the degree of connection between the defendant and the jurisdiction of the court; the consequences of the conduct in question, having regard to any law by which the relevant transactions may have been governed; and the likelihood that any order which might be made by the English court would be recognised and enforced by the foreign court, should the need arise.

73. It follows that an Australian director of a UK-registered company may be vulnerable to pursuit for breaches of the UK Insolvency Act. Such liability might also extend to the situation of a person who is not the director of a UK-registered company, but who was involved in conduct proscribed by that Act by virtue of his or her role as the director of an Australian-registered holding company or subsidiary of a UK-registered company, or a counterparty to a contract or other arrangement with a UK-registered company.⁹⁹

74. Further, such sections can be applied to non-UK directors of non-UK registered companies where such companies are wound up by courts of the United Kingdom. Courts in the United Kingdom have the power to wind up foreign companies that are not registered under the UK Companies Act if a 'sufficient connection' with the United Kingdom is established.¹⁰⁰ Totty, Moss and Segal summarise the factors that must be present as follows: (a) there must be a sufficient connection with the jurisdiction, which may (but need

and Lord Carnwath JJSC agreeing). In so finding, the Court approved the decision of the Court of Appeal in *Re Paramount Airways Ltd (No.2)* [1993] Ch. 223.

⁹⁷ *Re Paramount Airways Ltd (No.2)* [1993] Ch. 223 (C.A).

⁹⁸ Geoffrey Morse (Ed), *Palmer's Company Law* (on-line service, accessed 20 July 2018), [15.599.25.1]. See too *Re Paramount Airways Ltd (No.2)* [1993] Ch. 223 (C.A).

⁹⁹ See e.g. *Bank of India v Morris* [2005] B.C.C. 739, [2005] EWCA Civ 693.

¹⁰⁰ UK Insolvency Act, s 221; *Re Latreefers Inc, Re Latreefers Inc* [2001] B.C.C. 174; [2001] 2 B.C.L.C. 116.

not) be the presence of assets there; (b) there must be a reasonable possibility of benefit to those applying to wind the company up; and (c) one or more persons interested in the distribution of the company's assets must be a person over whom the court can exercise jurisdiction.¹⁰¹ One reason why courts have acceded to such applications is the existence of valuable actions against directors of such companies under the UK Insolvency Act.¹⁰²

75. For example, in *Re Howard Holdings Pty Ltd* [1998] B.C.C. 549, a Panamanian shipping company was wound up as an unregistered company in the United Kingdom and its liquidator obtained leave *ex parte* to serve its Monaco-resident directors with proceedings under UK Insolvency Act s 214. The directors applied to have the order discharged but were unsuccessful. Chadwick J held that “*the winding-up order having been made, there can be no doubt that the court has jurisdiction to make declarations against foreign directors of foreign companies pursuant to s. 214 of that Act in an appropriate case.*”¹⁰³ His Honour dismissed an argument by the directors to the effect that such a finding would expose them to liability for breach of a law which did not govern them at the time that they made the impugned decisions (which were made in Monaco by directors who were residents of Monaco, and which concerned a Panamanian-registered company). His Honour held that such a matter was relevant to the exercise of the discretion as to whether to find the directors liable, but did not exclude the possibility of liability.¹⁰⁴
76. There is a third means by which foreign directors might find themselves tried by reference to duties imposed by UK law. Section s 426 of the UK Insolvency Act allows foreign liquidators of foreign companies access to United Kingdom courts, if a court in one of a limited group of jurisdictions (which includes Australia¹⁰⁵) requests it, for reasons which can include the prosecution of directors under either UK law or the law of the foreign jurisdiction.¹⁰⁶

¹⁰¹ Peter Totty, Gabriel Moss and Nick Segal, *Totty, Moss & Segal: Insolvency* (online service), [E1-02].

¹⁰² See e.g. *Re Company No 00359 of 1987* [1988] Ch 210.

¹⁰³ *Re Howard Holdings Pty Ltd* [1998] B.C.C. 549, 552.

¹⁰⁴ *Re Howard Holdings Pty Ltd* [1998] B.C.C. 549, 554-555.

¹⁰⁵ Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1986, SI 1986/2123. That and various other like- and similarly-named orders made in 1996, 1989, 1996 and 1998 designate a total of some 21 common-law countries for the purposes of s 426: see Lloyd Tamlin, ‘Assistance Pursuant to Section 426 of the Insolvency Act 1986’ in Richard Sheldon, *Cross-Border Insolvency* (4th Ed, 2015), [4.15]-[4.17].

¹⁰⁶ Lord Collins of Mapesbury and Jonathon Harris, *Dicey, Morris & Collins on the Conflict of Laws* (15th Ed) (online service), at Rule 179 ask whether assistance might be given “in relation to a

77. For example, in *Re Bank of Credit and Commerce International (No 9)* [1994] 3 All E.R. 764 (*BCCI No 9*), a company (Bank of Credit and Commerce International (Overseas) Ltd, ‘**BCCI Overseas**’) was being wound up on the order of the Grand Court of the Cayman Islands, the jurisdiction where it was incorporated. Cayman Islands law had no equivalent to the fraudulent trading and wrongful trading actions found in ss 213 and 214 of the UK Insolvency Act. At the request of BCCI Overseas’ Caymanian liquidators, the Grand Court issued a letter of request to the High Court of Justice of England and Wales asking that court

“...to exercise its jurisdiction under s 426 of the Insolvency Act 1986 to assist [the Grand Court] by making orders under [ss 213 and 214, among others] in the form of and substantially in the form of the orders set out below if and insofar as the High court of Justice, England considers it just and appropriate that such orders be made.”

78. The proposed defendants to the actions under ss 213 and 214 included former directors of BCCI Overseas apparently domiciled in Saudi Arabia and Pakistan, respectively.

79. Finding against arguments by one of the directors that the High Court had no jurisdiction under s 426 to apply English insolvency law to foreign directors of a foreign company not registered in the United Kingdom, Rattee J held that s 426 gives the United Kingdom courts the discretion, exercisable only for the purpose of assisting a relevant foreign court, to apply either United Kingdom law or the law of the jurisdiction of the foreign court.¹⁰⁷ His Honour held that the discretion should be exercised in favour of giving the assistance requested by the foreign court “unless there was some good reason for not doing so.”¹⁰⁸ No such reason existed on the facts of the case. Further, the assets of BCCI Overseas and the assets of a related company, Bank of Credit and Commerce SA (**BCCI SA**) were the subject of an agreement, approved by the High Court, that they be pooled for the purpose of litigation. The High Court had independent jurisdiction to hear claims seeking the same declarations in respect of BCCI SA as those sought by the liquidators of BCCI Overseas, against the same defendants. As the affairs of BCCI Overseas and those of BCCI SA were “hopelessly intertwined”, Rattee J found that it was a “classic situation” for the High Court

request from the courts of a country other than that which appointed the liquidator but in which insolvency proceedings have nonetheless been commenced.”

¹⁰⁷ Insolvency Act 1986 s 426(5) and (10); *Re Bank of Credit and Commerce International (No 9)* [1994] 3 All E.R. 764, 783.

¹⁰⁸ *Re Bank of Credit and Commerce International (No 9)* [1994] 3 All E.R. 764, 785. See too *Hughes v Hannover Ruckversicherungs AG* [1997] B.C.C. 921, 938–939; *England v. Smith* [2000] BPIR 28; and *New Cap Reinsurance Corp Ltd v Grant* [2011] EWHC 677 (Ch).

to exercise its discretion and grant assistance by trying the claims for declarations in the terms set out in the letter of request.¹⁰⁹

80. Section 426 has also been used by UK courts to apply laws of the jurisdiction from whence the letter of request came, even in circumstances where those laws operate in a fashion contrary to the analogous UK law¹¹⁰ - raising the prospect that Australian directors might be made subject to non-UK law on the order of a United Kingdom court.
81. And it is not just actions under United Kingdom laws that foreign directors might be faced with pursuant to s 426. The entire armory of a United Kingdom insolvency administrator might be brought to bear in investigating the affairs of a non-UK company, if the United Kingdom accedes to a request from a foreign court. One example can be found in *In Re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621, which concerns the efforts of the liquidator of Alan Bond's Australian private investment company, Dallhold Investments Pty Ltd (**Investments**), to recover assets for the benefit of its creditors.¹¹¹ Investments' assets included all of the shares in Dallhold Estates (UK) Pty Ltd (**Estates**), a company incorporated in Western Australia which owned a valuable leasehold interest in the United Kingdom (in which Mr Bond's daughter was living). The liquidators of Investments obtained from the Federal Court of Australia a letter of request under s 581(4) of the *Corporations Law* seeking the assistance of the High Court of Justice for the purpose of obtaining the appointment of an administrator of Estates under the UK Insolvency Act.¹¹² Chadwick J found that s 426 gave the High Court the power to make the appointment despite the fact that Estates was not incorporated or registered in England, and did so.¹¹³

¹⁰⁹ *Re Bank of Credit and Commerce International (No 9)* [1994] 3 All E.R. 764, 785.

¹¹⁰ See e.g. *England v Smith* [2001] Ch. 419, where the High Court of Justice compelled an English accountant to be subject to a public examination under s 596 of the Corporations Law in circumstances where the Court, if exercising its discretion under the English equivalent of that section, would have declined to allow the examination.

¹¹¹ The fascinating story of the liquidator's efforts is told in Paul Barry, *Going for Broke: How Bond Got Away With It* (Bantam Books, 2000). The application in question is dealt with at pages 64-66.

¹¹² *Re Dallhold Estates (UK) Pty Ltd* (1991) 6 ACSR 378 (Gummow J). English administration proceedings were preferable to a liquidation in either England or Australia, because the appointment of a liquidator would have led to surrender of the lease.

¹¹³ At 183 [4.50] – [4.66], the author discusses how the UK courts might go about determining which is the appropriate law to apply. It is not necessary for us to consider that subject further for present purposes. Further examples of the application of UK and non-UK law under s 426 can be found in Tamlin, above n 105, 179 [4.41] and in Totty Moss and Segal, above n 101, [E1-09].

82. Totty Moss and Segal report that “[a]lthough there are at present few reported authorities on the operation of s.426, it is understood that orders in aid are granted, in chambers, in respect of both personal bankruptcy and corporate insolvency proceedings with increasing frequency.”¹¹⁴
83. It is worth noting that the common law of the United Kingdom requires courts to provide some measure of assistance to foreign liquidators where they are officers of foreign courts, but that assistance is of little relevance to the present discussion.¹¹⁵

United States

84. In the United States, insolvency jurisdiction is an *in rem* jurisdiction which the courts will accept exists if the debtor has assets or an office within the jurisdiction.¹¹⁶ Further, *in personam* jurisdiction may also be found to exist under a variety of other laws, state and federal. For example, in New York State, personal jurisdiction is vested either (1) generally, where the defendant's contacts with the forum have been continuous and systematic; or (2) specifically, where the defendant has purposefully directed his or her activities toward the forum and the litigation arises out of or is related to his contact with the forum.¹¹⁷ Where a company is listed on a US stock exchange, the federal *Securities Exchange Act* applies and provides for worldwide service, and for US courts to have jurisdiction prefaced upon the defendant having “purposefully availed himself of the privilege of doing business in the forum state and that the defendant could foresee being haled into court there.”¹¹⁸ In *Alpha Capital Anstalt v New Generation Biofuels, Inc.* Fed. Sec. L. Rep. P 98,244 (SDNY, 2014) the US District Court for the Southern District of New York found that because a company was listed on the New York Stock Exchange, the Court had jurisdiction to hear a claim against the company and its chief technical officer (who was at all times resident and working in Italy) in relation to alleged misrepresentations as to the value of master licence agreements associated with patent applications. The representations were purportedly contained in public filings made with the New York Stock

¹¹⁴ Totty Moss and Segal, above n 101, [E1-10].

¹¹⁵ See the discussion in Totty Moss and Segal, above n 101, [E1-11].

¹¹⁶ 11 USC §§ 103(a), 109(a); *Re Barnett*, 737 F 3d 238 (2nd Cir, 2013); *Re Octaviar Administration Pty Ltd*, 511 BR 361 (Bankr, SD NY, 2014); *Re Ocean Rig UDW Inc*, 570 BR 687 (Bankr SD NY, 2017).

¹¹⁷ *Alki Partners, L.P.*, 769 F. Supp. 2d 478, 488 (Dist SD NY, 2011) (citing *In re AstraZeneca Sec. Litig.*, 559 F. Supp. 2d 453, 466-7 (Dist SD NY 2008).

¹¹⁸ *SEC v. Straub*, 921 F. Supp. 2d 244, 253 (Dist SD NY, 2013).

Exchange. The Chief Technical Officer never signed any of the NYSE filings.¹¹⁹ The cause of action was based upon a breach of US federal law.

85. Once jurisdiction is established, choice of law must be considered. United States company law is still largely state-based law and the choice of law rules are individually state-based in relation to causes of action based on state law, such as actions for breach of fiduciary duty, whilst federal choice of law rules apply to actions under federal statutes. In the majority of states the courts apply a test of which jurisdiction has the most 'significant relationship' to the subject matter.¹²⁰
86. In tort matters, including breach of duties, the court considers the following factors: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (d) the place where the relationship between the parties is centred.¹²¹ When weighing those four factors, it is not the number of contacts, but the qualitative nature of those particular contacts that determines which state has the most significant relationship to the occurrence and the parties.¹²²
87. The American Law Institute in its *Restatement of Conflict of Laws* has summarised the federal choice of law rules as follows:

The local law of the state of incorporation will be applied to determine the existence and extent of a director's or officer's liability to the corporation, its creditors and shareholders, except where, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the parties and the transaction, in which event the local law of the other state will be applied.¹²³

88. And

A liability imposed by the state of incorporation upon a director or officer may be enforced in other states.¹²⁴

¹¹⁹ *Alpha Capital Anstalt v New Generation Biofuels, Inc.* Fed. Sec. L. Rep. P 98,244; 2014 WL 6466994 (SDNY, 2014), 7-8. Also see the cases cited there at 7

¹²⁰ See eg *Asarco LLC v Americas Mining Corporation* 382 BR 49 (Dist, SD Tex, 2008).

¹²¹ Ibid, citing American Law Institute, *Restatement (Second) of Conflict of Laws* (1971) § 145.

¹²² Ibid citing American Law Institute, *Restatement (Second) of Conflict of Laws* (1971) § 145.

¹²³ American Law Institute, *Restatement (Second) of Conflict of Laws* (1971) § 309.

¹²⁴ American Law Institute, *Restatement (Second) of Conflict of Laws* (1971) § 310.

89. The difference in the choice of law rules that operate in each state and federally means where there are multiple causes of action pleaded that a different jurisdiction's laws may apply in the same proceeding in respect of different causes of action.¹²⁵
90. Where the choice of law is as between American and foreign law, and a 'true conflict of law'¹²⁶ arises, the 'principle of comity' is applied to determine whether, as a matter of construction, the law in question should apply to the facts to hand. In *Maxwell Commun Corp v Barclays Bank (In re Maxwell Commun Corp)* 93 F 3d 1036 (2d Cir NY 1996) (*Maxwell*), Judge Cardamone (writing for the United States Court of Appeals, Second Circuit) wrote at 1047:

The principle of comity does not limit the legislature's power and is, in the final analysis, simply a rule of construction ...

We realize that "international comity" may describe two distinct doctrines: as a canon of construction, it might shorten the reach of a statute; second, it may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state, the so-called comity among courts. Whether these are two distinct doctrines – and we need not decide that question – in the context of this case the concepts are not two inconsistent propositions.

91. His Honour went on to write at 1048:

Comity is a doctrine that takes into account the interests of the United States, the interests of the foreign state, and those mutual interest the family of nations have in just and efficiently functioning rules of international law ... Comity is especially important in the context of the Bankruptcy Code for two reasons. First, deference to foreign insolvency proceedings will, in many cases, facilitate 'equitable, orderly and systematic' distribution of the debtor's assets ... Second, Congress explicitly recognized the importance of the principles of international comity in transnational insolvency situations when it revised the bankruptcy laws.

92. The application of the comity doctrine in any particular case requires the court to consider all relevant factors, including the link between each state and the relevant activity, the connection between each state and the person responsible for the activity or protected by the law, the nature of the activity and its importance to the states, the effect of the relevant law on justified expectations, the significance of the regulation to the international system, the extent of other states' interests and the likelihood of conflict with other states' regulations.¹²⁷

¹²⁵ See e.g. *Re Gulf Fleet Holdings Inc* 491 BR 747 (Bankr, WD La, 2013).

¹²⁶ Said to exist if compliance with the potentially-applicable laws of two legal systems would be impossible: *Hartford Fire Insurance Co v California* 509 US 764 (1993).

¹²⁷ *Maxwell Commun Corp v Barclays Bank (In re Maxwell Commun Corp)* 93 F 3d 1036 (2d Cir NY 1996) (*Maxwell*), 1048.

93. *Maxwell* concerned a company that was incorporated in England but which had commenced Chapter 11 bankruptcy proceedings in the United States. It was simultaneously undergoing administration in the United Kingdom. The company commenced proceedings in the United States Bankruptcy Court under Bankruptcy Code § 547(b) and § 550(a)(1) to recover voidable preferences given to banks in England and France. Those provisions allowed a trustee to avoid certain transfers that had been made within 90 days before the filing of a bankruptcy proceeding. The equivalent English provision, s. 239 of the *Insolvency Act 1986*, limited avoidance to situations where the debtor intended to prefer the transferee. The Court found that there was a conflict between the two avoidance rules because it was impossible to distribute the debtor's assets in a manner consistent with both rules.
94. Applying the comity rule, it found that England had a closer connection to the disputes than did the United States: the debtor, most of its creditors, its board of directors and its executives were English and it was managed in London. Most of its debt was incurred in England. The impugned transactions had only insignificant connections to the United States, and were governed by English law. The only factor linking the transfers to the United States was that the source of some of the funds was the sale of American businesses, but the Court of Appeals found that factor "not particularly weighty" because the companies were sold as going concerns. The application of English law would not 'undercut' the policy of United States bankruptcy law, and hence the United States did not have any significant interest in applying its own avoidance law. Because of the close connection between England and the dispute, England had a stronger interest in applying its own avoidance law to the actions. And English law could have been expected to apply in the event of bankruptcy. It followed that the doctrine of international comity precluded application of the American avoidance law to the transfers.¹²⁸
95. United States courts are willing to apply US law to foreign officers of companies providing the company has a sufficient connection with that state of the USA. As in the case in *Alpha Capital* it is irrelevant whether that officer has ever resided or worked in that state. The same would apply to Australian entities listed on an exchange in the USA or those which have businesses or a large number of assets in the United States.

¹²⁸ Further examples of the application of the comity principle in bankruptcy cases are found in *French v Liebmann (In re French)* 440 F.3d 145, 148 (4th Cir. 2006), *Securities Investor Protection Corporation v Bernard L. Madoff Investments Securities LLC* 513 BR 222 (Bankr. S.D.N.Y. 2014) 535 B.R. 543 (Bankr. S.D.N.Y. 2015).

New Zealand

96. Directors might become subject to New Zealand duties by exercise of the New Zealand courts' discretion to wind up an 'overseas company'¹²⁹ under NZ Companies Act s 342. In determining whether or not to exercise the discretion, one commentator suggests that the 'sufficient connection' requirement adopted by United Kingdom courts will be adopted.¹³⁰ The winding up of overseas companies is conducted under Part 16 of the NZ Companies Act (which governs the winding up of domestic corporations) with modifications set out in Schedule 9 to the NZ Companies Act. Notably, the liquidator's powers under ss 300 and 301¹³¹ operate without modification in the winding up of an overseas company.¹³²
97. Additionally, s 8 of the *Insolvency (Cross-border) Act 2006* (NZ) (the **NZ Cross-border Act**) provides that the High Court of New Zealand may "act in aid of and be auxiliary to" the court of another country which has jurisdiction in an insolvency proceeding, if that other court makes an order requesting the aid of the High Court in relation to that insolvency proceeding. Section 8(2) provides that if the High Court so acts, it "*may exercise the powers that it could exercise in respect of the matter if it had arisen within its own jurisdiction.*" The section is designed to operate in addition to the assistance provisions provided by the UNCITRAL Model Law on Cross-border Insolvency (**Cross-border Model Law**) as given effect in New Zealand by the NZ Cross-border Act. The range of assistance that might be provided by the High Court is illustrated by the judgments in the personal bankruptcy of Mr Alan Geraint Simpson.¹³³ While we are not aware of any instance in which it has been used to provide assistance in a corporate insolvency, there seems no good reason why the High Court of New Zealand might not utilise s 8 in a manner similar to that adopted by the High Court of Justice in *BCCI No 9* if similar circumstances arose.

¹²⁹ An 'overseas company' is a body corporate incorporated outside New Zealand: NZ Companies Act s 2(1).

¹³⁰ Sean Gollin, 'Cross-border Insolvency Legislation' in Paul Heath and Mike Whale, *Heath and Whale: Insolvency Law in New Zealand* (2nd Ed, 2013), 823 [25.6].

¹³¹ Described at [39] and [43] above.

¹³² See generally Mike Whale and James Nolen, 'New Zealand' in INSOL International, *Directors in the Twilight Zone V* (2017), 9.2.2.

¹³³ See e.g. *Williams v Simpson (No 5)* [2011] 2 NZLR 380 (HC). See too *Batty v Reeves* [2015] NZHC 908.

Canada

98. Justice Morawetz has referred to Canada's insolvency statutes as follows: although 'based upon English common law, many of the significant amendments over the past 20 years have been made in order to adopt and follow US practices'.¹³⁴
99. In *Beals v Saldanha* the Supreme Court of Canada confirmed that in order to apply the principles of international comity and recognise a foreign judgment, there must be a real and substantial connection with Canada.¹³⁵ The Court also stated that the presence of more traditional indicia of jurisdiction such as residence, presence in the foreign jurisdiction and attornment will serve to strengthen the real and substantial connection to the action or parties.¹³⁶ In *Morguard Investments Ltd v De Savoye*, the Supreme Court of Canada set out considerations to be employed in establishing the 'real and substantial connection'.¹³⁷ In *Re Lear Canada*, the Ontario Superior Court stated that the jurisdiction to which the debtor is most closely connected should exercise primary control of the insolvency process and be afforded comity in order to avoid multiple proceedings.¹³⁸
100. Where the debtor is not connected to the jurisdiction whose representatives are seeking comity the court may not grant comity. The Queen's Bench in Alberta has refused to recognise under comity Chapter 11 proceedings in the USA of a Canadian company where the company was neither carrying on business nor had any assets in the USA.¹³⁹
101. Citing Part XII of the BIA and Part IV of the CCAA, the authors of INSOL's *Directors in the Twilight Zone V* state at 9.1.2 that "in general, all the provisions of the BIA and CCAA relating to the administration of a Canadian company apply equally to the administration of a foreign company."

¹³⁴ Justice Geoffrey Morawetz, 'Acceptance Remarks of the Honourable Geoffrey Morawetz' (2012) 29 *Emory Bankruptcy Development Journal* 5, 10.

¹³⁵ [2003] 3 SCR 416, 437 [29].

¹³⁶ *Ibid*, 440-1, [37].

¹³⁷ [1990] 3 SCR 1077, adopted by *Re Lear Canada* (2009) CanLii 37931 (ON SC) (14 July 2009).

¹³⁸ *Re Lear Canada* (2009) CanLii 37931 (ON SC) (14 July 2009) [15].

¹³⁹ *Re Singer Sewing Machine Company of Canada Limited* (2000) 259 ABR 364 [8], [26].

Recognition of Foreign Judgments

102. It is one thing for an Australian director to be found liable under a foreign law, and quite another for that judgment to be enforced here. In Australia there are at present four possible means of doing so:

- (a) For certain judgments of New Zealand courts, under the *Trans-Tasman Proceedings Act 2010* (Cth) (the **Trans-Tasman Act**);
- (b) under the *Foreign Judgments Act 1991* (Cth) (the **Foreign Judgments Act**);
- (c) under the common law, including the principle of comity; and
- (d) pursuant to section 581 of the Corporations Act or s 29(2) of the *Bankruptcy Act 1966* (Cth) (the **Bankruptcy Act**).

103. Each has its own limitations including the jurisdictions from which judgments can be recognised.

104. So far as is relevant, the Trans-Tasman Act applies to final judgments given in civil proceedings by New Zealand courts.¹⁴⁰ Such judgments can be registered and then enforced in Australia.

105. The Foreign Judgments Act only applies to judgments given by certain nominated courts proclaimed in the *Foreign Judgments Regulations 1992* (Cth). No courts in the United States of America, India or China have been proclaimed, and nor have courts in several provinces of Canada. Section 7 of the Act also sets out a number of grounds upon which a judgment debtor can apply to have the judgment overturned even if it is given by a proclaimed court.

¹⁴⁰ Trans-Tasman Act, s 66, 67. Note though that under r 16 of the Trans-Tasman Proceedings Regulations 2012 (Cth), a judgment is not registrable if (among other things) if it relates wholly or in part to an order made by a NZ court: (a) under the *Insolvency (Cross-border) Act 2006* (NZ): (i) recognising an Australian or foreign (other than NZ) proceeding; or (ii) providing a discretionary remedy in relation to an Australian or foreign proceeding, if the order is made: (A) on or after the filing of an application for recognition of the proceeding and before the application is decided; or (B) on or after recognition of the proceeding; or (b) under NZ domestic insolvency laws, commencing a proceeding and appointing a representative, if the order is subject to recognition in Australia under the *Cross-Border Insolvency Act 2008* (Cth).

106. The Australian common law also gives a court a discretion to allow a foreign judgment to be enforced where:

- (i) the foreign court exercised jurisdiction in the international sense being where:
 - (i) the party against whom judgment was obtained was present or resident in that foreign jurisdiction; or
 - (ii) the party against whom judgment was obtained voluntarily submitted to that jurisdiction;
- (b) the judgment is final and conclusive;
- (c) the parties are identifiable; and
- (d) if the judgment is in personam it is for a fixed or readily calculable sum obtained within the limitation period.¹⁴¹

107. Section 581 of the *Corporations Act 2001* (Cth) or section 29(2) of the *Bankruptcy Act 1966* (Cth) provide that courts must act in aid of prescribed countries and may act in aid of the courts of other countries in relation to insolvency matters. The prescribed countries are set out in the relevant Act and in reg 5.6.74 of the *Corporations Regulations 2001* (Cth) and reg 3.01 of the *Bankruptcy Regulations 1996* (Cth).

Recent developments: the UNCITRAL Model Law on Recognition of Foreign Insolvency Judgments

108. At its meeting in July 2018, UNCITRAL adopted a Model Law on the Recognition and Enforcement of Insolvency Related Judgments (**Recognition Model Law**). The Model Law is due to be put before the General Assembly before the end of the 2018, following which it can be enacted by member states.

109. This proposed model law was designed to circumvent the decisions in *Rubin v Eurofinance SA* [2013] 1 AC 236 and *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 in relation to the recognition of restructuring proceedings or other judgements that bind third parties, and *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 and *Re OJSC International Bank of Azerbaijan* [2018] EWHC

¹⁴¹ Martin Davies, Andrew Bell and Justice Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia*, (Lexis Nexis, 9th ed, 2014) 895 -903. But see Lord Collins of Mapesbury and Jonathon Harris, above n 106 [14R-054].

59, which restricted the ability to recognise judgments that affected third parties or sought to forgive debts that arose under contracts created under a different jurisdictions' laws.

110. The proposed law applies in relation to an 'insolvency-related foreign judgment', which means a judgment that:
- (a) arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed;
 - (b) was issued on or after the commencement of the insolvency proceeding to which it is related; and
 - (c) does not include a judgment commencing an insolvency proceeding.

111. A judgment is defined in art 2 as

Any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses. An interim measure of protection is not to be considered a judgment for the purposes of this Law.

112. The wide definition is intended to apply not only to recovery proceedings such as those for antecedent transactions but also some breach of duty claims such as insolvent trading and claims for breach of duties that caused the insolvency.¹⁴²

113. The definition of 'insolvency proceeding' is the same as that under the Cross-border Model Law (for which see below). It means a collective judicial or administrative proceeding pursuant to which the assets of a debtor (whether individual or corporate) are subject to the control of a court for the purposes of reorganisation or liquidation. It covers proceedings by courts, administrative bodies and 'other competent authorities'. In an Australian context, both ASIC and AFSA would be administrative bodies, and insolvency proceedings would include creditors voluntary liquidations, voluntary administrations, own-petition bankruptcies and personal insolvency agreements, all of which can be commenced outside court.

114. A foreign proceeding must be a collective proceeding in which the debtor's assets are realised for the benefit of all creditors. A receiver appointed by a secured creditor does not

¹⁴² United Nations Commission on Trade Law *Draft Guide to Enactment of the UNCITRAL Model Law on recognition and enforcement of insolvency-related judgements* UN Doc A/CN.9/WG.V/WP.157(23 February 2018), [56]-[61].

come within that definition. The question of whether a foreign proceeding fits within the definition of an insolvency proceeding should be determined according to the law of the state in which the proceeding is issued.¹⁴³

115. Article 10(1) envisages that the model law would also cover proceedings issued by creditors with the approval of a court where the insolvency representative has decided not to pursue the proceedings,¹⁴⁴ and by a party to whom a cause of action has been assigned by the insolvency representative.
116. Article 12 provides that a insolvency-related foreign judgment **must** be recognised and enforced provided:
- (a) the requirements of article 9 (with respect to effectiveness and enforceability) are met;
 - (b) the person seeking recognition and enforcement of the insolvency-related foreign judgment is an insolvency representative within the meaning of art 2(b) or another person entitled to seek recognition and enforcement of the judgment under art 10(1);
 - (c) the application meets the requirements of art 10(2), which deal with notice; and
 - (d) recognition and enforcement is sought from a court referred to in art 4 or the question of recognition arises by way arises by way of defence or as an incidental question before such a court.
117. Article 13 sets out specific grounds upon which a court may refuse recognition or enforcement namely:
- (a) the party against whom the proceeding giving rise to the judgment was instituted:
 - (i) was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented a case in defence without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or
 - (ii) was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of the enacting state concerning

¹⁴³ *Rubin v Eurofinance SA* [2010] 1 All ER (Comm) 81, 94 [46]; *Re Betcorp Ltd* 400 BR 266, 280 (Bankr, D Nev, 2009).

¹⁴⁴ For example, proceedings under s 588T(2)(a) of the Corporations Act.

service of documents;

- (b) the judgment was obtained by fraud;
- (c) the judgment was inconsistent with a judgment issued in the enacting state in a dispute involving the same parties;
- (d) the judgment is inconsistent with an earlier judgment issued in a state other than the enacting state in a dispute between the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in the enacting state;
- (e) recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings or would conflict with a stay or other order issued in insolvency proceedings relating to the same debtor commenced in the enacting state or another state;
- (f) the judgment materially affects the rights of creditors generally, such as determining whether a plan of reorganisation or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved, and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;
- (g) the originating court did not satisfy one of the following conditions:
 - (i) the court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;
 - (ii) the court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating state, unless it was evident that an objection to jurisdiction would not have succeeded under that law;
 - (iii) the court exercised jurisdiction on a basis on which a court in the enacting state could have exercised jurisdiction; and
 - (iv) the court exercised jurisdiction on a basis that was not [inconsistent or

incompatible]¹⁴⁵ with the law of the enacting state.

118. States that have enacted legislation based on the Cross-border Model Law might wish to enact art 13(h):

The judgment originates from a State whose proceeding is not recognizable under *[insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency]*, unless:

- (i) The insolvency representative of a proceeding that is or could have been recognized under *[insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency]* participated in the originating proceeding to the extent of engaging in the substantive merits of the claim to which that proceeding related; and
- (ii) The judgment relates solely to assets that were located in the originating State at the time that proceeding commenced.

119. Where States have enacted the Cross-border Model Law, paragraph (h) allows them to refuse to recognise a judgment that originates from a jurisdiction that is not the debtor's centre of main interest or where they have an establishment being the determining factor as to whether the insolvency proceeding could be recognised as either the foreign main proceeding or foreign non-main proceeding under that Model Law. This is to ensure consistency should a later application be made under that Model Law for recognition of the insolvency proceedings and where there are multiple proceedings in different states as to which proceeding should take precedence.

120. Article 15 provides that a receiving court should not refuse recognition and enforcement of one part of a judgment upon the basis that another part is not recognisable. The severable part of the judgment should be recognised.

121. Whilst an application is pending the court also has power to grant provisional relief this includes granting freezing orders or other asset preservation orders under art 11. In framing any orders either provisionally or for recognition or enforcement, those orders should have the same effect as if they were made in the receiving State and do not exceed the orders granted in the originating State.

¹⁴⁵ Enacting state to choose which term to insert.

PART III

Director liability under the Cross-border Model Law

An introduction to the Cross-border Model Law

122. The Cross-border Model Law is a template for adoption and adaptation by legislators – each adopting state enacts its own local version. At present 44 countries have adopted it.¹⁴⁶ It is given the force of law in Australia by the *Cross-border Insolvency Act 2008* (Cth) (the **CBIA**).
123. The Cross-border Model Law does not provide choice of law rules, but largely respects states’ substantive and procedural insolvency laws, providing mechanisms to assist the administration of insolvencies with transnational elements. It applies where local assistance is sought by a foreign court or representative in connection with a foreign proceeding; where assistance is sought in a foreign state in connection with a local insolvency proceeding; where foreign and local proceedings take place concurrently; and where foreign persons have an interest in local insolvency proceedings.¹⁴⁷
124. The Cross-border Model Law allows the ‘foreign representative’¹⁴⁸ of a ‘foreign proceeding’¹⁴⁹ to seek recognition of that proceeding within the enacting State, regardless of the jurisdiction in which the proceeding was opened, by making an application to a court in the enacting state. Where the foreign proceeding satisfies certain threshold qualifications, the local court is obliged to recognise it.¹⁵⁰ Where the proceeding has been opened in the state of the debtor’s COMI, the proceeding is recognised as a ‘foreign main proceeding’. Where the proceeding has been opened in a State where the debtor has an ‘establishment’ but not its COMI, it is recognised as a ‘foreign non main proceeding’. If the debtor has

¹⁴⁶ <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>, accessed 24 July 2018.

¹⁴⁷ Model Law, Art 1(1).

¹⁴⁸ “A collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation”: Model Law, Art 2(a).

¹⁴⁹ “A person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”: Model Law, Art 2(d).

¹⁵⁰ Model Law, Art 17.

neither its COMI or an establishment in the opening state, there is no discretion to grant recognition.¹⁵¹

125. There is no definition of COMI in the Cross-border Model Law, but UNCITRAL in its Legislative Guide recommends that the appropriate meaning is that contained in the EC Insolvency Regulation.¹⁵² That regulation provides that in respect of incorporated debtors, COMI “*should correspond to the place where the debtor conducts the administration of [its] interests on a regular basis and is therefore ascertainable by third parties.*”¹⁵³ Article 16 deems that to be the place of the company’s registered office unless there is proof to the contrary. In Australia, the Federal Court has looked at various factors in determining a company's COMI including: (a) the place of residence of the directors; (b) the place of incorporation; (c) the place all executive decisions as to employee remuneration, business strategy and what to do with any cash generated through the company’s business in Australia were made in the UK; (d) the place of residence of the majority of employees; (e) the place of residence of the majority of the company’s creditors; (f) the place the company paid tax and whether it paid tax in Australia; and the state in which the majority of the company assets (including residence) were located.¹⁵⁴ In the case of an Australian corporate entity which is a wholly owned subsidiary of a foreign entity and only has one resident director in Australia, it is foreseeable that the COMI of the Australian entity may be deemed to be the jurisdiction in which its ultimate holding entity is located.
126. Article 2(f) of the Cross-border Model Law defines ‘establishment’ to mean “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.” In Australia the Federal Court (after referring to the authorities from New Zealand, UK and the USA) has equated ‘establishment’ to a place of operations.¹⁵⁵
127. Recognition of a proceeding as a foreign main proceeding has significant and automatic consequences: there is a moratorium on individual actions concerning the debtor’s assets,

¹⁵¹ *Legend International Holdings Inc (in liq) v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSC 308 (Randall AsJ) and (in *New Zealand Williams v Simpson (No 5)* [2011] 2 NZLR 380 (HC, Heath J).

¹⁵² United Nations Commission on International Trade Law, General Assembly, *Legislative Guide on Insolvency Law*, UN Publications Sales No E.05.V.10 (United Nations, 2005),41 [13].

¹⁵³ Recital 13.

¹⁵⁴ *Wild v Coin Co International PLC (Administrators Appointed)* [2015] FCA 354, [66].

¹⁵⁵ *Gainsford v Tannenbaum* (2012) 216 FCR 543, 559 [51].

rights, obligations and liabilities, and on the transfer, encumbrance and disposal of, or execution against, the debtor's assets.¹⁵⁶ The court granting recognition may also grant further discretionary relief on a case-by-case basis, including entrusting the administration, realisation and distribution of the debtor's assets to the foreign representative or some other person, and granting additional relief that may be available to an insolvency practitioner under the local law.¹⁵⁷

Might foreign law be applied in a local proceeding?

128. Article 23 of the Cross-border Model Law provides:

Actions to avoid acts detrimental to creditors

1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [*refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation*].^[158]
2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

129. At least in the United States, art 23 allows the foreign representative to initiate local court proceedings for the application of the foreign avoidance law.¹⁵⁹ Might the same result apply in Australia, with the result that a foreign representative might bring actions against Australian directors utilising foreign law?

130. In Australia, s 17 of the CBIA states (so far as is presently relevant):

- (1) The actions referred to for the purposes of paragraph 1 of Article 23 of the Model Law (as it has the force of law in Australia) are actions arising under or because of ... (b) Division 2 of Part 5.7B of the Corporations Act 2001.
- (2) A provision referred to in paragraph (1)(a) or (b) applies, with appropriate changes, in relation to an action for the purposes of a foreign proceeding in the same way it would apply if the action were for the purposes of a proceeding in relation to ... a company (within the meaning of section 9 of the Corporations Act 2001) ...

¹⁵⁶ Model Law, Art 20.

¹⁵⁷ Model Law, Art 21.

¹⁵⁸ Italicised text in the model law contains directions to local lawmakers.

¹⁵⁹ *In re Condor Insurance Ltd*, 601 F 3d 319. Contrast *Fibria Celulose S/A v Pan Ocean Co. Ltd & Anor* [2014] EWHC 2124 (Ch), [105] – [108] in relation to the position under the *Cross-border Insolvency Regulations 2006* (Eng).

131. The Explanatory Memorandum to the Cross-border Insolvency Bill 2008 (EM) stated that art 23 is “*drafted narrowly in that it does not create any substantive right regarding [avoidance] actions and also does not provide any solution involving conflict of laws.*”¹⁶⁰ Article 23 and CBIA s 17(1), make that proposition good in respect of the Australian implementation of the Cross-border Model Law: they give the foreign representative ‘standing’ to initiate proceedings under Division 2 of Pt 5.7B of the Corporations Act (overcoming the fact that the foreign representative may not be the liquidator of the debtor – generally the only person entitled to bring suit under the provisions of Part 5.7B Div 2) but do not purport to create substantive rights in the foreign representative that would not otherwise have existed.¹⁶¹ For example, art 23 grants a foreign representative standing to commence a proceeding under s 588FF against (for example) a director of the company for being the beneficiary of an unreasonable director-related transaction (subject to the court being satisfied of the matters referred to article 23(2) in the case of a non-main proceeding),¹⁶² but does not provide the choice of law rule that determines whether or not an Australian court would apply the section to a given director of a given company.
132. Similarly, art 21(g) of the Model Law allows the court granting recognition to grant any additional relief available to Australian liquidators. For example, a foreign representative might seek orders allowing that representative to issue proceedings against a local director for insolvent trading under Corporations Act s 588G (which falls within Div 3 of Part 5.7A). The difference between art 21(g) and art 23 is that the former, although it allows the court to grant relief much wider than (and inclusive of) the relief available under art 23, is discretionary, whereas art 23 operates as an automatic consequence of recognition for foreign main proceedings and subject to a non-discretionary (albeit subjective) condition for foreign non-main proceedings. As with art 23, while art 21(g) gives the court the power to grant relief, it does not provide a choice of law rule to determine whether or not the law will grant such relief at the suit of the foreign representative.

¹⁶⁰ Explanatory Memorandum, Cross-border Insolvency Bill 2007, [67]. The text of the Explanatory Memorandum closely follows that of paragraphs 200 and 201 of the Guide to Enactment in the *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2013) (**UNCITRAL Guide**).

¹⁶¹ This however is not to say that Court will not apply foreign law if that foreign law is the applicable law to be applied under Australian choice of law rules (as discussed further below).

¹⁶² See Corporations Act s 588FDA.

133. In both cases, Australian courts have to look to Australian choice of law rules to determine whether any particular action is available to the foreign representative of any given proceeding; the Cross-border Model Law does not create additional substantive rights in foreign representatives. As one American commentator stated: “[t]he intent of ... the Model Law, is to facilitate the effective administration of foreign proceedings. It is not to impose [local] law on the conduct of foreign proceedings.”¹⁶³
134. An alternative view of art 23, which is perhaps more consistent with the wording of art 23 and CBIA s 17 (albeit inconsistent with the EM and the UNCITRAL Guide) is that by granting standing to a foreign representative as if he, she or it were a ‘liquidator’ of a ‘company’, art 23 and CBIA s 17 invest the foreign representative with a statutory right to commence proceedings under Div 2 of Part 5.7B of the Corporations Act regardless of the operation of the common law choice of law rules.¹⁶⁴ The alternative arguments are yet to be tested by any Australian court, and as there are notable differences between local implementations of art 23 of the Cross-border Model Law,¹⁶⁵ foreign decisions regarding art 23 may be of limited assistance in interpreting that article as implemented by CBIA s 17.
135. Whatever the correct interpretation of art 23, is there a danger that Australian directors might be subjected to suit by foreign representatives utilising the law of the company’s COMI, as local directors in the United States are?¹⁶⁶ The short answer is yes: nothing in the Cross-border Model Law or the CBIA explicitly allows a foreign representative to invoke powers provided by foreign law, but they do not shut the foreign representative out of doing so if the choice of forum and choice of law rules otherwise allow it. And the drafters of the Cross-border Model Law deliberately shrank from imposing choice of law rules.

¹⁶³ Selinda A. Melnik, ‘United States of America’ in Look Chan Ho, *Cross-border Insolvency: A Commentary on the UNCITRAL Model Law on Cross-border Insolvency* (3rd Ed, 2012), 496. See too Look Chan Ho, *Cross-border Insolvency: Principles and Practice* (2016), 183-184 [4-047].

¹⁶⁴ Operating similarly to Corporations Act s 186, as to which see *ASIC v MacDonald (No 11)* (2009) 71 ACSR 368, 523-524 (Gzell J).

¹⁶⁵ See e.g. *Fibria Celulose S/A v Pan Ocean Co. Ltd & Anor* [2014] EWHC 2124 (Ch), [105] – [108], distinguishing *In re Condor Insurance Ltd*, 601 F 3d 319 in part on the basis of differences between the United States and United Kingdom implementations of the provision.

¹⁶⁶ *In re Condor Insurance Ltd*, 601 F 3d 319; 2010 U. S. App. LEXIS 5635. Look Chan Ho argues that English courts should act similarly: Look Chan Ho, ‘Applying Foreign Law – Realising the Model Law’s Potential’ (2010) *Journal of International Banking Law and Regulation*, 552. Available at SSRN: <http://ssrn.com/abstract=1675487>.

136. Under the common law, applying Australian choice of law rules (which would dictate that the place of incorporation was the proper law for the determination of a director's responsibilities) and provided no point was successfully taken regarding an Australian court not being the appropriate forum, there should be no obstacle to the foreign representative pursuing an Australian director for a breach of the foreign law in the Australian court. But that does not necessarily mean that the foreign representative would be seeking the application of the law of the COMI – because that might be different to the law of the place of incorporation.
137. Having said that, if Australia were to adopt the Recognition Model Law, and if the foreign representative were to obtain a judgment against the director in the country of the company's COMI under the law of the COMI, or in a country in which the company had an establishment under the law of that country, the Recognition Model Law would significantly reduce the avenues available to the director to resist local enforcement of that judgment.

Recent Developments: UNCITRAL's Work on the Cross-border Insolvency of Enterprise Groups

138. UNCITRAL is in the process of developing a model law facilitating the cross border insolvency of enterprise groups. The model law is at a draft stage and is still being discussed within UNCITRAL's Working Group V.
139. As presently proposed, the model law would confer jurisdiction on courts of one entity within an enterprise group to restructure or wind up the group as a whole. Where the COMI of an entity within that group is not within that jurisdiction it could opt into those proceedings. An entity could be ordered by a court of the State of its COMI not to participate in a group restructuring.¹⁶⁷ By considering enterprise groups as a whole, the model law intends to allow for the shifting of assets and restructuring of debts within a group for the benefit of group members as a whole.
140. The proposed model law would allow for courts in Australia to recognise foreign group restructuring proceedings and to make orders to protect the assets in Australia of group members whilst restructuring is occurring. It further allows courts to recognise and give effect to ultimate group restructurings as a whole rather than on an individual company basis as is the case at present Cross Border Insolvency Act 2008.

¹⁶⁷ Article 11.

Conclusion

141. As illustrated above, there are remarkable differences between the duties imposed on directors of companies from jurisdiction to jurisdiction. For example, several countries require directors take into account more than the interests of the company and its shareholders, and to contemplate the interests of other stakeholders including creditors, employees and society as a whole. In Canada and the USA those other stakeholders have been given the right to bring proceedings against directors for breach of duties through either derivative proceedings or oppression proceedings. And in New Zealand directors owe some duties directly to shareholders.
142. While traditional common law choice of law rules look to the jurisdiction of incorporation for the content of directors' duties, those rules are altered in many jurisdictions by statutes which purport to extend liability to directors beyond the enacting state's borders. As a result, directors might be exposed to duties which go well beyond those imposed by the country of incorporation. Directors should be aware of the obligations imposed upon them, both contractually and under the laws of the states in which the entity may be listed, as courts in those jurisdictions may determine that they have jurisdiction over the director.
143. That situation is now further complicated by the emergence of cross-border norms for foreign judgment recognition and enforcement – notably, the Recognition Model Law which we expect will soon be adopted by UNCITRAL. The impact of those developments on directors is that the factors which practically determine their exposure to liability for actions taken in the management and oversight of companies will likely expand beyond those recognised by the traditional common choice of law rules and be affected by international rules regarding the recognition of judgments, under which principles of COMI and establishment will have a significant bearing on their liability.
144. Specifically, as the Recognition Model Law is adopted (especially in Europe and the USA, which appears likely given that it was designed to circumvent a number of UK decisions which prevent the recognition of some insolvency judgments issued by courts in those jurisdictions), international pressure will mount on Australia also to adopt that model law. If Australia adopts it, then Australian directors will have to be aware of the duties imposed upon directors in the jurisdiction of the company's COMI and in each jurisdiction in which it has an establishment.

145. With the increased internationalisation of corporations there is a growing need for a uniform set of choice of law rules especially in relation to corporations and insolvency proceedings in order to avoid the possibility of contradictory laws and duties applying to directors of those entities. It has been suggested that UNCITRAL should look at this issue. In Europe the EC Insolvency Regulation provides that the law of the state in which the proceedings are issued (*lex fori*) is the law applicable to the insolvency administration, with notable exceptions for matters such as immovable property. However, it is unlikely that non-European States will accept this as being the relevant choice of law rule especially if it is not the jurisdiction of the debtor's COMI or where it has an establishment.