UNCITRAL UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective

UNITED NATIONS

Further information may be obtained from:
UNCITRAL Secretariat, Vienna International Centre
P.O. Box 500, 1400 Vienna, Austria
Telephone: (+43-1) 26060-4060 Telefax: (+43-1) 26060-5813
Internet: www.uncitral.org E-mail: uncitral@uncitral.org

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective

(Updated 2013)

UNITED NATIONS
New York, 2014

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

© United Nations, March 2014. All rights reserved.

The designations employed and the presentation of material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna

Preface

The *UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective* was finalized and adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 1 July 2011. The project arose from a request by judges attending the Eighth UNCITRAL/INSOL International/World Bank Multinational Judicial Colloquium, held in Vancouver, Canada, in 2009,[1] that consideration should be given to providing assistance for judges with respect to questions arising under the Model Law. In 2010, the Commission agreed that work to prepare such assistance should be conducted informally, through consultation principally with judges but also with insolvency practitioners and other experts, in much the same manner as the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (2009) was developed.

The first draft of the judicial perspective was prepared by Justice Paul Heath of the High Court of New Zealand and developed further through consultations with judges. It was presented to Working Group V (Insolvency Law) in December 2010 for discussion and circulated to Governments for comment in early 2011. It was also presented to participants at the Ninth UNCITRAL/INSOL International/World Bank Multinational Judicial Colloquium, held in Singapore in March 2011. A revised version of the judicial perspective, taking into account the comments provided by the Working Group, Governments and participants at the judicial colloquium, was presented to the Commission for finalization and adoption at its forty-fourth session in 2011. The text was adopted by consensus on 1 July 2011; on 9 December 2011, the General Assembly adopted resolution A/RES/66/96, in which it expressed its appreciation to the Commission for completing and adopting *The Judicial Perspective* (see annex II).

The Judicial Perspective was updated in 2013 to reflect the revisions to the Guide to Enactment of the Model Law, adopted by the Commission in 2013 as the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency,[2] and jurisprudence applying and interpreting

[1]This colloquium is one of a series of colloquiums organized jointly by UNCITRAL, INSOL and the World Bank. For reports of the colloquiums see: http://www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html

[2]The Guide to Enactment and Interpretation of the Model Law is available from: http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html

the Model Law issued between July 2011 and 15 April 2013 (decisions issued after that date will be considered in the next updating of The Judicial Perspective). The updates were prepared by the Secretariat in con sultation with a board of experts established in accordance with the Commission's decision of 1 July 2011.[3] Members of the board are: Leif Clark (United States of America), Miodrag Đordević (Slovenia), Allan Gropper (United States of America), Min Han (Republic of Korea), Paul Heath (New Zealand), Geoffrey Morawetz (Canada), Alastair Norris (United Kingdom), Diana Talero Castro (Colombia) and Jean-Luc Vallens (France). Prior to consideration by the Commission, the updates were made available to Working Group V (Insolvency Law) at its forty-third session in April 2013 and to judges attending the Tenth Multinational Judicial Colloquium, held in The Hague in May 2013. The Commission took note of the updates and authorized publication of the updated text.[4]

[3]See Annex II, para. 2.

[4]*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 209.

Contents

Page

I. Introduction 1

A. Purpose and scope 1

B. Glossary 2

II. Background 4

A. Scope and application of the UNCITRAL Model Law. 4

B. A judge's perspective 7

C. Purpose of the UNCITRAL Model Law 9

III. Interpretation and application of the UNCITRAL Model Law . . 11

A. The "access" principle 11

B. The "recognition" principle 14

C. The process of recognition 21

D. Relief 48

E. Cooperation and coordination 65

Annexes

I. Case summaries 77

II. Decision of the United Nations Commission on International Trade Law and General Assembly resolution A/RES/66/96 103

A. Decision of the Commission 103

B. General Assembly resolution 66/96 104

I. Introduction

A. Purpose and scope

1. The present text discusses the UNCITRAL Model Law on Cross-Border Insolvency from a judge's perspective. Recognizing that some enacting States have amended the Model Law to suit local circumstances, different approaches might be required if a judge concludes that the omission or modification of a particular article from the text as enacted necessitates such a course.[1] The present text is based on the Model Law as endorsed by the General Assembly of the United Nations in December 1997 and its accompanying Guide to Enactment.[2] The Guide to Enactment has been revised to include additional guidance with respect to the interpretation and application of selected aspects of the Model Law relating to "centre of main interests" in the light of the emerging jurisprudence interpreting the Model Law in those States that have enacted legislation based upon it. The revisions were adopted by the Commission in July 2013 as the "Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency".[3]

2. Although the present text makes references to decisions given in a number of jurisdictions, no attempt is made to critique the decisions, beyond pointing out issues that a judge may want to consider should a similar case come before him or her. Nor has any attempt been made to provide references to all relevant decisions touching on the interpretation issues raised by the Model Law. Rather, the intention is to use decided cases solely to illustrate particular strands of reasoning that might be adopted in addressing specific issues. In each case, the judge will determine the case at hand on the basis of domestic law, including the terms of legislation enacting the Model Law.

3. The present text does not purport to instruct judges on how to deal with applications for recognition and relief under the legislation enacting the Model Law. As a matter of principle, such an approach would run counter to

[1] The present text neither makes reference to nor expresses views on the various adaptations to the Model Law made in some enacting States.

[2] General Assembly resolution 52/158.

[3] Available from: http://www.uncitral.org/uncitral/uncitral_texts.html

principles of judicial independence. In addition, in practical terms, no single approach is possible or desirable. Flexibility of approach is all-important in an area where the economic dynamics of a situation may change suddenly. All that can be offered is general guidance on the issues a particular judge might need to consider, based on the intentions of those who crafted the Model Law and the experiences of those who have used it in practice.

4. Deliberately, this text is ordered so as to reflect the sequence in which particular decisions would generally be made by the receiving court under the Model Law, as distinct from providing an article-by-article analysis.

B. Glossary

1. Terms and explanations

5. The following paragraphs explain the meaning and use of certain expressions that appear frequently in the present document. Many of these terms are common to the UNCITRAL Model Law, the UNCITRAL Legislative Guide on Insolvency La*w* and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.[4] Their use in the present document is consistent with their use in those texts:

(a) "The CLOUT system": refers to the case law on UNCITRAL texts reporting system. Abstracts of cases dealing with the UNCITRAL Model Law are available in the six official languages of the United Nations from www.uncitral.org/uncitral/en/case_law/abstracts.html;

(b) "Cross-border insolvency agreement": an oral or written agreement intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest;[5]

(c) "Enacting State": a State that has enacted legislation based on the UNCITRAL Model Law;

(d) "Insolvency representative": a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or liquidation of the insolvency estate;

---

[4]These UNCITRAL texts are available from www.uncitral.org/uncitral/en/uncitral_texts.html.
[5]These agreements are discussed in some detail in the UNCITRAL Practice Guide.

(e) “Judge”: a judicial officer or other person appointed to exercise the powers of a court or other competent authority having jurisdiction under legislation based on the UNCITRAL Model Law;

(f) “Receiving court”: the court in the enacting State from which recognition and relief is sought.

2. *Reference material*

(a) References to cases

6. References to specific cases are included throughout the present text. In general, since those references are to cases included in the summaries provided in the annex, only a short-form reference is included in the text, e.g. *Bear Stearns* refers to the proceedings concerning *In Re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd* (case no. 4 in annex I). References to page or paragraph numbers in association with those cases are references to the relevant portion of the version of the judgement cited in the annex.

(b) References to texts

7. The present text includes references to several texts dealing with cross-border insolvency, including the following:

(a) “UNCITRAL Model Law”: UNCITRAL Model Law on Cross-Border Insolvency (1997);

(b) “Guide to Enactment and Interpretation”: Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, as revised and adopted by the Commission on 18 July 2013;[2]

(c) “UNCITRAL Legislative Guide”: UNCITRAL Legislative Guide on Insolvency Law (2004), including parts three (2010) and four (2013);

(d) “UNCITRAL Practice Guide”: UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);

(e) “EC Regulation”: European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings;

(f) “European Convention”: Convention on Insolvency Proceedings of the European Union (1995);

(g) “Virgos Schmit Report”: M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996, available from http://globalinsolvency.com/sites/globalinsolvency.com/files/insolvency report.pdf [last visited 2 January 2014]

II. Background

A. Scope and application of the UNCITRAL Model Law

8. In December 1997, the General Assembly endorsed the Model Law on Cross-Border Insolvency, developed and adopted by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law was accompanied by a Guide to Enactment that provided background and explanatory information to assist those preparing the legislation necessary to implement the Model Law and judges and others responsible for its application and interpretation. As noted above, the Guide to Enactment has been revised to include additional guidance with respect to the interpretation and application of selected aspects of the Model Law relating to "centre of main interests" and was adopted by the Commission on 18 July 2013 as the "Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency".[6]

9. The Model Law does not purport to address substantive domestic insolvency law. Rather, it provides procedural mechanisms to facilitate more efficient disposition of cases in which an insolvent debtor has assets or debts in more than one State. As at 1 December 2013, 20 States and territories had enacted legislation based on the Model Law.[7]

10. The Model Law is designed to apply where:[8]

(a) Assistance is sought in a State (the enacting State) by a foreign court or a foreign representative in connection with a foreign insolvency proceeding;

(b) Assistance is sought in the foreign State in connection with a specified insolvency proceeding under the laws of that State;

(c) A foreign proceeding and an insolvency proceeding under specified laws of the enacting State are taking place concurrently, in respect of the same debtor;

---

[6]Official Records of the General Assembly, Sixty-eighth Session, Supplement No.17 (A/68/17), para. 198.

[7]Australia (2008), British Virgin Islands (overseas territory of the United Kingdom of Great Britain and Northern Ireland; 2003), Canada (2005), Colombia (2006), Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2002), Serbia (2004), Slovenia (2007), South Africa (2000), Uganda (2011) and United States of America (2005). The year of enactment indicated above is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force some time after enactment.

[8]UNCITRAL Model Law, art. 1, para. 1.

(d) Creditors or other interested persons have an interest in requesting the commencement of, or participating in, an insolvency proceeding under specified laws of the enacting State.

11. The Model Law anticipates that a representative (the foreign representative) will have been appointed to administer the insolvent debtor's assets in one or more States or to act as a representative of the foreign proceedings at the time an application under the Model Law is made.[9]

12. The Model Law requires an enacting State to specify the court or other competent authority that has the power to deal with issues arising under the Model Law.[10] Acknowledging that some States will nominate administrative bodies rather than courts, the definition of "foreign court" includes both judicial and other authorities competent to control or supervise a foreign proceeding.[11]

13. The Model Law envisages that particular entities, such as banks or insurance companies, the failure of which might create systemic risks within the enacting State, may be excluded from the operation of the Model Law.[12]

14. There are four principles on which the Model Law is built. They are:

(a) The "access" principle: This principle establishes the circumstances in which a "foreign representative"[13] has rights of access to the court (the receiving court) in the enacting State from which recognition and relief is sought;[14]

(b) The "recognition" principle: Under this principle, the receiving court may make an order recognizing the foreign proceeding, either as a foreign "main" or "non-main" proceeding;[15]

(c) The "relief" principle: This principle refers to three distinct situations. In cases where an application for recognition is pending, interim relief may be granted to protect assets within the jurisdiction of the receiving court.[16] If a proceeding is recognized as a "main" proceeding, automatic relief follows.[17] Additional discretionary relief is available in respect of "main"

[9]Ibid., art. 2, subpara. *(d)*; see also UNCITRAL Model Law, art. 5, as to the ability of an enacting State to specify those representatives who may seek recognition and relief in a foreign court.

[10]Ibid., art. 4.

[11]Ibid., art. 2, subpara. *(e)* definition of "foreign court".

[12]Ibid., art. 1, para. 2; see also the Guide to Enactment and Interpretation, paras. 55-60, which discuss this question in more detail.

[13]As defined by art. 2, subpara. *(d)* of the UNCITRAL Model Law.

[14]Ibid., art. 9.

[15]Ibid., art. 17.

[16]Ibid., art. 19.

[17]Ibid., art. 20.

proceedings, and relief of the same character may be given in respect of a proceeding that is recognized as "non-main";[18]

(d) The "cooperation" and "coordination" principle: This principle places obligations on both courts and insolvency representatives in different States to communicate and cooperate to the maximum extent possible, to ensure that the single debtor's insolvency estate is administered fairly and efficiently, with a view to maximizing benefits to creditors.[19]

15. Those principles are designed to meet the following public policy objectives:[20]

(a) The need for greater legal certainty for trade and investment;

(b) The need for fair and efficient management of international insolvency proceedings, in the interests of all creditors and other interested persons, including the debtor;

(c) Protection and maximization of the value of the debtor's assets for distribution to creditors, whether by reorganization or liquidation;

(d) The desirability and need for courts and other competent authorities to communicate and cooperate when dealing with insolvency proceedings in multiple States; and

(e) The facilitation of the rescue of financially troubled businesses, with the aim of protecting investment and preserving employment.

16. In December 2009, the General Assembly endorsed the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.[21] The Practice Guide discusses, by reference to actual cases, various means by which cooperation among insolvency representatives, courts or other competent bodies may be enhanced to increase the fairness and efficiency of the administration of the estates of insolvent debtors who have assets or creditors in more than one jurisdiction. One mechanism used to facilitate cooperation, the cross-border insolvency agreement, is discussed in some detail. Depending on applicable domestic law and the subject matter of a particular cross-border agreement, in some cases there may be a need for a court (or other competent authority) to approve such an agreement. The Practice Guide discusses examples of such agreements.[22]

---

[18]Ibid., art. 21.

[19]Ibid., arts. 25, 26, 27, 29 and 30.

[20]Preamble to the UNCITRAL Model Law; see also the Guide to Enactment and Interpretation, para 3.

[21]General Assembly resolution 64/112; the text of the UNCITRAL Practice Guide is available from www.uncitral.org/uncitral/en/uncitral_texts.html.

[22]See, generally, UNCITRAL Practice Guide, chap. III, and the case summaries included in annex I to the Practice Guide.

B. A judge's perspective

17. While the UNCITRAL Model Law emphasizes the desirability of a uniform approach to its interpretation based on its international origins,[23] the domestic law of most States is likely to require interpretation in accordance with national law; unless the enacting State has endorsed the "international" approach in its own legislation.[24] In any event, any court considering legislation based on the Model Law is likely to find the international jurisprudence of assistance to its interpretation.

18. In approaching his or her tasks, a judge[25] has a perspective that is necessarily different from that of an insolvency representative. A judicial officer's obligation is to impartially determine questions submitted by a party based on information (evidence) placed before him or her. His or her obligation is to act judicially, meaning that all interested parties should, in the absence of exceptional circumstances, be given an opportunity to be heard on all issues that might materially affect the ultimate decision, in order to ensure due process is followed. In some States, persons presiding over competent administrative authorities[26] may not be affected by such constraints. While applicable domestic law in some States may require judges to satisfy themselves independently that any order sought should be made, the national law of other States may contemplate that the court simply give effect to the wishes of the parties.

19. Some differences in approach to the interpretation of the terms of the Model Law (or any adaptation of its language) may arise from the way in which judges from different legal traditions approach their respective tasks. Although general propositions are fraught with difficulty, the greater codification of law in some jurisdictions may tend to focus more attention on the text of the Model Law than would be the case in other jurisdictions without the same degree of codification or in which many superior courts have an inherent jurisdiction to determine legal questions in a manner that is not contrary to any statute or regulation[27] or have the authority to develop particular aspects of the law for which there is no codified rule.[28]

---

[23]In States that enact the Model Law as drafted, its terms must be interpreted having regard "to its international origin and to the need to promote uniformity in its application and the observance of good faith" (UNCITRAL Model Law, art. 8).

[24]Indeed, the UNCITRAL Model Law itself makes it clear that the terms of any relevant treaty or agreement to which an enacting State is a party will take precedence over the terms of the Model Law (art. 3 and paras. 91-93 of the Guide to Enactment and Interpretation).

[25]See the extended definition of the term "judge" in the glossary, para. 5 *(e)* above.

[26]That is, authorities that come within the definition of "foreign court" (UNCITRAL Model Law, art. 2, subpara. *(e)*).

[27]For a discussion of the inherent jurisdiction see I. H. Jacob, "The Inherent Jurisdiction of the Court" Current Legal Problems 23 (1970).

[28]Examples include the development of the law of equity and negligence in common law systems.

20. These different approaches could affect a receiving court's inclination to act on the Model Law's principle of cooperation between courts and coordination of multiple proceedings.[29] If the domestic law of the enacting State incorporates the cooperation and coordination provisions of the Model Law, there will be a codified recognition of steps that can be taken in that regard.

21. Without the explicit adoption of such provisions,[30] there may be doubt as to whether, as a matter of domestic law, a court is entitled to engage in dialogue with a foreign court or to approve a cross-border insolvency agreement entered into by insolvency representatives in different States and other interested parties. The court's ability to do so will depend on other provisions of relevant domestic law. On the other hand, those courts which possess an inherent jurisdiction are likely to have greater flexibility in determining what steps can be taken between courts, in order to give effect to the Model Law's emphasis on cooperation and coordination.

22. Due process is a concept that is well understood in jurisdictions of all legal traditions. Minimum standards require a transparent process, notification to the parties of any communications that may take place between relevant courts and the ability for parties to be heard on any issues that arise, whether by their physical presence or through an opportunity to make submissions in writing. Irrespective of the legal tradition, it is desirable that safeguards be in place to ensure due process is followed.[31] Those principles assume even greater importance in cases where court-to-court communications take place.

23. Unlike an insolvency representative directly involved in the administration of an insolvent estate, a particular judge is unlikely to have specific knowledge of the issues raised on an initial application to the court, even though urgency often exists in insolvency cases involving complex issues and large sums of money.[32] Judges who have not experienced proceedings of this type before might require assistance from the foreign representative,[33] generally through his or her legal counsel. That assistance could include succinct, yet informative, briefs and evidence.

[29]UNCITRAL Model Law, arts. 25-27, 29 and 30; see also paras. 187-222 below.

[30]For example, in cases involving member States of the European Union (except Denmark), the EC Regulation, while requiring cross-border cooperation among insolvency representatives, makes no reference to cooperation between courts.

[31]See also paras. 187-222 below.

[32]UNCITRAL Model Law, art. 17, para. 3, emphasizes the need for speedy resolution of applications for recognition of a foreign proceeding.

[33]As defined in the UNCITRAL Model Law, art. 2, subpara. *(d)*.

24. From an institutional perspective, there is a need for a judge to be given enough time to read and digest the information proffered before embarking upon a hearing. The pre-hearing reading time required in any given case will be dictated by the urgency with which the application must be addressed, the size of the relevant insolvency administrations, their complexity, the number of States involved, the economic consequences of particular decisions and relevant public policy factors.

25. Over 80 judges from some 40 States, attending a judicial colloquium in Vancouver, Canada, in June 2009,[34] expressed the view that consideration should be given to the provision of assistance to judges (subject to the overriding need to maintain judicial independence and the integrity of a particular State's judicial system) on ways to approach questions arising under the Model Law. The present text is intended to provide such assistance. Its final form has evolved as a result of a series of informal consultations, principally with judges but also with insolvency practitioners and other experts, with Working Group V (Insolvency Law) and with participants at the Ninth Multinational Judicial Colloquium, held in Singapore in March 2011. It was also circulated to Governments for comment, prior to its consideration by the Commission in July 2011.[35] The text was updated in 2013 as noted in the preface. Prior to consideration by the Commission in July 2013, the revisions to the published text of *The Judicial Perspective* were made available to Working Group V (Insolvency Law) at its forty-third session (April 2013) and to the Tenth Multinational Judicial Colloquium, held in The Hague in May 2013.

C. Purpose of the UNCITRAL Model Law

26. The UNCITRAL Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Enacting States are encouraged to use the Model Law to make useful additions and improvements to national insolvency regimes, in order to resolve more readily problems arising in cross-border insolvency cases.

27. As mentioned above, the Model Law respects differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways. These include:

---

[34]For reports of the judicial colloquiums, see footnote 1.

[35]See annex II for the decision taken by the Commission on 1 July 2011, in which it adopted The Judicial Perspective.

(a) Providing foreign representatives with rights of access to the courts of the enacting State. This permits the foreign representative to seek relief that will provide a temporary "breathing space" and allows the receiving court to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

(b) Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be;

(c) Providing a transparent regime for the right of foreign creditors to commence or participate in an insolvency proceeding in the enacting State;

(d) Permitting courts in the enacting State to cooperate effectively with courts and representatives involved in a foreign insolvency proceeding;

(e) Authorizing courts in the enacting State and persons administering insolvency proceedings in that State to seek assistance abroad;

(f) Establishing rules for coordination when an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in another State;

(g) Establishing rules for coordination of relief granted in the enacting State to assist two or more insolvency proceedings involving the same debtor that may take place in multiple States.

28. The Guide to Enactment and Interpretation of the UNCITRAL Model Law emphasizes the centrality of cooperation in cross-border insolvency cases in order to achieve the efficient conduct of those proceedings and optimal results. A key element is cooperation both between the courts involved in the various proceedings and between those courts and the insolvency representatives appointed in the different proceedings.[36] An essential element of cooperation is likely to be the encouragement of communication among the insolvency representatives and/or other administering authorities of the States involved.[37] While the Model Law provides authorization for cross-border cooperation and communication between courts, it does not specify how that cooperation and communication might be achieved, but rather leaves that up to each jurisdiction to determine by application of its own domestic laws or practices. The Model Law does, however, suggest various ways in which cooperation might be implemented.[38]

29. The ability of courts, with the appropriate involvement of the parties, to communicate "directly" with, and to request information and assistance "directly" from, foreign courts or foreign representatives is intended to avoid

[36]UNCITRAL Model Law, arts. 25 and 26. See also the UNCITRAL Practice Guide.

[37]For example, see the discussion of the use of cross-border agreements in chapter III of the UNCITRAL Practice Guide.

[38]UNCITRAL Model Law, art. 27; see also the UNCITRAL Practice Guide, chap. II.

the use of time-consuming procedures traditionally in use, such as letters rogatory. As insolvency proceedings are inherently chaotic and value evaporates quickly with the passage of time, this ability is critical when there is a need for a court to act with urgency.

III. Interpretation and application of the UNCITRAL Model Law

A. The "access" principle

30. The UNCITRAL Model Law envisages a proceeding being opened by an application made to the receiving court by an insolvency representative of a debtor who has been appointed in another State—the "foreign representative". The application may seek:

(a) To commence an insolvency proceeding under the laws of the enacting State;[39]

(b) Recognition of the foreign proceeding in the enacting State,[40] so that the foreign representative may:

(i) Participate in an existing insolvency proceeding in that State;[41]

(ii) Apply for relief under the Model Law;[42] or

(iii) To the extent that domestic law permits, intervene in any proceeding to which the debtor is a party.[43]

31. Article 2 of the UNCITRAL Model Law defines both "foreign proceeding" and "foreign representative".

---

[39]UNCITRAL Model Law, art. 11, and the Guide to Enactment and Interpretation, paras. 112-114.

[40]Ibid., art. 15, and paras. 127-136.

[41]Ibid., art. 12, and paras.115-117, which make it clear that the purpose of article 12 is to give the foreign representative standing to "participate" in the proceedings by making petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding. Where the law of the enacting State uses a word other than "participation" to express that concept, that other term may be used in enacting the provision. It is noted that article 24 uses the term "intervene" to refer to the foreign representative taking part in an individual action by or against the debtor (as opposed to a collective insolvency proceeding).

[42]Ibid., arts. 19 and 21, and paras. 170-175 and 189-195.

[43]Ibid., art. 24, and paras. 204-208; see footnote 41 above on the use of the term "intervene".

Article 2. Definitions

For the purposes of this Law:

(a) "Foreign proceeding" means 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;

...

(d) "Foreign representative" means 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;

32. The definitions of "foreign representative" and "foreign proceeding" are linked. In order to fall within the definition of a "foreign representative", a person must be administering a "collective judicial or administrative 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" or be acting as a representative of the foreign proceeding.[44] A "foreign representative" is entitled, as of right, to apply directly to the receiving court.[45]

33. In some circumstances, it might be argued that a particular entity administered by a "foreign representative" is not a "debtor" for the purposes of the domestic law to be applied by the receiving court.[46] A question of that type arose in *Rubin v Eurofinance* (case no. 23).[47] In that case, receivers and managers had been appointed by a court in the United States of America for a debtor referred to as "The Consumers Trust". A trust of that description is recognized as a legal entity—a "business trust"—under United States law, but is not recognized as a legal entity under English law. On a recognition application to the English court, it was argued that the trust was not a "debtor" as a matter of English law. The judge rejected that submission, holding that, having regard to the international origins of the UNCITRAL Model Law, a "parochial interpretation" of the term "debtor" would be "perverse".[48] The judge raised a separate question as to whether the relief

[44]The definition of the term "foreign court" is discussed in para. 12 above.
[45]Ibid., art. 9.
[46]The term "debtor" is not defined in the Model Law.
[47]Full citations for the cases mentioned in the text are set forth in annex I.
[48]*Rubin v Eurofinance* (first instance), paras. 39-40.

provisions of the Model Law could work in respect of a debtor not recognized as a matter of English law, but, on the facts of the case, it was not necessary to determine that point.[49]

34. Whether the "foreign representative" is authorized to act as a representative of a debtor's liquidation or reorganization is determined by the applicable law of the State in which the insolvency proceedings began.[50] In some cases, expert evidence of applicable law may be desirable, to determine whether the particular proceeding falls within the scope of the definitions. In other cases, where the procedure in issue is well known to the receiving court, expert evidence may not be necessary. Where the decision appointing the foreign representative indicates that that person satisfies the definition in article 2, subparagraph *(d)*, the court may rely on the presumption established by article 16, paragraph 1 of the Model Law.

35. In *Stanford International Bank* (case no. 26), the English first-instance court expressed the view that a receiver appointed in the United States of America would not be a "foreign representative" as defined, because no authorization had been provided, at that stage of the receiver's appointment, to administer a liquidation or reorganization of the debtor company.[51] That observation was made in the context of a receivership ultimately found by the English court not to be a collective proceeding under a law relating to insolvency.[52]

36. The UNCITRAL Model Law envisages a "foreign representative" as including one appointed on an "interim basis", but not one whose appointment has not yet commenced—for example, by virtue of a stay of an order appointing the insolvency representative pending an appeal.[53] Where there is a change in the status of the foreign representative subsequent to their appointment, that issue would be addressed under article 18, subparagraph *(a)*. One approach to determining whether a "foreign representative" has standing is to consider whether the definition of "foreign proceeding" is met before determining whether the applicant has been authorized[54] to administer a qualifying reorganization or liquidation of the debtor's assets or affairs, or to act as a representative of the foreign proceeding.

---

[49]Ibid., para. 41.

[50]UNCITRAL Model Law, art. 5.

[51]*Stanford International Bank* (first instance), para. 85.

[52]Cf. para. 77 below.

[53]See the definition of "foreign representative" in the UNCITRAL Model Law, art. 2, para. *(d)*. A foreign representative whose appointment had commenced, but whose status might nevertheless be subject to further consideration by the originating court, could be considered to be a foreign representative for the purposes of article 2 (see *Lightsquared* (case no. 18), paras. 19-20). If the foreign representative's status were to be changed as a result of that further consideration, however, the receiving court would have to review the issue in the light of article 18 of the Model Law.

[54]For the purposes of the UNCITRAL Model Law, art 2, subpara. *(d)*.

37. Under that approach, a judge would need to be satisfied that:

(a) The "foreign proceeding" in respect of which recognition is sought is a judicial or administrative proceeding, (including an interim proceeding) in a foreign State.[55]

(b) The proceeding is "collective" in nature;[56]

(c) The judicial or administrative proceeding arose out of a law relating to insolvency and, in that proceeding, the debtor's assets and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation;

(d) The control or supervision is being effected by a "foreign court", namely "a judicial or other authority competent to control or supervise a foreign proceeding";[57] and

(e) The applicant has been authorized in the 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".[58]

38. The foreign representative's ability to seek early recognition (and the consequential ability to seek relief)[59] is often essential for the effective protection of the assets of the debtor from dissipation or concealment. For that reason, the receiving court is obliged to decide the application "at the earliest possible time".[60] The phrase "at the earliest possible time" has a degree of elasticity. Some cases may be so straightforward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, "the earliest possible time" might be measured in months. Interim relief will be available in the event that some order is necessary while the recognition application is pending.[61]

B. The "recognition" principle

1. Introductory comment

39. The object of the "recognition" principle is to avoid lengthy and time-consuming processes by providing prompt resolution of applications for recognition. This brings certainty to the process and enables the receiving

[55]See the discussion of interim and final orders in *Gerova* (case no. 14) in footnote 81 below.
[56]See paras. 71-78 below.
[57]UNCITRAL Model Law, art. 2, subpara. *(e)*, and para. 12 above.
[58]UNCITRAL Model Law, art. 2, subpara. *(d)*.
[59]Ibid. in particular, arts. 20, 21, 23 and 24. As to interim relief while the recognition application is pending, see art. 19.
[60]Ibid., art. 17, para. 3.
[61]See paras. 150-159 below.

court, once recognition has been given, to determine questions of relief in a timely fashion.

40. What follows is a general outline of the recognition principle. A more detailed discussion of its component parts is contained in paragraphs 59-143 below.

2. Evidential requirements

41. A foreign representative will make an application under the UNCITRAL Model Law in order to seek recognition of the foreign proceeding. Article 15 of the Model Law establishes the requirements to be met by that application. In deciding whether a foreign proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the definition.[62] The Model Law makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the proceeding satisfies the requirements of article 15, recognition should follow in accordance with article 17.

Article 15. Application for recognition of a foreign proceeding

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) In the absence of evidence referred to in subparagraphs *(a)* and *(b),* any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

[62]UNCITRAL Model Law, art. 2, subpara. *(a)*.

3. Power to recognize a foreign proceeding

42. The power of the receiving court to recognize a foreign proceeding is derived from article 17 of the UNCITRAL Model Law.

Article 17. Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:

(a) The foreign proceeding is a proceeding within the meaning of subparagraph *(a)* of article 2;

(b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph *(d)* of article 2;

(c) The application meets the requirements of paragraph 2 of article 15; and

(d) The application has been submitted to the court referred to in article 4.

2. The foreign proceeding shall be recognized:

(a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph *(f)* of article 2 in the foreign State.

3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

43. To facilitate recognition, article 16 creates certain presumptions concerning the authenticity of documents and the content of the order commencing the foreign proceedings and appointing the foreign representative.

Article 16. Presumptions concerning recognition

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph *(a)* of article 2 and that the foreign representative is a person or body within the meaning of subparagraph *(d)* of article 2, the court is entitled to so presume.

> 2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.
>
> 3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

44. The foreign representative has a continuing duty of disclosure. He or she must inform the receiving court promptly of any substantial change in the status of the recognized foreign proceeding or of his or her appointment and any other foreign proceeding regarding the same debtor of which the foreign representative becomes aware.[63]

45. Article 17, paragraph 2, determines the status to be afforded to the foreign proceeding for recognition purposes. That article envisages recognition on only two grounds: as either a "foreign main proceeding" or a "foreign non-main proceeding".[64] The former is a foreign proceeding that is taking place in the State where "the debtor has the centre of its main interests",[65] while the latter is a foreign proceeding taking place in a State where the debtor has "an establishment". The term "establishment" means "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services".[66] Implicitly, the UNCITRAL Model Law does not provide for recognition of other types of insolvency proceedings, for example those commenced in a State where there is only a presence of assets.[67] It might be noted, however, that some States that have enacted the Model Law do provide additional powers to the courts under other law[68] to assist foreign proceedings that might include types of proceedings not subject to recognition under the Model Law.

46. *Bear Stearns* (case no. 4) is an illustration of a case in which a "foreign proceeding" was held to be neither a "foreign main proceeding" nor a "foreign non-main proceeding". Both the court of first instance and the appellate court held that a provisional liquidation commenced in the Cayman Islands did not qualify under either category because the evidence failed to establish either that the debtor's centre of main interests was situated in the Cayman Islands or that some non-transitory activity occurred there. Accordingly, those proceedings were not recognized.

---

[63]Ibid., art. 18.

[64]Ibid., see definition of these terms in art. 2, subparas. *(b)* and *(c)*.

[65]This term is not defined in the UNCITRAL Model Law; see discussion in paras. 93-135 below.

[66]UNCITRAL Model Law, art. 2, subpara. *(f)*, see paras. 136-142 below.

[67]See the Guide to Enactment and Interpretation, paras. 85 and 156.

[68]E.g. under sect. 8 of the New Zealand Insolvency (Cross-Border) Act of 2006 and sect. 426 of the United Kingdom Insolvency Act of 1986.

4. Reciprocity

47. There is no requirement of reciprocity in the UNCITRAL Model Law. It is not envisaged that a foreign proceeding will be denied recognition solely on the grounds that a court in the State in which the foreign proceeding was commenced would not provide equivalent relief to an insolvency representative from the enacting State. Nevertheless, judges should be aware that some States, when enacting legislation based on the Model Law, have included reciprocity provisions in relation to recognition.[69]

5. The "public policy" exception

48. The receiving court retains the ability to refuse to take any action covered by the Model Law, including to deny recognition or the relief sought, if to take that action would be "manifestly contrary" to the public policy of the State in which the receiving court is situated.[70] The notion of "public policy" is grounded in domestic law and may differ from State to State. For that reason, there is no uniform definition of "public policy" in the Model Law.

49. In some States, the expression "public policy" may be given a broad meaning, in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees. In those States, public policy would only be used to refuse the application of foreign law or the recognition of a foreign judicial decision or arbitral award when to do otherwise would contravene those fundamental principles. What is considered to be a fundamental principle is governed by the constitutional and statutory legislation of the receiving State. In *Ephedra* (case no. 10), the inability to have a jury trial in Canada on certain issues to be resolved in the Canadian proceedings, in circumstances in which there was a constitutional right to such a trial in the United States of America, was held not to be "manifestly contrary to the public policy of the United States". The United States court held, on appeal, that the term "manifestly contrary to public policy" created a very narrow exception "intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State." It concluded that, notwithstanding the importance in the United States of the constitutional right to a jury trial, the procedures at issue plainly afforded claimants a fair and impartial proceeding (notwithstanding that there was no jury trial) and nothing more was required by the provision of the United States law equivalent to article 6.[71]

---

[69]E.g. Mexico, Romania, South Africa and Uganda.
[70]UNCITRAL Model Law, art. 6.
[71]*Ephedra*, pp. 336-337.

50. For the applicability of the public policy exception in the context of the UNCITRAL Model Law, it is important to distinguish between the notion of public policy as it applies to domestic affairs and the notion of public policy as it is used with respect to matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the reality that international cooperation would be unduly hampered if "public policy" were interpreted broadly in that context.

51. The purpose of the expression "manifestly contrary", used in many international legal texts to qualify the expression "public policy", is to emphasize that public policy exceptions should be interpreted restrictively and that the exception is intended to be invoked only under exceptional circumstances involving matters of fundamental importance to the enacting State.[72]

52. Other than in the context of the public policy exception, the Model Law makes no provision for a receiving court to evaluate the merits of the foreign court's decision by which the proceeding was commenced or the foreign representative appointed.[73]

53. Application of the public policy exception has been considered in several cases in addition to *Ephedra*. In *Gold & Honey* (case no. 15), a court in the United States of America refused recognition of Israeli proceedings on several grounds, including that of public policy. In that case, after insolvency proceedings had been commenced in the United States and after the automatic stay had come into force, a receivership order was made in Israel in respect of the debtor company. The United States judge declined to recognize that receivership proceeding on the basis that not only was the Israeli receivership not a collective proceeding or one in which the debtor's assets and affairs were subject to control or supervision by the court, but also that to afford recognition "would reward and legitimize [the] violation of both the automatic stay and [subsequent orders of the court] regarding the stay".[74] Because recognition "would severely hinder United States bankruptcy courts' abilities to carry out two of the most fundamental policies and purposes of the automatic stay—namely, preventing one creditor from obtaining an advantage over other creditors, and providing for the efficient and orderly distribution of a debtor's assets to all creditors in accordance with their relative priorities",[75] the United States judge considered that the high threshold required to establish the public policy exception had been met.

[72]For example, see para. 53 below.
[73]See para. 41 above.
[74]*Gold & Honey*, p. 371.
[75]Ibid., p. 372.

54. In *Toft* (case no. 28), a court in the United States of America declined to grant the foreign representative of German insolvency proceedings the right to intercept the debtor's postal and electronic mail in the United States. The judge considered that such an order would fall within the public policy exception because it exceeded the traditional limits on the powers of a trustee under United States law, constituted relief that was banned by statute in the United States and might subject anyone who carried it out to criminal prosecution. The request for such relief on an ex parte basis was also contrary to United States law. A similar order had been recognised and enforced in England on the basis that *(a)* the relief granted in Germany did not violate English public policy because, under English law, the court could enter a mail redirection order similar to the one entered in Germany, and *(b)* there should be no concern about lack of procedural fairness in granting ex parte relief, because the debtor had been able to oppose the mail interception order in the German proceeding, and his challenge had been rejected by the German court.[76]

6. "Main" and "non-main" foreign proceedings

55. A "foreign proceeding" can be recognized only as either "main" or "non-main". The basic distinction between foreign proceedings categorized as "main" and "non-main" concerns the availability of relief flowing from recognition. Recognition of a "main" proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor[77] and an automatic "freeze" of those assets,[78] subject to certain exceptions.[79]

7. Review or rescission of recognition order

56. It is possible for the receiving court to review its decision to recognize a foreign proceeding as either "main" or "non-main" where it is demonstrated that the grounds for making a recognition order were "fully or partially lacking or have ceased to exist".[80]

57. Examples of circumstances in which modification or termination of an earlier recognition order might be appropriate are:

[76]Order by the High Court of England and Wales, 16 February 2011.

[77]UNCITRAL Model Law, art. 20, subparas. 1 *(a)* and *(b)*.

[78]Ibid., art. 20, subpara. 1 *(c)*.

[79]Ibid., art. 20, para. 2. Recognition of "main" and "non-main" foreign proceedings is discussed in more detail in paragraphs 93-143 below.

[80]Ibid., art. 17, para. 4.

(a) If the recognized foreign proceeding has been terminated;

(b) If the order commencing the foreign insolvency proceeding has been reversed by an appellate court in that State;[81]

(c) If the nature of the recognized foreign proceeding has changed, for example, a reorganization proceeding has been converted into a liquidation proceeding or the status of the foreign representative has changed;

(d) If new facts have emerged that require or justify a change in the court's decision—for example, if a foreign representative has breached conditions on which relief had been granted.[82]

58. A decision on recognition may also be subject to appeal or review under applicable domestic law. Some appeal procedures under national laws give an appeal court the authority to review the merits of the case in its entirety, including factual aspects. Domestic appeal procedures of an enacting State are not affected by the terms of the UNCITRAL Model Law.

C. The process of recognition

1. Introductory comments

59. For a relevant proceeding to qualify as a "foreign proceeding", the foreign representative must persuade the receiving court that the proceeding:[83]

(a) Is a collective judicial or administrative proceeding in a foreign State;

(b) Has been brought pursuant to a law relating to insolvency, and is one in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and

(c) Is for the purpose of reorganization or liquidation.

[81]In *Gerova* (case no. 14), certain creditors argued that the foreign proceeding should not be recognized in the United States of America because the order commencing that proceeding was subject to an appeal. The United States court held that there was nothing in sections 1517 or 1515 of Chapter 15 of the United States Bankruptcy Code [article 17 or article 15 MLCBI] that required the decision to be final or not subject to an appeal. The court observed that the order of the foreign court was sufficient to permit the foreign representatives to take up their duties and if it were to be reversed on appeal, section 1518 of Chapter 15 [article 18 MLCBI] would require them to advise the court accordingly (p. 94).

[82]See Guide to Enactment and Interpretation, paras.164-166.

[83]UNCITRAl Model Law, art. 2, subpara. *(a)*, definition of "foreign proceeding".

60. In unpacking the elements of the definition of "foreign proceeding", questions arise over the meaning of the terms "collective judicial or administrative proceeding", the nature of a "law relating to insolvency" and whether there is "control or supervision by a foreign court". Those concepts reflect jurisdictional requirements and, logically, must be determined before it can be decided whether the "foreign proceeding" is a "main" or "non-main" proceeding.[84]

61. If the receiving court were to find that a "foreign proceeding" existed, it would turn its attention to the status of that proceeding. The terms "foreign main proceeding" and "foreign non-main proceeding" are defined in article 2.

Article 2. Definitions

For the purposes of this Law:

…

(b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph *(f)* of this article;

(f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

62. The critical question, in determining whether a foreign proceeding (in respect of a corporate debtor) should be characterized as "main", is whether it is taking place "in the State where the debtor has the centre of its main interests".[85] In the case of a natural person, the "centre of main interests" is presumed to be the person's "habitual residence".[86] In *Re Stojevic*[87] the English court found that, essentially, a man's habitual residence was his settled, permanent home, the place where he lived with his wife and family until the younger members of the family grew up and left home and the place to which he returned from business trips elsewhere or

[84]Ibid., art. 17, para. 2, which identifies the need to determine the status of the foreign proceeding that the receiving court is recognizing.

[85]See the discussion in paras. 93-135 below.

[86]UNCITRAL Model Law, art. 16, para. 3.

[87][2007] BPIR 141, para. 58 and following.

abroad. It also noted that a man might have another residence, called an ordinary residence, which was a place where he lived and which was not his settled, permanent home and the place where he lived when away from home on business or on holiday with his wife and family. Depending on the nature of his work, a man might well live away from his settled, permanent home for a greater number of days in any given year than he spent there with his wife and family.

63. In *Williams v Simpson (No. 5)* (case no. 30), the New Zealand court held that a finding on location of the habitual residence would largely be based on the facts of each case. It noted that consideration would be given to factors like "settled purpose, the actual and intended length of stay in a State, the purpose of the stay, the strength of ties to the State and any other State (both in the past and currently), the degree of assimilation into the State (including living and schooling arrangements), and cultural, social and economic integration."[88] Although the debtor had carried on business in England, sometimes lived in England and held both United Kingdom and New Zealand passports, the court found the evidence was insufficient to rebut the presumption and the debtor's habitual residence was in New Zealand.

64. Demonstration of the existence of a "non-main proceeding" requires proof of a lesser connection, namely that the debtor has "an establishment" within the State where the foreign proceeding is taking place. The term "establishment" is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services".[89] There is a legal issue as to whether the term "non-transitory" refers to the duration of a relevant economic activity or to the specific location at which the activity is carried on.

65. As noted above,[90] the decision to recognize a proceeding as either "main" or "non-main" has important ramifications. Once a foreign proceeding is recognized as a "main" proceeding, automatic relief follows, in the nature of stays of various enforcement actions that could otherwise be taken in the receiving court's jurisdiction.[91] In contrast, only discretionary relief is available to a foreign representative in respect of a "non-main" proceeding.[92]

---

[88]*Williams v Simpson* (No. 5), para. 42, citing *Basingstoke v Groot* [2007] NZFLR 363 (CA); see also the discussion by the United States Bankruptcy Court in *In re Paul Zeital Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013) [CLOUT case no. 1274].

[89]UNCITRAL Model Law, art. 2, subpara. *(f)*; see also the discussion in paras. 136-143 below.

[90]See para. 55 above.

[91]UNCITRAL Model Law, art. 20; see also paras. 160-167 below.

[92]Ibid., art. 21; see also paras. 168-186 below.

66. From an evidential perspective, the receiving court is entitled to presume that:

(a) Any decision or certificate of the type to which article 15, paragraph 2, refers is authentic;[93]

(b) All documents submitted in support of the application for recognition are authentic, whether or not they have been "legalized";[94]

(c) "In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual," is the centre of the debtor's main interests.[95]

67. Ordinarily, whether a "foreign proceeding" is of a character that meets the criteria of a "main" proceeding will be a matter of expert evidence on the relevant domestic law of the State in which the proceeding was initiated. Determination of whether an "establishment" exists (to demonstrate a non-main proceeding) involves a question of fact. Depending upon applicable national law, the receiving court might be able to rely, in the absence of expert evidence, on reproduction of statutes and other aids to interpretation to determine the status of the particular form of insolvency proceeding at issue.[96]

68. A number of the decided cases that considered the meaning of "foreign proceeding", "foreign main proceeding" and "foreign non-main proceeding" have involved members of enterprise groups. For the purposes of the Model Law, the focus is on individual entities and therefore on each and every member of an enterprise group as a distinct legal entity.[97] It may be that the centre of main interests of each individual group member is found to lie in the same jurisdiction, in which case the insolvency of those group members can be conducted in a single jurisdiction, but there is no scope for addressing the centre of main interests of the enterprise group as such under the Model Law.

69. In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under the laws of the recognizing State, proof that the debtor is insolvent.[98]

---

[93]Ibid., art. 16, para. 1.

[94]Ibid., art. 16, para. 2.

[95]Ibid., art. 16, para. 3; see paras. 93-135 below.

[96]An illustration of that approach can be found in *Betcorp* (case no. 5), in which the United States of America's Bankruptcy Court used the explanatory memorandums that accompany draft legislation in Australia and are prepared to assist Parliament in understanding the purpose and structure of the legislation it is being asked to consider. Such memos may be used by a domestic court in Australia as an aid to resolving ambiguities, but the court is not bound to do so (pp. 282-283).

[97]This point is emphasized by the Canadian court in *Lightsquared* (case no. 18), para. 29; see also *Eurofood* (case no. 11), para. 37 (decided under the EC Regulation).

[98]UNCITRAL Model Law, art. 31.

2. Elements of the definition of 'foreign proceeding"

70. The following paragraphs discuss the various characteristics required of a "foreign proceeding" under article 2. Although discussed separately, these characteristics are cumulative and article 2, subparagraph *(a)* should be considered as a whole. Whether a foreign proceeding possesses or possessed those characteristics would be considered at the time the application for recognition is considered by reference to the date of commencement of the foreign proceeding.[99]

(a) "Collective judicial or administrative proceeding"

71. The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up[100] or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law. If a proceeding is collective it must also satisfy the other elements of the definition, including that it be for the purpose of liquidation or reorganization.[101]

72. In evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. However, a proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors' rights is unaffected by it. An example would be insolvency proceedings that exclude encumbered assets from the insolvency estate, leaving those assets unaffected by the commencement of the proceedings and allowing secured creditors to pursue their rights outside of the insolvency law. Examples of the manner in which a collective proceeding for the purposes of article 2 might deal with

---

[99] See Guide to Enactment and Interpretation, paras. 157-160 and paras. 129-134 below.

[100] "Winding up" is a procedure in which the existence of a corporation and its business are brought to an end.

[101] See paras. 91-92 below.

creditors include providing creditors that are adversely affected by the proceeding with a right (though not necessarily the obligation): to submit claims for determination; to receive an equitable distribution or satisfaction of their claims; to participate in the proceedings;[102] and to receive notice of the proceedings in order to facilitate that participation.

73. Within the parameters of the definition of "foreign proceedings", a variety of collective proceedings might be eligible for recognition. It was anticipated that some of those proceedings would be compulsory, while others might be voluntary. Some might relate to the liquidation of assets of a debtor; others might focus on the reorganization of the debtor's affairs. The Model Law was also intended to cover circumstances in which a debtor (corporate or individual) retained some measure of control over its assets, albeit subject to supervision by a court or other competent authority.[103]

74. Judges may be asked to determine whether there is a "collective" insolvency proceeding that engages the Model Law. Several cases may be of assistance.

75. In *Betcorp* (case no. 5), a voluntary liquidation commenced under Australian law was held by a court in the United States of America to be an administrative proceeding falling within the scope of the Model Law. Because the voluntary liquidation realized assets for the benefit of all creditors, the requisite aspect of a "collective" proceeding was held to be present.[104] In *Gold & Honey* (case no. 15), a receivership commenced under Israeli law was held by a United States court not to be an insolvency or collective proceeding on the basis that it did not require the receivers to consider the

[102]In *Ashapura Minechem* (case no. 2), the court at first instance in United States of America considered that although the Indian legislation under which the foreign proceeding had commenced did not include a formal mechanism for participation by unsecured creditors, in practice those creditors were given a voice (at the discretion of the Board for Industrial and Financial Reconstruction that administered the relevant legislation), they could receive distributions under an arrangement with creditors and had the ability to appeal adverse determinations made by the Board and have those appeals heard in the Indian judicial system. The United States court concluded that the availability of appellate review and the ability of creditors to participate before the Board demonstrated that the Indian proceedings were collective. That decision was affirmed on appeal, p. 141.

[103]Guide to Enactment and Interpretation, para. 71, e.g. for a so-called debtor in possession.

[104]*Betcorp*, p. 281. A different view of that type of voluntary proceeding was referred to by the Australian court in *Tucker (no. 2)*, [(2009) FCA 1481 [CLOUT case no. 922]], paras. 20-22, in the context of the meaning of "insolvency proceedings" in article 2. The court quoted the explanatory memorandum to the Cross-Border Insolvency Bill 2008 (which was drafted to enact the Model Law in Australia), which noted that "The expression 'insolvency proceedings' may have a technical meaning, but it is intended in subparagraph *(a)* [*referring to art. 2 of the Model Law*] to refer broadly to proceedings involving companies in severe financial distress". The court also referred to a consultation paper prepared by the Australian Treasury, which stated that, in the context of the Australian Corporations Act, the scope of the Model Law would extend to liquidations arising from insolvency, reconstructions and reorganizations under Part 5.1 and voluntary administrations under Part 5.3A. … It would … not extend to a member's voluntary winding up or winding up by a court." [Corporate Law Economic Reform Program's Proposals for Reform: Paper no. 8, Cross-Border Insolvency—Promoting international cooperation and coordination, p. 23].

rights and obligations of all creditors and was designed primarily to allow a certain party to collect its debts.[105] In *British American Insurance* (case no. 6), the court concurred with the courts in both *Betcorp* and *Gold & Honey* as to the meaning of "collective", noting that such proceedings contemplated both the consideration and the eventual treatment of claims of various types of creditors, as well as the possibility that creditors might take part in the foreign action.[106]

76. In another case, *Stanford International Bank* (case no. 26), a receivership order made by a court in the United States of America was held by a court in England not to be a collective proceeding pursuant to an insolvency law. The receiving court held that the order was made after an intervention by the Securities Exchange Commission of the United States "to prevent a massive ongoing fraud". The purpose of the order was to prevent detriment to investors, rather than to reorganize the corporation or to realize assets for the benefit of all creditors.[107] That view was upheld on appeal, largely for the reasons given by the English lower court.[108]

77. In a further decision concerning *Stanford International Bank*, a United States of America appeal court noted the language in other United States court opinions[109] that had contrasted a collective proceeding to a receivership and found a receivership not to be a collective proceeding on the basis that it was a remedy instigated at the request and for the benefit of a single secured creditor. The United States court went on to find that the receivership in *Stanford* was not that type of receivership, it being instituted "at the request of the Securities and Exchange Commission for the benefit of all Stanford Entities' investor-victims and creditors". The court concluded that although the case before it did not require it to decide the question, it would nevertheless find the receivership to be a collective proceeding.[110]

78. In *ABC Learning Centres* (case no. 1), the court in the United States of America considered that various provisions of Australian law indicated the collective nature of the liquidation proceedings that were the subject of the application for recognition. Those provisions included the duty of the liquidator to consider the rights of the creditors in distributing the assets of the debtor; that subject to priorities etc. debts and claims ranked equally and were to be paid pro rata; that adequate notice was to be given to all

[105] *Gold & Honey*, p. 370.

[106] *British American Insurance*, p. 902.

[107] *Stanford International Bank* (first instance), paras. 73-85.

[108] *Stanford International Bank* (on appeal), paras. 25-29.

[109] E.g., *British American Insurance* (case no. 6), p. 902 and *Ashapura Minechem* (case no. 2), pp. 136-137.

[110] S*tanford International Bank*, Civil Action No. 3:09-CV-0721-N, United States District Court, Northern District of Texas, 30 July 2012, p. 17, footnote 20.

creditors with respect to the insolvency proceedings and related creditors' meetings; that the decision to commence those proceedings was backed by the majority of creditors both in number and in amount of debt; that the creditors' committee set up as required by Australian law had included representatives of various types of creditors; and that creditors had the right to seek court review. The receivership proceedings that were taking place concurrently with the liquidation proceedings, a situation contemplated under Australian law, were agreed not to be collective proceedings as they were, by design, for the benefit of the secured creditors that had commenced that action.[111]

(b) "Pursuant to a law relating to insolvency"

79. The Model Law includes the requirement that the foreign proceeding be "pursuant to a law relating to insolvency" to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but that nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained[112] and irrespective of whether the law that contained the rules related exclusively to insolvency.

80. This aspect of article 2, subparagraph *(a)* has been considered by the courts in several cases concerning voluntary liquidation proceedings. In *Stanford International Bank*, the English court at first instance concluded that the liquidation of an Antiguan company, ordered by the Antiguan court on the basis that it was just and equitable to do so, was "pursuant to a law relating to insolvency". Although the ground for liquidation was confined to regulatory misbehaviour under the applicable legislation, the insolvency of the company was a factor relevant to the Antiguan court's discretion to make the order. That decision was upheld on appeal, the English appellate court observing that since the Antiguan law provided for liquidation of corporations on just and equitable grounds, which included insolvency, as well as infringements of regulatory requirements, it could be characterised as "pursuant to a law relating to insolvency".

81. In *Betcorp* (case no. 5), the court in the United States of America held that a voluntary liquidation commenced under Australian law was "pursuant to a law relating to insolvency" because when the nature of the relevant

[111] *ABC Learning Centres*, pp. 328-330.
[112] Guide to Enactment and Interpretation, para. 73.

legislation (the Corporations Act) was considered as a whole, it was a law that regulated the whole life-cycle of an Australian corporation, including its insolvency. That decision was followed by the United States court in *ABC Learning Centres* (case no. 1), which also concerned an Australian creditors' voluntary liquidation conducted under the same law.

82. In *Chow Cho Poon* (case no. 7), an Australian court considered whether a judicial liquidation, ordered by a court in Singapore on the ground that it was just and equitable to do so, was a proceeding "pursuant to a law relating to insolvency". The court considered the decisions in *Stanford International Bank, Betcorp* and *ABC Learning Centres* and concluded that those decisions pointed to a clear basis on which provisions concerning such liquidations might be classified as "a law relating to insolvency". Accordingly, even though the liquidation in question was ordered on the just and equitable ground alone and apparently without any finding, express or implied, of insolvency, the Australian court found that it could be said to be made "pursuant to a law relating to insolvency".

Guide to Enactment and Interpretation

83. Following consideration and discussion of this issue in UNCITRAL's Working Group V (Insolvency Law) and the Commission, the Guide to Enactment and Interpretation of the Model Law takes a somewhat different approach to the decisions cited above, clarifying that a simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress for the purposes of article 2, subparagraph *(a)*. Where a type of proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2 subparagraph *(a)* of the Model Law only if the debtor is insolvent or in severe financial distress.[113]

(c) "Subject to control or supervision by a foreign court"

84. No distinction is drawn, in the definition of "foreign court",[114] between reorganization and liquidation proceedings controlled or supervised by a judicial body or by an administrative body. That approach was taken to ensure that those legal systems in which control or supervision was under

[113]Ibid. para. 48.
[114]UNCITRAL Model Law, art. 2, subpara. *(e)*; see also para. 12 above.

taken by non-judicial authorities would still fall within the definition of "foreign proceeding".[115]

85. The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. The Guide to Enactment and Interpretation of the Model Law indicates that although it is intended that the control or supervision required under subparagraph *(a)* should be formal in nature, it may be potential rather than actual. A proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession, would satisfy this requirement. Control or supervision may be exercised not only directly by the court, but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.[116]

86. Proceedings in which the court exercises control or supervision at a late stage of the insolvency process or in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so, should not be excluded. An example of the latter might be cases where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceeding nevertheless remains open or pending and the court retains jurisdiction until implementation is completed.

87. Subparagraph *(a)* of article 2 makes it clear that both assets *and* affairs of the debtor should be subject to control or supervision; it would not be sufficient if only one or the other were covered by the foreign proceeding.[117]

88. The concept of "control or supervision" has received limited judicial attention to date.

89. The court in *Betcorp* (case no. 5) held that the voluntary liquidation proceeding in Australia was subject to supervision by a judicial authority: the Australian courts. That view was based on three factors: *(a)* the ability of liquidators and creditors in a voluntary liquidation to seek court

[115]Guide to Enactment and Interpretation, para 87. In *Ashapura Minechem* (case no. 2), for example, the Indian proceeding recognized in the United States of America was pending before the Indian Board for Industrial and Financial Reconstruction, an administrative agency authorized to function as an administrative tribunal under the Sick Industrial Companies (Special Provisions Act, 1985). In *Tradex Swiss* AG (384 BR 34 at 42 (2008)) [CLOUT case no. 791], the Swiss Federal Banking Commission was held by the court in the United States of America to be a "foreign court" because it controlled and supervised liquidation of entities in the brokerage trade.

[116]Guide to Enactment and Interpretation, para. 74.

[117]*Gold & Honey* (case no. 15), p. 371.

determination of any question arising in the liquidation; *(b)* the general supervisory jurisdiction of Australian courts over actions of liquidators; and *(c)* the ability of any person “aggrieved by any act, omission or decision” of a liquidator to appeal to an Australian court, which could “confirm, reverse or modify the act or decision or remedy the omission, as the case may be”.[118]

90. In the later case of *ABC Learning Centres* (case no. 1), the application for recognition of foreign proceedings commenced in Australia was opposed on several grounds, including that the foreign insolvency proceeding was not controlled or supervised by a foreign court. However, the United States court found, based upon the factors outlined in *Betcorp* that, notwithstanding that Australian courts do not direct the day-to-day operations of the debtor and that most liquidators proceed with their duties largely without court involvement, the relevant law gave the Australian court various control and supervisory roles with respect to liquidation proceedings that satisfied the requirements of article 2, subparagraph *(a)*.[119]

(d) “For the purpose of liquidation or reorganization”

91. Some types of proceeding that may satisfy certain elements of the definition of foreign proceeding may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation. They may take various forms, including proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganize the insolvency estate; proceedings designed to prevent detriment to investors rather than to all creditors (in which case the proceeding is also likely not to be a collective proceeding); or proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization, for example, the power to do no more than preserve assets.

92. Types of procedures that might not be eligible for recognition could include financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt where the negotiations do not lead to the commencement of an insolvency proceeding conducted under the insolvency law.[120] Such measures would generally satisfy neither the requirement for collectivity nor for control or supervision by the court.[121]

[118] *Betcorp*, pp. 283-284.

[119] *ABC Learning*, pp. 331-332.

[120] Such contractual arrangements would remain enforceable outside the Model Law without the need for recognition; nothing in the Model Law or Guide to Enactment and Interpretation is intended to restrict such enforceability.

[121] See paras. 71-74 above.

3. The main proceeding: centre of main interests

(a) Introductory comments

93. In the case of a corporate debtor, to recognize a foreign proceeding as a "main" proceeding, the receiving court must determine that the "centre of [the debtor's] main interests" was situated within the State in which the foreign proceeding originated.[122] A review of the origin of the concept of "centre of main interests" and the way in which it has been applied in decided cases may be of assistance to judges grappling with this issue.

94. For the purposes of the UNCITRAL Model Law, a deliberate decision was taken not to define "centre of main interests". The notion was taken from the Convention on Insolvency Proceedings of the European Union (the European Convention), for reasons of consistency.[123] At the time the Model Law was finalized, the European Convention had not come into force, and it subsequently lapsed for lack of ratification by all Member States.[124]

95. Subsequently, European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation) applied to Member States (except Denmark) of the European Union as a means of dealing with cross-border insolvency issues within the European Union. The concepts of "main proceedings" and "centre of main interests" were carried forward into the text of the EC Regulation.[125] The EC Regulation stresses the need for the centre of main interests to be "ascertainable by third parties".[126] The Guide to Enactment and Interpretation of the Model Law notes that the notion of "centre of main interests" corresponds to the formulation in article 3 of the European Convention and acknowledges the desirability of "building on the emerging harmonization as regards the notion

[122]UNCITRAL Model Law, art. 2, subpara. *(b)*.

[123]See Guide to Enactment and Interpretation, para. 81; cf. art. 3 of the European Convention – set out in para. 98 below.

[124]For the relevant history, see the opinions of the Advocates General in *Re Staubitz-Schreiber* ([2006] ECR I-701) and *Eurofood*, at para 2. For a more extensive discussion see Moss, Fletcher and Isaacs, The *EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2nd ed.) (Oxford University Press, 2009), paras 1.01-1.25.

[125]ECouncil Regulation, Recitals (12) and (13) set out in para. 96 below.

[126]Ibid., Recital (13).

of a 'main' proceeding".[127] Although the concepts in the two texts are similar, they serve different purposes. The determination of "centre of main interests" under the EC Regulation relates to the jurisdiction in which main proceedings should be commenced. The determination of "centre of main interests" under the Model Law relates to the effects of recognition, principal among those being the relief available to assist the foreign proceeding.

96. Recitals (12) and (13) of the EC Regulation state:

> "(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings[128] to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.
>
> "(13) The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

97. In anticipation of ratification of the European Convention by all Member States, an explanatory report on the Convention was prepared (the Virgos-Schmit Report).[129] That report provided guidance on the concept of "main insolvency proceedings" and, notwithstanding the subsequent demise of the Convention, has been accepted generally as an aid to interpretation of the term "centre of main interests" in the EC Regulation.

98. The Virgos-Schmit Report explained the concept of "main insolvency proceedings" as follows:

---

[127]Guide to Enactment and Interpretation, para. 81; see also A/52/17, para. 153, in which it was stated that "… the interpretation of the term in the context of [the] Convention would be useful also in the context of the Model [Law]". It should be noted that the EC Regulation does not define centre of main interests (see recital 13 below). During discussion in the UNCITRAL working group negotiating the Model Law, it was noted that the selection of the concept of centre of main interests to determine main proceedings offered several advantages, including that it would be in harmony with the approach and terminology utilized in the European Convention. That would enable use of the Model Law to contribute to the development of a standardized and widely understood terminology, rather than inadvertently contributing to an undesirable diversification of terminology (A/CN.9/422, para. 90).

[128]The EC Regulation refers to "secondary proceedings", while the Model Law uses "non-main proceedings". Secondary proceedings under the EC Regulation are winding-up proceedings (art. 3, para. 3).

[129]See subpara. 7 *(g)* above.

"73. Main insolvency proceedings

"Article 3 (1) enables main insolvency universal proceedings to be opened in the Contracting State where the debtor has his centre of main interests. Main insolvency proceedings have universal scope. They aim at encompassing all the debtor's assets on a world-wide basis and at affecting all creditors, wherever located.

"Only one set of main proceedings may be opened in the territory covered by the Convention.

...

"75. The concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

"The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.

"By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression 'main' serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

"In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence.

"Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office."

(b) Court decisions interpreting "centre of main interests"

99. There have been a number of court decisions that consider the meaning of the phrase "centre of main interests", either in the context of the EC

Regulation or national laws based on the UNCITRAL Model Law and which identify the factors relevant to rebutting the presumption in article 16, paragraph 3 of the Model Law as it relates to corporate debtors and to individuals. A number of subtle differences in approach have emerged, and it might be noted that courts in some jurisdictions might seek evidence of a greater quality or quantity to rebut the presumption than is the case in other States.[130]

100. The leading European decision is *Eurofood* (case no. 11), which arose out of a dispute between Irish and Italian courts about whether an insolvent subsidiary company with a registered office in a different State from the parent company had its "centre of main interests" in the State of its registered office or that of the parent company.

101. To answer that question, the European Court of Justice (ECJ) had to determine the strength of the presumption that the registered office would be regarded as the centre of a particular company's main interests. For the purpose of the EC Regulation, the presumption is found in article 3, paragraph 1:[131]

> *"Article 3*
>
> **International jurisdiction**
>
> "1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

102. The ECJ held that, "in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community Legislature in favour of the registered office ... can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect".[132]

[130]For example, under Chapter 15 of the United States of America's Bankruptcy Code (the chapter enacting the UNCITRAL Model Law), the wording of the presumption was changed from "proof" to the contrary to "evidence" to the contrary (Section 1516 *(c)* provides: "In the absence of evidence to the contrary the debtor's registered office … is presumed to be the centre of the debtor's main interests."). The legislative history behind that change suggests it was one reflecting terminology, namely that the way in which the word "evidence" is used in the United States may more closely reflect the term "proof" as used in some other English-speaking States. Decisions of United States courts must be read in that context.

[131]Compare with UNCITRAL Model Law, art. 16, para. 3. See also Virgos-Schmit Report, para. 76.

[132]*Eurofood*, para. 34.

103. In considering the presumption, the ECJ suggested that it could be rebutted in the case of a "letterbox company" which does not carry out any business in the territory of the State in which its registered office is situated.[133] In contrast, it took the view that "the mere fact" that a parent company made economic choices (for example, for tax reasons) as to where the registered office of the subsidiary might be situated would not be enough to rebut the presumption.[134]

104. *Eurofood* places significant weight on the need for predictability in determining the centre of main interests of a debtor. In the subsequent case of *Interedil* (case no. 17), the ECJ held that the second sentence of article 3 must be interpreted to mean that "a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties." When management, including the making of management decisions, and supervision of a company takes place in the same location as the registered office, in a manner that is ascertainable by third parties, the presumption cannot be rebutted. However, where a company's central administration is not in the same place as its registered office, a comprehensive assessment of all the relevant factors must be undertaken in order to establish, in a manner that is ascertainable by third parties, the location of the company's actual centre of management and supervision and of the management of its interests. In that particular case, the court held that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated could not be regarded as sufficient factors to rebut the presumption, unless the comprehensive assessment of all relevant factors pointed to that other Member State.[135]

105. In *Bear Stearns* (case no. 4), the United States of America's court considered the question of determination of the centre of main interests of a debtor under the Model Law. The application for recognition involved a company registered in the Cayman Islands which had been placed into provisional liquidation in that jurisdiction.

106. The court identified the rationale for the change made to the presumption by the United States legislation enacting the Model Law, i.e. replacing "proof" with "evidence".[134] The judge said, by reference to the legislative history of the provision:

[133]Ibid., para. 35.

[134]Ibid., para 36. See also the full summary of the court's conclusions on this topic in para. 37 of the judgement.

[135]*Interedil*, para. 59.

> "The presumption that the place of the registered office is also the centre of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy."

107. The judge stated that this "permits and encourages fast action in cases where speed may be essential, while leaving the debtor's true 'centre' open to dispute in cases where the facts are more doubtful". He added that this "presumption is not a preferred alternative where there is a separation between a corporation's jurisdiction of incorporation and its real seat".[136]

108. The court, in *Bear Stearns*, referred to the burden of displacing the presumption. The court regarded the onus as being on the foreign representative seeking recognition to demonstrate that the centre of main interests was in some place other than the registered office.[137] In that particular case, the court regarded the presumption as having been displaced by the evidence adduced by the foreign representative in support of the petition. All evidence pointed towards the principal place of business being in the United States.

109. After discussing the *Eurofood* judgement, the United States court expressed the view that the place where the debtor conducted the administration of his interests on a regular basis, and that was therefore ascertainable by third parties generally, equated with the concept of "principal place of business" in United States law.[138] More recently, the term "principal place of business" was defined as the "nerve centre" for the purposes of certain laws by the United States Supreme Court in *Hertz Corp v Friend*.[139] That approach appears to have been followed in *Fairfield Sentry* (case no. 12), for Model Law purposes.[140]

110. The decision in *Bear Stearns* was appealed, on the ground that the judgement did not "accede" to principles of comity and cooperation and on the ground of an asserted erroneous interpretation of the presumption by the judge. On appeal, the appellate judge had no difficulty in holding that principles of comity had been overtaken by the concept of recognition. The

[136]*Bear Stearns* (first instance), p.128.

[137]Ibid.

[138]Ibid., p. 129.

[139]130 S Ct 1181 (2010). The Supreme Court indicated that courts should focus on the actual place where the coordination, direction and control of the corporation was taking place, observing that the location would likely be obvious to members of the public dealing with it.

[140]*Fairfield Sentry*, pp. 64-66. The United States court found that the facts before it suggested the debtor's most feasible administrative nerve centre as having existed for some time in the British Virgin Islands (BVI). Those facts included the composition and site of decision-making of an independent litigation committee that governed the debtor's affairs, the conduct of board meetings telephonically with the debtor's counsel in the BVI; and, since the commencement of the BVI liquidation in 2009, the direction and coordination of the debtor's affairs by BVI liquidators with resident employees and offices. The decision was affirmed on appeal to the District Court (No. 10 Civ. 7311 (S.D.N.Y 16 September 2011)); as at 15 April 2013, that decision is on further appeal.

appellate judge held that "recognition" ought to be distinguished from "relief". The appellate court affirmed the lower court's decision that the burden lay on a foreign representative to rebut the presumption and that the court had a duty to determine independently whether that had been done, irrespective of whether party opposition was or was not present.[141]

111. In common with the lower court, the appellate court in *Bear Stearns* accepted that the concept of centre of main interests and the presumption were derived from the European Convention—that the "centre of main interests" equated to the "principal place of business". The appellate court also affirmed a list of factors set out in the first-instance decision, to be taken into account in assessing whether a centre of main interests has been established in accordance with the application for recognition. The factors identified were:[142]

(a) The location of the debtor's headquarters;

(b) The location of those who direct the debtor company;

(c) The location of the debtor's primary assets;

(d) The location of the majority of creditors, or at least those affected by the case;

(e) Applicable law in relation to disputes that might arise between debtor and creditor.

112. In *Betcorp* (case no. 5), although the centre of main interests of the Australian company did not appear to be seriously in dispute, the judge offered some thoughts on the subject. He concluded that "a commonality of cases analysing debtors' [centre of main interests] demonstrates that courts do not apply any rigid formula or consistently find one factor dispositive; instead courts analyse a variety of factors to discern, objectively, where a particular debtor has its principal place of business. That inquiry examines the debtors' administration, management and operations along with whether reasonable and ordinary third parties can discern or perceive where the debtor is conducting these various functions."[143]

113. Further decisions are those of the English courts at first instance and on appeal in *Stanford International Bank* (case no. 26). That case involved an application for recognition in England of a proceeding commenced in Antigua and Barbuda and considered whether a "head office functions" test, articulated in earlier decisions by English courts, was still good law, having regard to *Eurofood*.

[141] *Bear Stearns* (on appeal), pp. 335-336.
[142] *Bear Stearns* (first instance), p. 128; *Bear Stearns* (on appeal), pp. 336-337.
[143] *Betcorp*, p. 290.

114. At first instance, the judge accepted a submission that ascertainment by third parties was an overarching consideration, following the approach set out in *Eurofood*.[144] The judge made that decision in the context of the Cross-Border Insolvency Regulations 2006 (enacting the UNCITRAL Model Law in Great Britain), rather than under the EC Regulation. In determining what was meant by the term "ascertainable", the judge referred to information in the public domain and what a typical third party would learn from dealings with the debtor.[145] In doing so, the judge declined to follow an earlier decision of his own in which he had applied the "head office functions" test.

115. The judge observed that the difference in approach, in relation to rebuttal of the presumption, between courts in the United States of America and European courts was that the United States courts placed the burden on the person asserting that the particular proceedings were "main proceedings", while *Eurofood* put the burden on the party seeking to rebut the presumption.[146]

116. The judge expressed some doubt about whether the factors listed in *Bear Stearns*[147] had been qualified by a requirement of "ascertainability", indicating that it had been a requirement of *Eurofood*. Nevertheless, the judge said that even though the specific list of criteria was not qualified in that way by the United States court, it would seem plausible that an informed creditor could at least be aware of the location of those who directed the debtor company, its headquarters and the place where primary assets could be found, as well as whether the debtor was trading domestically or internationally.[148] The importance of the first-instance observation in *Stanford International Bank* lies in its implicit emphasis on the need for evidence of which factors were ascertainable to third parties dealing with the debtor.

117. The decision in *Stanford International Bank* was upheld on appeal. In the principal judgement, the presiding judge held that there was a clear correlation between the words used in the UNCITRAL Model Law and the EC Regulation, both in relation to "centre of main interests" and the presumption.[149] After discussing United States and other authorities, he held that the first-instance judge was correct to follow *Eurofood* and confirmed that the explanation in the Virgos-Schmit Report[150] (concerning ascertainability) was

[144]*Stanford International Bank* (first instance), para. 61.

[145]Ibid., para. 62.

[146]Ibid., paras. 63 and 65.

[147]See para. 111 above.

[148]*Stanford International Bank* (first instance), para. 67; compare with the list of factors set out at para. 111 above.

[149]*Stanford International Bank* (on appeal), para. 39.

[150]Virgos-Schmit Report, para. 75; see para. 98 above.

equally apposite for Model Law proceedings. The presiding judge did not necessarily see the United States as applying a different onus on rebutting the presumption, but left that question open.[151] Subsequent cases under the Model Law have confirmed the requirement of ascertainability.[152]

(c) The Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency

118. The Guide to Enactment and Interpretation of the Model Law responds to uncertainty and unpredictability that has arisen with respect to interpretation of the concept of centre of main interests. The revised Guide notes that where the debtor's centre of main interests coincides with its place of registration, no issue concerning rebuttal of the presumption in article 16, paragraph 3 of the Model Law will arise. In reality, however, the debtor's centre of main interests may not coincide with its place of registration and the party alleging that it is not at that place will be required to satisfy the court as to its location.[153] The court of the receiving State will be required to consider independently where the debtor's centre of main interests is located and whether the requirements of the Model Law are met. It may in some cases be assisted in that task by information included in the order of the originating court as to the nature of the foreign proceeding,[154] although that order clearly is not binding on the receiving court. In those cases where the debtor's centre of main interests does not coincide with its place of registration, the centre of main interests will be identified by factors that indicate to those who deal with the debtor (especially creditors) where it is located.

119. The revisions to the Guide propose that the following principal factors, considered as a whole, will tend to indicate whether the location in which the foreign proceeding has commenced is the debtor's centre of main interests. The factors are the location: *(a)* where the central administration of the debtor takes place, and *(b)* which is readily ascertainable by creditors,[155] analysed by reference to the date of commencement of the foreign proceedings.

---

[151] *Stanford International Bank* (on appeal), para 55.

[152] *Ackers v Saad* ([2010] FCA 221) [CLOUT case no. 1219]; *Gerova* (case no. 14); *Lightsquared* (case no. 18); *Massachusetts Elephant & Castle* (case no. 19); *Millennium Global* (case no. 21).

[153] Guide to Enactment and Interpretation, paras. 141-144.

[154] As an example, the Canadian court in *Cinram International* (case no. 8) outlined the factors that the applicants had submitted indicated that the location of the debtors' centre of main interests was Canada. The court indicated that it had included that outline with respect to the centre of main interests "for informational purposes only. This court clearly recognizes that it is the function of the receiving court—in this case, the United States Bankruptcy Court for the District of Delaware—to make the determination on the location of the centre of main interests and to determine whether this [Canadian] proceeding is a "foreign main proceeding" for the purposes of Chapter 15" (para. 42).

[155] Guide to Enactment and Interpretation, para. 145; as to timing see also paras. 129-135 below.

120. When these principal factors do not yield a ready answer regarding the debtor's centre of main interests, a number of additional factors concerning the debtor's business may be considered. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the endeavour is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's centre of main interests, which is readily ascertainably by creditors.

121. The additional factors may include the following: the location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.[156]

122. The Guide indicates that the order in which the additional factors are set out is not intended to indicate the priority or weight to be accorded to them, nor it is intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a given case.[157]

123. Several cases decided during the revision of the Guide to Enactment of the Model Law (between 2010-2013) considered the factors determining centre of main interests and adopted the approach of focussing upon a few principal factors. In *Massachusetts Elephant & Castle* (case no. 19), the Canadian court considered three principal factors—that the location was *(a)* where the debtor's principal assets or operations are found; *(b)* where the management of the debtor took place; and *(c)* readily ascertainable by a significant number of creditors as the debtor's centre of main interests, noting that while other factors might also be considered relevant, they should perhaps be considered to be of secondary importance and only to the extent that they supported these three factors.[158]

---

[156]Ibid, para. 147.
[157]Ibid.
[158]*Massachusetts Elephant & Castle*, paras. 30-31.

124. Those factors were followed in *Lightsquared* (case no. 18),[159] where the Canadian judge also observed that while in most cases these principal factors will all point to a single jurisdiction as the centre of main interests, there may be some instances where there will be conflicts among the factors that would require a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the judge said, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

125. In *think3* (case no. 27),[160] the Japanese court was required to determine whether the foreign main proceeding was a proceeding commenced in the United States of America or one commenced in Italy. At both first instance and on appeal, the courts considered the factors being discussed in the course of the revision of the Guide to Enactment and whether the location of the headquarter function or nerve centre of the debtor was an element of the factors to be considered.

(d) Movement of centre of main interests

126. A debtor's centre of main interests may move prior to commencement of insolvency proceedings, in some instances in close proximity to commencement and even between the time of the application for commencement and the actual commencement of those proceedings.[161] Whenever there is evidence of such a move in close proximity to the commencement of the foreign proceeding, it may be desirable for the receiving court, in determining whether to recognize those proceedings, to consider the factors identified in paragraphs 119 and 121 above more carefully and to take account of the debtor's circumstances more broadly. In particular, the test that the centre of main interests is readily ascertainable to third parties may be harder to

---

[159] *Lightsquared*, paras. 25-26.

[160] In the Japanese legislation enacting the Model Law, the phrase "principal place of business" is used rather than "centre of main interests" and there is no presumption with respect to registered office that is equivalent to article 16, paragraph 3 of the Model Law. As the court at first instance explains in *think3*, however, "principal place of business" is considered to have substantively the same meaning in the Japanese legislation as "centre of main interests" and judicial precedents in other countries regarding centre of main interests and the trend of discussion in UNCITRAL are to be considered and examined [chapter 3, issue 2-2 (2), p. 19]. [Unofficial English translation on file with the UNCITRAL Secretariat; see http://www.insol.org/page/304/japan (last visited 1 December 2013)].

[161] In some examples, the move was intended to give the debtor access to an insolvency process, such as reorganization, that more closely met its needs than what was available under the law of its former centre of main interests. In other examples, the move of the centre of main interests may have been designed to thwart the legitimate expectations of creditors and third parties.

meet if the move of the centre of main interests occurs in close proximity to the commencement of proceedings.

127. In *Interedil* (case no. 17), decided under the EC Regulation, the ECJ considered the impact of the move of the debtor's registered office before commencement of the insolvency proceedings. It held that where a debtor company's registered office is transferred before a request to commence insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of the new registered office.[162]

128. It is unlikely that a debtor could move its place of registration (or habitual residence) after the commencement of insolvency proceedings, since many insolvency laws contain specific provisions preventing such a move. In any event, if this were to occur, it should not affect the decision as to centre of main interests for the purposes of the Model Law, since the time relevant to that determination is the date of commencement of the foreign proceeding, as discussed in paragraph 134 below.

(e) Date at which to determine centre of main interests

129. The Model Law does not expressly indicate the date by reference to which the centre of main interests (or establishment) should be determined, other than to provide in article 17, subparagraph 2 *(a)* that the foreign proceeding is to be recognized as a main proceeding "if it is taking place in the State where the debtor has the centre of its main interests." The use of the present tense in article 17 requires the foreign proceeding to be current or pending at the time of the recognition decision; if the proceeding for which recognition is sought is no longer current or pending in the originating State, there is no proceeding eligible for recognition under the Model Law.

130. There has been some judicial consideration of the question of timing. In *Betcorp* (case no. 5), for example, the judge held that the time at which the centre of main interests should be determined was the time at which the application for recognition was made.[163] That interpretation seems to arise from the tense in which the definition of "foreign main proceeding" is expressed: "means a foreign proceeding taking place in the State where the debtor has the centre of its main interests". A similar problem arises in relation to the place of an "establishment" under the definition of "foreign non-main proceeding": "means a foreign proceeding ... taking place in a State where the debtor has an establishment". The approach in *Betcorp* was

[162]*Interedil*, para. 59.
[163]*Betcorp*, pp. 290-292.

followed in *Ran (Fifth Circuit)* (case no. 22) and *British American Insurance* (case no. 6).

131. In more recent cases, courts have held that the relevant date for determining centre of main interests is the date on which the foreign proceeding commenced. In *Millennium Global* (case no. 21), the judge at first instance observed that recognition proceedings are ancillary to the foreign proceeding and that the date of the application for recognition is mere happenstance and may take place at any time, even some years, after the commencement of the foreign proceeding. Moreover, if centre of main interests is viewed as equivalent to a debtor's principal place of business, an interpretation used by a number of courts, centre of main interests must refer to the debtor's business before commencement of the foreign proceeding, since after commencement, particularly of liquidation proceedings, the business typically ceases and there is no place of business.[164] This decision was followed in *Gerova* (case no. 14); the judge observed that at the date of the application for recognition, the debtor had no business activities or connections with Bermuda, only the activities of the liquidator winding up the business.[165]

132. The date of the making of the application for commencement of the foreign proceeding or the commencement of that proceeding was also followed by the Japanese court at first instance in *think3* (case no. 27) and affirmed on appeal.[166] The Japanese court at first instance observed that if the timing of the determination was to be governed by the date of the application for recognition, then in cases where there were multiple applications for recognition of the same foreign proceeding in different countries, the timing of the determination would end up being different in each of those countries and would lead to a lack of unification, with different results in different courts. Moreover, the court said, use of the date of the application for recognition might encourage an arbitrary choice of the time to apply for recognition.

133. In *Interedil* (case no. 17), decided under the EC Regulation, the ECJ held that it is the location of the debtor's centre of main interests at the date on which the request to open insolvency proceedings was lodged that is relevant for determining the court having jurisdiction.

134. The Guide to Enactment and Interpretation indicates that having regard to the evidence required to accompany the application for recognition under article 15 and the relevance accorded the decision commencing the

[164]*Millennium Global* (first instance), pp.71 and following; the issue of the date at which to determine centre of main interests and establishment was not considered by the appeal court.

[165]*Gerova*, pp. 92-93.

[166]*think3*, Tokyo High Court, chapter 3-2, p. 6; Tokyo District Court, chapter 3, issue 2-1, pp. 12-14.

foreign proceeding and appointing the foreign representative, the date of commencement of the foreign proceeding is the appropriate date for determining the location of debtor's centre of main interests.[167] The choice of that date provides a test that can be applied with certainty to all insolvency proceedings. It also addresses issues that may arise where the business activity of the debtor has ceased at the time of the application for recognition,[168] where, as may occur in cases of reorganization, it is not the debtor entity that continues to have a centre of main interests, but rather the reorganizing entity, as well as circumstances where there is a change of residence between the commencement of the foreign proceeding and the application for recognition under the Model Law.

(f) Abuse of process

135. On a recognition application, ought the court to be able to take account of abuse of its processes as a ground to decline recognition? There is nothing in the UNCITRAL Model Law itself which suggests that extraneous circumstances should be taken into account on a recognition application. The Model Law envisages the application being determined by reference to the specific criteria set out in the definitions of "foreign proceeding", "foreign main proceeding" and "foreign non-main proceeding". Since what constitutes abuse of process depends upon domestic law or procedural rules, the Model Law does not explicitly prevent receiving courts from applying domestic law, particularly procedural rules, to respond to a perceived abuse of process.

4. Non-main proceedings: "establishment"

(a) Introductory comments

136. In order for a proceeding to be recognized as a "non-main proceeding", a debtor must have "an establishment" in the foreign jurisdiction. The

[167]Guide to Enactment and Interpretation, para. 159.

[168]In *Fairfield Sentry* (case no. 12), the court at first instance in the United States of America noted that the debtor had effectively ceased doing business some time before the commencement of liquidation proceedings and before the application for recognition and that its activities had for an extended period of time been conducted only in connection with the liquidation of its business. The judge found that it was appropriate to take that extended period into account in determining the debtor's centre of main interests (pp. 64-65). In *British American Insurance* (case no. 6), the court suggested that a debtor's centre of main interests may become lodged with the foreign representative where a foreign representative remains in place for an extended period, and relocates all of the primary business activities of that debtor to that location (or brings that business to a halt), thereby causing creditors and other parties to look to the [foreign representative] as the location of that debtor's business, (p. 914).

term "establishment" forms part of the UNCITRAL Model Law's definition of "foreign non-main proceeding". It is also used, in the EC Regulation, to assist courts of Member States to determine whether jurisdiction exists to open secondary insolvency proceedings when the centre of main interests is in another Member State. Article 3, paragraph 2, of the EC Regulation states:

"Article 3

International jurisdiction

...

"2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State."

137. The Guide to Enactment and Interpretation notes[169] that the definition of "establishment" was inspired by article 2, paragraph *(h)*, of the European Union Convention on Insolvency Proceedings. The Virgos-Schmit Report on that Convention provides some further explanation of "establishment":

> "Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.
>
> "The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an 'establishment'. A certain stability is required. The negative formula ('non-transitory') aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor."[170]

138. Whether an "establishment" exists is largely a question of fact; no presumption is provided in the Model Law. Necessarily, that factual question will turn on specific evidence adduced. It must be established that the debtor "carries out a non-transitory economic activity with human means and goods

[169]Guide to Enactment and Interpretation, para. 88.
[170]Virgos-Schmit Report, para. 71.

or services" within the relevant State.[171] There is, however, a legal issue as to whether the term "non-transitory" refers to the duration of a relevant economic activity or to the specific location at which the activity is carried on.

(b) Court decisions on interpretation of "establishment"

139. The term "establishment" has been discussed by some of the authorities. In *Bear Stearns* (case no. 4),[172] "establishment" was equated with "a local place of business". In that case, the court held that there was no evidence to establish that non-transitory economic activity was taking place in the Cayman Islands. On appeal, the appellate court made it clear that auditing activities carried out in the preparation of incorporation documents did not constitute "operations" or "economic activity" for the purposes of an "establishment"; neither did investigations carried out by the provisional liquidators into whether antecedent transactions could be avoided.[173]

140. It may be that more emphasis should be given to the words "with human means and goods and services" in the definition of "establishment". A business operation, run by human beings and involving goods or services, seems to be implicit in the type of local business activity that will be sufficient to meet the definition of the term "establishment". In *Interedil* (case no. 17), decided under the EC Regulation, the ECJ observed that the fact that the definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organization and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an "establishment".

141. In *Ran* (case no. 22), the appellate court considered the issue of establishment from the point of view of the individual debtor and what might be sufficient to constitute an establishment. The court noted the source of the definition of establishment in the Model Law, and the requirement, in the context of corporate debtors, for there to be a place of business.[174] The court said that "equating a corporation's principal place of business to an individual debtor's primary or habitual residence, a place of business could conceivably align with the debtor having a secondary residence or possibly a place of employment in the country where the receiver claims that he has

---

[171] UNCITRAL Model Law, art. 2, subpara. *(f)*.

[172] *Bear Stearns* (first instance), pp. 131-132; see also *Lavie re Ran* (2009) (case no. 22), pp. 285-288 and *British American Insurance*, (case no. 6), pp. 914-916.

[173] *Bear Stearns* (on appeal), pp. 338-339.

[174] Referring to the test in *Bear Stearns* (first instance), at pp. 130-131.

an establishment".[175] The receiver argued that the presence of debts and the insolvency proceedings in Israel constituted an "establishment" for the purposes of recognition. The court disagreed, taking the view that the existence of insolvency proceedings and debts in Israel would not qualify the Israeli proceedings for recognition as non-main proceedings.[176]

142. In *Williams v Simpson (No. 5)* (case no. 30), the difficulty was that while, under English law, the winding up of a business in the United Kingdom (by paying debts) constituted a ground on which the debtor could be subject to the insolvency laws of England, it did not amount to an "establishment" in the context of a person who had been retired for some 12 years and had no (actual) existing business in that country.

(c) Date at which to determine the existence of an establishment

143. As noted above, the Model Law does not expressly indicate the relevant date for determining the centre of main interests of the debtor. The same is true with respect to determining the existence of an establishment. The Guide to Enactment and Interpretation suggests that the date of commencement of the foreign proceeding is the appropriate date for determining the existence of an establishment for the debtor.[177]

D. Relief

1. Introductory comments

144. Three types of relief are available under the UNCITRAL Model Law:

(a) Interim (urgent) relief that can be sought at any time after the application to recognize a foreign proceeding has been made;[178]

(b) Automatic relief consequent upon recognition of a foreign proceeding as a "foreign main proceeding";[179] and

(c) Discretionary relief consequent upon recognition of the foreign proceedings as either a main or non-main proceeding.[180]

---

[175] *Ran* (5th Cir. 2010), p. 1027.
[176] Ibid., p. 1028.
[177] Guide to Enactment and Interpretation, para. 160.
[178] UNCITRAL Model Law, art. 19.
[179] Ibid., art. 20.
[180] Ibid., art. 21.

145. The Model Law specifies the type of relief available, particularly following recognition. It does not import the effects under foreign law of the commencement of the foreign proceedings, nor does it rely upon the relief available in the recognizing State.

146. By virtue of the definition of "foreign proceeding",[181] the effects of recognition extend to foreign "interim proceedings".[182] That solution is necessary because interim proceedings are not distinguished from other insolvency proceedings merely because they are of an interim nature.

147. If, after recognition, the foreign "interim proceeding" ceases to have a sufficient basis for the automatic effects of article 20, the automatic stay could be terminated pursuant to the law of the enacting State, as indicated in article 20, paragraph 2.

148. Nothing in the Model Law limits the power of a court or other competent authority to provide additional assistance to a foreign representative under other laws of the enacting State.[183]

149. Consideration of a particular statute enacting the Model Law is required in order to determine whether any type of relief (automatic or discretionary) envisaged by the Model Law has been removed or modified in the enacting State.[184] Once available relief has been identified, it is up to the receiving court, in addition to automatic relief flowing to a recognized "main" proceeding, to craft any appropriate relief required. The decision in *Bear Stearns* (case no. 4) that the question of relief should be clearly distinguished from the question of recognition was followed in *Atlas Shipping* (case no. 3), in which the court in the United States of America held that, once a court had recognized a foreign main proceeding, Chapter 15 of the United States Bankruptcy Code specifically contemplated that the court would exercise its discretion to fashion appropriate post-recognition relief consistent with the principles of comity.[185] That decision was also followed in *Metcalfe & Mansfield* (case no. 20), in which a United States court was

---

[181]Ibid., art. 2, subpara. *(a)*.

[182]An example is the appointment of an interim (provisional) liquidator prior to the making of a formal order putting a debtor company into liquidation, which is possible under the law of numerous States. See, for example, s 246 Companies Act 1993 and r 31.32 of the High Court Rules of New Zealand.

[183]UNCITRAL Model Law, art. 7. This article is designed to encompass relief based on comity, exequatur or the use of letters rogatory or under any other law of a particular State.

[184]States that have enacted legislation based on the Model Law have taken different approaches. For example, in the United States, the scope of the automatic stay is wider (to conform to chapter 11 of its Bankruptcy Code). In Mexico the stay does not operate to prevent the pursuit of individual actions, as opposed to enforcement. Japan and the Republic of Korea provide that the relief available upon recognition is subject to the discretion of the court on a case-by-case basis, rather than applying automatically as provided by the Model Law.

[185]*Atlas Shipping*, p. 738.

asked to enforce certain orders for relief issued by a Canadian court, orders that were broader than would have been permitted under United States law. The court noted that principles of comity did not require the relief granted in the foreign proceedings and the relief available in the United States to be identical. The key determination was whether the procedures used in the foreign proceeding met the fundamental standards of fairness in the United States; the court held that the Canadian procedures met that test.[186]

2. *Interim relief*[187]

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the debtor's assets;

(b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) Any relief mentioned in paragraph 1 *(c), (d)* and *(g)* of article 21.

2. *[Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]*

3. Unless extended under paragraph 1 *(f)* of article 21, the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

150. Article 19 deals with "urgently needed" relief that may be ordered at the discretion of the court and is available as of the moment of the application for recognition. It is in the nature of discretionary relief that the court

[186]*Metcalfe & Mansfield*, pp. 697-698.

[187]The summary that follows is based substantially on the Guide to Enactment and Interpretation, paras. 170-175.

may tailor it to the case at hand.[188] This idea is reinforced by article 22, paragraph 2, according to which the court may subject the relief granted under article 19 to conditions it considers appropriate. In each case it will be necessary for a judge to determine the relief most appropriate to the circumstances of the particular case and any conditions on which the relief should be granted.

151. Article 19 authorizes the court to grant the type of relief that is usually available only in collective insolvency proceedings,[189] as opposed to the "individual" type of relief that may be granted before the commencement of insolvency proceedings under domestic rules of civil procedure.[190] Nevertheless, discretionary "collective" relief under article 19 is somewhat narrower than the relief available under article 21.

152. The restriction of interim relief to a "collective" basis is consistent with the need to establish, for recognition purposes, that a "collective" foreign proceeding exists. Collective measures, albeit in a restricted form, may be urgently needed, before the decision on recognition, in order to protect the assets of the debtor and the interests of the creditors.[191] Extension of available interim relief beyond collective relief would frustrate those objectives. On the other hand, because recognition has not yet been granted, interim relief should, in principle, be restricted to urgent and provisional measures.

153. The urgency of the measures is alluded to in the opening words of article 19, paragraph 1 of the Model Law. Subparagraph *(a)* restricts a stay to execution proceedings, and subparagraph *(b)* refers to perishable assets

[188]The receiving court is entitled to tailor relief to meet any public policy objections. For a discussion of the "public policy" exception in relation to questions of relief, see paras. 48-54 above. In *Tri-Continental Exchange* [349 B.R. 627 (Bankr. E.D. Cal. 2006) [CLOUT case no. 766]], which involved the recognition in the United States of America of proceedings commenced in Saint Vincent and the Grenadines, the United States court considered whether to impose additional conditions, in accordance with articles 6 and 22, on the relief sought by the foreign representatives, i.e. that they be entrusted under article 21 with the administration or realization of the debtors' assets within the territorial jurisdiction of the United States, but not with the distribution of those assets. The court concluded that such conditions were unnecessary in the circumstances. The record did not warrant the court placing itself in a position in which it could impede the progress of the main proceeding in Saint Vincent and the Grenadines and, if it later transpired that there was reason for the court to have discomfort about that conclusion, article 22, paragraph 3, enabled it to revise its position and exercise its authority under article 22, paragraph 2, to impose conditions on the entrustment under article 21, subparagraph 1 *(e)*, to the foreign representatives. Those conditions could include the giving of a security or the filing of a bond.

[189]I.e. the same type of relief available under article 21.

[190]I.e. measures covering specific assets identified by a creditor.

[191]See also the discussion of *Rubin v Eurofinance* (case no. 23) in paras. 176-177 below.

and assets susceptible to devaluation or otherwise in jeopardy.[192] Otherwise, the measures available under article 19 are essentially the same as those available under article 21.

154. Article 19 relief is provisional in nature. The relief terminates when the application for recognition is decided upon;[193] however, the court is given the opportunity to extend the measure.[194] The court might wish to do so, for example, to avoid a hiatus between provisional relief granted before recognition and substantive discretionary relief issued afterwards.

155. Article 19, paragraph 4, emphasizes that any relief granted in favour of a foreign non-main proceeding must be consistent (or should not interfere) with the foreign main proceeding.[195] In order to foster coordination of pre-recognition relief with any foreign main proceeding, the foreign representative applying for recognition is required to attach to the application for recognition a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.[196]

156. In addition to addressing the possibility that interim relief might be subjected to conditions the court thinks appropriate, as noted above, article 22 addresses the need for the court to provide adequate protection of the interests of creditors and other interested persons in granting or denying relief upon recognition of foreign proceedings and modifying or terminating that relief.

---

[192]E.g. *Tucker* (20 November 2009) [(2009) 76 ACSR 19; (2009) FCA 1354] [CLOUT case no. 922], in which the Australian court made orders for interim protection of aircraft parts inventory stored at locations in Australia and controlled by Qantas, on the basis that they might be at risk because of a dispute as to entitlement to the parts. The interim relief was granted to preserve the position and assets of the defendant in Australia for a limited period pending the hearing of the application seeking recognition of the English proceeding. On the evidence, the court was satisfied that it was likely that recognition would be granted, at which time relief under the Australian provision that was equivalent to article 20 would commence. A further example is the case of *Williams v Simpson* (17 September 2010) (case no. 30). Following an application by the trustee of the English bankruptcy proceedings, the New Zealand court made orders for interim measures, including the issue of a search warrant for a specific property, suspension of the debtor's ability to deal with his property in New Zealand and his examination by a court official. The court observed that "it would be odd if the ability to grant such relief [under article 19] extended only to property known to exist and readily locatable". It went on to say that "the flexibility inherent in article 19 could justify the issue of a search warrant to ascertain whether there are assets that are being concealed that might be in jeopardy if some form of interim relief did not attach to them" (para. 47). In the same case, a second application was made for interim relief to allow the examination of certain persons in order to determine issues of ownership of the items that had been seized pursuant to the search warrant. The court refused to grant the application on the grounds that the relief sought was not urgent as required under article 19, para. 1. It held that since the assets whose ownership was in question had already been seized and the issue of ownership would become relevant after the determination on recognition of the foreign proceedings, the order was not necessary.

[193]UNCITRAL Model Law, art. 19, para. 3.

[194]Ibid., art. 21, subpara. 1 *(f)*.

[195]Ibid.; see also arts. 29 and 30.

[196]Ibid., art. 15, para. 3.

Article 22. Protection of creditors and other interested persons

1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.

3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

157. The idea underlying article 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief.[197] This balance is essential to achieve the objectives of cross-border insolvency legislation.

158. Several cases have considered issues relating to adequate protection of creditors. In *Sivec* (case no. 24), the debtor obtained recognition of an Italian reorganization proceeding as a foreign main proceeding and modification of the automatic stay to permit litigation in the United States of America of two potentially offsetting claims. This litigation resulted in a United States creditor seeking relief from the stay to permit set-off of the two judgements. The Italian debtor requested enforcement of the Italian proceedings, which would apparently result in the United States creditor being unable to set-off the two judgements. The United States court determined that it would not accord comity to the Italian proceedings, as the Italian debtor "had failed to provide information regarding Italian law, the status of the Italian bankruptcy case or meet its burden of proof in requesting comity." The court expressed particular concern about lack of notice to the United States creditor, and found that basic elements of due process were lacking and that there was a failure to provide protection of a United States creditor's interests.[198]

159. In *SNP Boat Service* (case no. 25), the concept of adequate protection[199] was interpreted more narrowly. In that case, a Canadian creditor

---

[197]See generally Guide to Enactment and Interpretation, paras. 196-199. In *Tri-continental Exchange* (349 B.R. 627 (Bankr. E.D. Cal. 2006) [CLOUT case no. 766]), the court said that the standards that inform the analysis of [article 22] protective measures in connection with discretionary relief emphasize the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favouring one group of creditors over another (at p. 637).

[198]*Sivec*, pp. 324-326.

[199]Referred to in the United States law as "sufficient protection".

objected to the debtor in a French insolvency proceeding seeking to repatriate assets in the United States of America to France on the basis that it would not receive "sufficient protection" of its interests in the French proceeding. On appeal, the United States court distinguished between relief under article 21, paragraph 2 and article 22, paragraph 1 of the Model Law, the latter providing more generally that the court may grant relief under articles 19 and 21 only if "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."[200] Although the objecting creditor was Canadian, the court held that it was not precluded from satisfying itself that the interests of foreign creditors in general were sufficiently protected before remitting property to the foreign jurisdiction, but rejected the idea that it could inquire into the individual treatment the particular creditor would receive in France.[201]

3. Automatic relief upon recognition of a main proceeding[202]

160. Article 20 addresses the effects of recognition of a foreign main proceeding, in particular the automatic effects and the conditions to which it is subject.

Article 20. Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding,

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) Execution against the debtor's assets is stayed; and

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

[200] *SNP Boat Service*, (on appeal) pp. 783-784.

[201] In a further United States case, *In re Lee*, [472 B.R. 156 (Bankr. D. Mass. 2012)] the foreign representative of Hong Kong-based debtors applied to take possession and control of property owned by the debtor in the United States, testifying that he had a duty under Hong Kong law to take possession of the property interests and that he was a rational actor, with a duty to protect and maximize the value of the property and to respect applicable transfer restrictions. The United States court concluded that the foreign representative had satisfied the burden of proof that creditors and the debtor would be sufficiently protected if the order for possession were granted, and that the creditors had not met their "ultimate burden of establishing the absence of sufficient protection."

[202] The summary that follows is based substantially on the Guide to Enactment and Interpretation, paras. 176-188.

> 2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to *[refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article].*
>
> 3. Paragraph 1 *(a)* of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.
>
> 4. Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under *[identify laws of the enacting State relating to insolvency]* or the right to file claims in such a proceeding.

161. While relief under articles 19 and 21 is discretionary, the effects provided by article 20 are not; they flow automatically from recognition of the foreign main proceeding. Another difference between discretionary relief under articles 19 and 21 and the effects under article 20 is that discretionary relief may be issued in favour of both main and non-main proceedings, while the automatic effects apply only to main proceedings. The automatic effects of recognition are different from the effects of an exequatur order.

162. The automatic consequences envisaged in article 20 are intended to allow time for steps to be taken to organize an orderly and fair cross-border insolvency proceeding, even if the effects of commencement of the foreign insolvency proceeding in the country of origin are different from the effects of article 20 in the recognizing State. This approach reflects a basic principle underlying the UNCITRAL Model Law, according to which the recognition of foreign proceedings by the court of the enacting State grants effects that are considered necessary for an orderly and fair conduct of cross-border insolvency.

163. If recognition would, in any given case, produce results that would be contrary to the legitimate interests of an interested party, including the debtor, the law of the recognizing State may provide possibilities for protecting those interests.[203]

164. Article 20, subparagraph 1 *(a)*, refers not only to "individual actions" but also to "individual proceedings" in order to cover, in addition to "actions" instituted by creditors in a court against the debtor or its assets, enforcement measures initiated by creditors outside the court system, which measures creditors are allowed to take under certain conditions in some States.

[203]See UNCITRAL Model Law, art. 20, para. 2.

Article 20, subparagraph 1 *(b)*, was added to make it abundantly clear that executions against the assets of the debtor are covered by the stay.[204]

165. Notwithstanding the "automatic" or "mandatory" nature of the effects of recognition under article 20, it is expressly provided that the scope of those effects depends on exceptions or limitations that may exist in the law of the enacting State.[205] Those exceptions may include the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, the initiation of court actions for claims that have arisen after the commencement of the insolvency proceeding (or after recognition of a foreign main proceeding) or the completion of open financial-market transactions.

166. Sometimes it may be desirable for the court to modify or terminate the effects of article 20. Domestic rules governing the power of a court to do so vary. In some legal systems, the courts are authorized to make individual exceptions upon request by an interested party, under conditions prescribed by local law. In view of that situation, article 20, paragraph 2, provides that the modification or termination of the stay and the suspension provided in the article is subject to the provisions of law of the enacting State relating to insolvency.[206]

167. Article 20, paragraph 4, clarifies that the automatic stay and suspension pursuant to article 20 do not prevent anyone, including the foreign representative or foreign creditors, from requesting the commencement of a local insolvency proceeding and participating in that proceeding.[207] If a local proceeding is initiated, article 29 deals with the coordination of the foreign and the local proceedings.[208]

[204]In *JSC BTA Bank* [434 BR 334 (Bankr. S.D.N.Y. 2010)] [CLOUT case no. 1211], the court in the United States of America held that the scope of the automatic stay [applicable under the Bankruptcy Code] was limited to proceedings that could have an impact on the property of a debtor located in the United States. An arbitration conducted in Switzerland after the commencement of the Chapter 15 proceedings did not violate that automatic stay where the law of the debtor's centre of main interests did not stay the arbitration and the debtor had apparently participated in it without objection. Similarly, the automatic stay did not apply to actions for purely post-recognition breaches of contract by a foreign debtor or related non-debtors.

[205]See UNCITRAL Model Law, art. 20, para. 2.

[206]The law of the United States of America, for example, includes an exception for governmental units acting in a regulatory or police capacity. In the case of *In re Nortel Networks Corp*., [669 F.3d 128 (3d Cir. 2011)], the United Kingdom pension regulator sought to commence a proceeding regarding a funding shortfall for Nortel's United Kingdom pension fund and gave notice under United Kingdom law to Nortel's subsidiaries in the United States and Canada, all of which were involved in plenary and concurrent bankruptcy cases. The United States courts held that since the United Kingdom pension regulator was acting as a trustee on behalf of private creditors for a pecuniary purpose and not as a regulator protecting the public safety or welfare, the action proposed by the regulator would violate the automatic stay.

[207]The right to apply to commence a local insolvency proceeding and to participate in it is, in a general way, dealt with in articles 11 to 13 of the Model Law.

[208]See paras. 210-213 below.

4. Post-recognition relief[209]

(a) The provisions of the Model Law

168. Article 21 deals with the relief that may be granted upon recognition of a foreign proceeding, indicating some of the types of relief that may be available.

Article 21. Relief that may be granted
upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 *(a)* of article 20;

(b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 *(b)* of article 20;

(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 *(c)* of article 20;

(d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) Extending relief granted under paragraph 1 of article 19;

(g) Granting any additional relief that may be available to *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* under the laws of this State.

---

[209]The present summary is taken substantially from the Guide to Enactment and Interpretation, paras. 189-195.

Article 21. Relief that may be granted upon recognition of a foreign proceeding (continued)

2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

169. Post-recognition relief under article 21 is discretionary. The types of relief listed in article 21, paragraph 1, are those most frequently used in insolvency proceedings; however, the list is not exhaustive. It is not intended to restrict the receiving court unnecessarily in its ability to grant any type of relief that is available and necessary under the law of the enacting State to meet the circumstances of a particular case.[210]

170. It is in the nature of discretionary relief that the court may tailor such relief to the case at hand. This idea is reinforced by article 22, paragraph 2, according to which the court may subject the relief granted to conditions it considers appropriate. In each case it will be necessary for a judge to determine the relief most appropriate to the circumstances of the particular case and any conditions on which the relief should be granted. Article 22 also addresses the need for the adequate protection of the interests of creditors and other interested persons when the court is granting or denying relief upon recognition of foreign proceedings and modifying or terminating that relief.

171. The "turnover" of assets to the foreign representative (or another person), as envisaged in article 21, paragraph 2, remains discretionary. The UNCITRAL Model Law contains several safeguards designed to ensure the protection of local interests before assets are turned over to the foreign representative.[211] In *Atlas Shipping* (case no. 3), the United States of America

[210]As already noted, the receiving court is entitled to tailor relief to meet any public policy objections. For a discussion of the "public policy" exception in relation to questions of relief, see *Tri-Continental* (footnote 188 above) and paras. 48-54 above.

[211]Those safeguards include: the general statement of the principle of protection of local interests in article 22, para. 1; the provision in article 21, para. 2 that the court should not authorize the turnover of assets until it is assured that the interests of local creditors are protected; and article 22, para. 2, according to which the court may subject the relief it grants to conditions it considers appropriate.

court granted relief sought by the Danish insolvency representative under the equivalent of article 21, subparagraph 1*(e)* and paragraph 2, with respect to funds held in United States bank accounts and subject to maritime attachment orders granted both before and after the commencement of insolvency proceedings in Denmark. The United States judge indicated that the relief granted was without prejudice to the rights, if any, of creditors to assert in the Danish bankruptcy court their rights to the previously garnished funds.[212] The judge also observed that the turnover of the funds to the foreign representative would be more economical and efficient in that it would permit all of Atlas' creditors worldwide to pursue their rights and remedies in one court of competent jurisdiction.

172. One salient factor to be taken into account in tailoring the relief is whether it is for a foreign main or non-main proceeding. It is necessary to bear in mind that the interests and the authority of a representative of a foreign non-main proceeding are usually narrower than the interests and the authority of a representative of a foreign main proceeding. The latter will, generally, seek to gain control over all assets of the insolvent debtor.

173. Article 21, paragraph 3, reflects that idea by providing that:

(a) Relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding; and

(b) If the foreign representative seeks information concerning the debtor's assets or affairs, the relief must concern information required in that non-main proceeding.

174. Those provisions suggest that relief in favour of a foreign non-main proceeding should not give unnecessarily broad powers to the foreign representative and that such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

175. In determining whether to grant discretionary relief under article 21, or in modifying or terminating any relief granted, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.[213] That is one of the reasons why the court may grant relief on such conditions as it considers appropriate.[214] Either a foreign representative or a person affected by relief may apply to modify or terminate the relief. The court may also do so on its own motion.[215]

---

[212]*Atlas Shipping*, p. 742.
[213]See paras. 156-159 above.
[214]See para. 170 above.
[215]UNCITRAL Model Law, art. 22, para. 3.

176. An example of a case in which relief was initially refused is *Rubin v Eurofinance* (case no. 23). The English receiving court was asked to grant relief to enforce an order to pay money to a particular creditor, given as a result of a judgement entered in the United States of America. An issue arose about whether relief of that type was contemplated by the Model Law. At first instance, the judge accepted that the proceeding in which judgement was entered was "part and parcel" of Chapter 11 insolvency proceedings in the United States.[216] While accepting, as a matter of English law, that the court could give effect to orders made in the course of foreign insolvency proceedings, the judge drew a distinction between a case in which an order was made to provide a mechanism of collective execution against property of a debtor by creditors whose rights had been admitted or established[217] (which would justify relief) and a judgement for money entered in favour of a single creditor (which would not). The judge considered that the order made in the Chapter 11 proceedings fell into the second category, meaning that the judgement could not be enforced under the terms of the UNCITRAL Model Law. For enforcement purposes, the usual rules of English private international law continued to apply.[218]

177. On a second appeal, the Supreme Court overturned the decision of the Court of Appeal and held that the judgements were subject to the ordinary private international law rules preventing enforcement because the defendants were not subject to the jurisdiction of the foreign court.[219] The court also held that there was nothing in the Model Law that suggested it would apply to recognition and enforcement of foreign judgements against third parties.

(b) Approaches to questions of discretionary relief

178. Because discretionary post-recognition relief will always be tailored to meet the circumstances of a particular case, it is not feasible to refer to particular examples of relief in a text of the present kind. Nevertheless,

[216]*Rubin v Eurofinance* (first instance), para. 47.

[217]Ibid. (first instance), para. 58, citing *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 (PC), para. 13.

[218]On a first appeal, the appellate court agreed that the proceeding was part of the Chapter 11 proceeding, but disagreed with the conclusion of the lower court, finding that the judgement in question was for the purposes of the collective enforcement regime of the insolvency proceeding. As such, the court held, that judgement was governed by the private international law rules relating to insolvency and not by the ordinary private international law rules preventing enforcement of judgements because the defendants were not subject to the jurisdiction of the foreign court (*Rubin v Eurofinance* (on appeal), para. 61).

[219]The decision of the United Kingdom Supreme Court in *Rubin* was conjoined with an appeal in the case of *New Cap Reinsurance Corp Ltd & Anor V Grant and others* [2012] UKSC 46. In that case, the Supreme Court held that the foreign judgement could be enforced because New Cap had submitted to jurisdiction by filing proofs of debt in the foreign insolvency proceedings.

different policy choices may be open to a court in deciding whether and, if so, to what extent relief should be granted. An informative example of different stances that can be taken with respect to granting discretionary relief (albeit in a proceeding to which the UNCITRAL Model Law did not apply) is a case concerning Australian liquidation proceedings, in which relief was sought in England. Although both England and Australia have enacted statutes based on the Model Law, neither statute was in force at the time that proceeding was commenced in England.[220]

179. The Australian liquidator took steps to realize and protect assets in England, mostly reinsurance claims on policies taken out in London, requesting the English courts to remit those assets to Australia for distribution among all creditors of the companies in accordance with Australian law. Australian law provided for the proceeds of reinsurance contracts to be used to pay liabilities under the relevant insurance contracts before being applied to repayment of general debts; however, English law (at the time) did not. The question was whether the English court ought to grant relief, which would have entailed a distribution to creditors inconsistent with the priorities required under English law. At first instance, the request was denied;[221] that decision was upheld on appeal.[222] On a second appeal, the earlier decisions were overturned and relief was granted in favour of the Australian liquidators.[223]

180. On the second appeal, the final court held that jurisdiction did exist to make the order sought and that, as a matter of discretion, the order should be made. Although the five judges who heard the appeal agreed on the result, they diverged in their reasons for reaching that conclusion:

(a) One view was that, as a matter of principle, a single insolvency estate should emerge in which all creditors (wherever situated) were entitled and required to prove their claims. Although the Australian legislation created different priorities, it did not give rise to a fundamental public policy consideration that might militate against relief being granted.[224] On that basis, the main proceeding in Australia should be allowed to have universal effect;[225]

(b) A second view was that, as Australia had been designated as a country to which assistance could be given under the Insolvency Act 1986, there was no reason why effect should not be given to the statutory

[220]The application by the Australian liquidators was dealt with pursuant to the Insolvency Act 1986 of the United Kingdom, s 426 (4), under which courts having jurisdiction in relation to insolvency law in any part of the United Kingdom were obliged to assist courts having corresponding jurisdiction in a number of designated countries, one of which was Australia.

[221]*HIH Casualty and General Insurance Ltd (2005)* (case no. 16).

[222]*HIH* (first appeal) (case no. 16).

[223]*McGrath v Riddell (HIH Casualty and General Insurance Ltd.)* (case no. 16).

[224]Compare the discussion of public policy in *Gold & Honey* in para. 53 above.

[225]*McGrath v Riddell (HIH Casualty and General Insurance Ltd.)*, paras. 30, 36 and 63.

requirement to assist the Australian liquidators. There was no fundamental public policy consideration that would disentitle the Australian liquidators from obtaining relief;[226]

(c) The third approach relied on four specific factors to grant relief:[227]

(i) The companies in liquidation were Australian insurance companies;

(ii) Australian law made specific provision for the distribution of assets in the case of the insolvency of such companies;

(iii) The Australian priority rules did not conflict with any provisions of English law in force at the material time that were designed to protect the holders of policies written in England;

(iv) The policy underlying the Australian priority rules accorded (by the time of the decision of the final court) with changes made to the law in England.

181. Another example is provided by *Vitro* (case no. 29), in which the United States of America appeal court outlined an approach for analyzing requests for relief under articles 7 and 21 that required a court to first determine whether relief requested by a foreign representative fell into one of the enumerated categories of article 21. If not, the court should decide whether the relief could be considered "appropriate relief" under article 21, paragraph 1, which entailed consideration of whether the requested relief had previously been granted under the law applicable before the enactment of Chapter 15 of the United States Bankruptcy Code and whether it would otherwise be available under United States law. Third, if the requested relief went beyond the relief available under the previous law or currently available under United States law, article 7 functioned as a "catch-all" that included forms of relief "more extraordinary" than those permitted under either the specific or the general provisions of article 21. The court reasoned that such a framework would prevent courts from subjecting relief under article 7 to the same limitations as relief under article 21, unless those limitations were specifically applicable and would avoid "all-encompassing applications" under article 7 and "prematurely expanding the reach of Chapter 15 beyond current international insolvency law." [228]

182. Applying this framework to the facts before it, the United States court affirmed the denial of the foreign representative's request to enforce an order confirming a Mexican reorganization plan that novated and in effect released

[226]Ibid., paras. 59, 62, 76 and 77.
[227]Ibid., para. 42.
[228]*Vitro*, pp. 1056-7.

the obligations of subsidiaries of the Mexican debtor that had guaranteed notes issued by the debtor, but had not themselves applied to commence insolvency proceedings. The court first determined that article 21, paragraphs 1 and 2 did not provide for discharge of the obligations of non-debtor guarantors. Next, the court determined that the general grant of relief in article 21, paragraph 1 did not provide the requested relief because non-consensual, non-debtor releases through a bankruptcy proceeding were "generally not available" under United States law and were "explicitly prohibited" in the particular court.[229] Turning to article 7, the court noted that such releases were sometimes available in other courts and the relief sought was therefore not precluded under article 7. The court found, however, that since Vitro had failed to provide evidence of the existence of extraordinary circumstances sufficient to establish a case for non-debtor releases under the law of those courts that allowed such releases, the lower court had not abused its discretion in denying relief under article 7.[230]

(c) Relief in cases involving suspect antecedent transactions

Article 23. 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].*

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.

183. Article 23[231] provides standing for a foreign representative, upon recognition, to initiate certain proceedings aimed at illegitimate antecedent transactions. The specific types of proceedings to which article 23 refer are likely to be identified in the adopting legislation of the enacting State.

184. When the foreign proceeding has been recognized as a "non-main proceeding", it is necessary for the court to consider specifically whether

[229]Ibid., pp. 1058 and following.

[230]The refusal to recognize third-party releases in *Vitro* stands in contrast to the recognition of such releases in *Metcalfe & Mansfield* (case no. 20). There the United States court found that the Canadian court approved non-debtor relief in limited circumstances which were in accord with the United States courts narrow application of article 7. Thus, the United States court concluded that the orders granted in the foreign proceeding should be enforced.

[231]See also Guide to Enactment and Interpretation, paras. 200-203.

any action to be taken under the article 23 authority relates to assets that "should be administered in the foreign non-main proceeding".[232] Again, this distinguishes the nature of a "main" proceeding from that of a "non-main" proceeding and emphasizes that the relief in a "non-main" proceeding is likely to be more restrictive than for a "main" proceeding.

185. Article 23 is drafted narrowly. To the extent that the enacting State authorizes particular actions to be taken by a foreign representative, they may be taken only if an insolvency representative within the enacting State could have brought those proceedings.[233] No substantive rights are created by article 23, nor are conflict-of-laws rules stated; in each case it will be a question of looking at the national conflict-of-laws rule to determine whether any proceeding of the type contemplated under article 23 can properly proceed.

186. In *Condor Insurance (Fogarty v Petroquest)* (case no. 9), the United States appellate court was asked to consider the jurisdiction of the bankruptcy court to offer avoidance relief under foreign law in a proceeding under Chapter 15 of the Bankruptcy Code in the United States. Reversing the decisions of the first-and second-instance courts, the appellate court held that the bankruptcy court did have that power. The case involved the recognition in the United States of foreign main proceedings commenced in Nevis, following which the foreign representatives commenced a proceeding alleging Nevis law claims against the debtor to recover certain assets fraudulently transferred to the United States. Chapter 15 excepts avoidance powers from the relief that may be granted under the equivalent of article 21, subparagraph 1 *(g)*, providing instead under article 23 that such powers may be exercised in a full bankruptcy proceeding. Chapter 15 does not, however, the appellate court found, deny the foreign representative powers of avoidance provided by applicable foreign law, and the language used in the legislation suggests the need for a broad reading of the powers granted to the court in order to advance the goals of comity to foreign jurisdictions.[234] Prior to this appellate decision, a similar interpretation had been approved in *Atlas Shipping* (case no. 3), in which the United States court had concluded that the decision of the second-instance court in *Condor Insurance* was open to question: the conclusion that a foreign representative was prevented from bringing avoidance actions based on foreign law was "not supported by anything specifically in the legislative history" of Chapter 15.[235]

---

[232]UNCITRAL Model Law, art. 23, para. 2.
[233]Ibid., art. 23, para. 1.
[234]*Condor Insurance* (on appeal), section III, pp. 321-329.
[235]*Atlas Shipping*, p. 744.

E. Cooperation and coordination[236]

1. Introductory comments

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]*.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] *and foreign courts or foreign representatives*

1. In matters referred to in article 1, a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

2. The *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

(a) Appointment of a person or body to act at the direction of the court;

(b) Communication of information by any means considered appropriate by the court;

[236]The present summary is taken substantially from the Guide to Enactment and Interpretation, paras. 209-241.

Article 27. Forms of cooperation (continued)

(c) Coordination of the administration and supervision of the debtor's assets and affairs;

(d) Approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) Coordination of concurrent proceedings regarding the same debtor;

(f) [*The enacting State may wish to list additional forms or examples of cooperation*].

187. Articles 25 to 27 of the UNCITRAL Model Law are designed to promote cooperation between insolvency representatives and the courts of different States to ensure insolvency proceedings affecting a single debtor are dealt with in a manner best designed to meet the needs of all of its creditors. The objective is to maximize returns to creditors (in liquidation and reorganization proceedings) and (in reorganization proceedings) to facilitate protection of investment and the preservation of employment[237] through fair and efficient administration of the insolvency estate.

188. Court cooperation and coordination are core elements of the Model Law. Cooperation is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets[238] or to find the best solutions for the reorganization of the enterprise. It is also often the only way in which proceedings concerning different members of the same enterprise group taking place in different States can be coordinated.[239] Cooperation leads to better coordination of the various insolvency proceedings, streamlining them with the object of achieving greater benefits for creditors.

189. Articles 25 and 26 not only authorize cross-border cooperation, they also mandate it. They provide that the court and the insolvency representative "shall cooperate to the maximum extent possible". These articles were designed to overcome a widespread lack, in national laws, of rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies. Enactment of these provisions is particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. Even in

[237]UNCITRAL Model Law, preamble, subpara. *(e)*.

[238]E.g. when items of production equipment located in two States are worth more if sold together than if sold separately.

[239]See UNCITRAL Legislative Guide, part three: Treatment of enterprise groups in insolvency, recommendations 239-254 on promoting cross-border cooperation in enterprise group insolvencies; see also para. 68 above.

jurisdictions in which there is a tradition of wider judicial latitude, this legislative framework for cooperation may prove useful.

190. The articles leave the decision as to when and how to cooperate to the courts and, subject to the supervision of the courts, to the insolvency representatives. For a court (or a person or body referred to in articles 25 and 26) to cooperate with a foreign court or a foreign representative regarding a foreign proceeding, the UNCITRAL Model Law does not require a formal decision to recognize that foreign proceeding. Accordingly, cooperation may occur at an early stage and before an application for recognition is made. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere (see also article 5). Moreover, cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph *(a)* that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets.

191. The ability of courts, with appropriate involvement of the parties, to communicate "directly" and to request information and assistance "directly" from foreign courts or foreign representatives is intended to avoid the use of traditional but time-consuming procedures, such as letters rogatory and exequatur. This ability is critical when the courts need to act with urgency.

2. Cooperation

192. The importance of granting the courts flexibility and discretion in cooperating with foreign courts or foreign representatives was emphasized at the Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency,[1] which was held prior to completion of the UNCITRAL Model Law. At that colloquium, reports on a number of cases in which judicial cooperation had in fact occurred were given by the judges involved in the cases.

193. From those reports, a number of points emerged:[240]

(a) Communication between courts is possible, but should be done carefully and with appropriate safeguards for the protection of the substantive and procedural rights of the parties;[241]

[240]Several of these points are addressed in the UNCITRAL Legislative Guide: part three specifically in paras. 14-40 of chap. III, and recommendations 240-245 on cooperation between courts in cross-border enterprise group insolvencies.

[241]Ibid., paras. 21-34 of chap. III and recommendations 241-243.

(b) Communication should be done openly, with advance notice to the parties involved[242] and in the presence of those parties, except in extreme circumstances;[243]

(c) Communications that might be exchanged are various and include formal court orders or judgements, informal writings of general information, questions and observations, and transcripts of court proceedings;[244]

(d) Means of communication include telephone, video link, facsimile and e-mail;[245]

(e) Where communication is necessary and is used appropriately, there can be considerable benefits for the persons involved in, and affected by, the cross-border insolvency.

194. Several cases illustrate how communication between courts and insolvency representatives has helped to coordinate multiple proceedings involving both individual debtors and debtors that are members of the same enterprise group and to ensure speedier completion of the administration of the insolvent debtors' estates.

195. In *Maxwell Communication,*[246] judges in the United States of America and England raised independently with the parties' legal representative in each country the possibility that a cross-border insolvency agreement[247] could be negotiated to assist in coordinating the two sets of proceedings. A facilitator was appointed by each of the courts, and resolution of a number of difficult issues emerged.[248]

196. In some cases either telephone or video link conferences have been held, involving judges and legal representatives in each jurisdiction. An example, from 2001, involved a joint hearing by video link involving judges in the United States and Canada and representatives of all parties in each jurisdiction.

[242]This is now set out specifically in various court rules, for example rule 2002, paragraph *(q)* (2), of the United States Federal Rules of Bankruptcy Procedure. In *Chow Cho Poon* (case no. 7), the Australian court pointed out that there should be express acknowledgement of cooperation by the courts involved and that it is not possible for one court to cooperate with another without the other being aware. It observed that article 27 of the Model Law contemplates cooperation to start by either a request from one court to another or by way of subscribing to an agreed plan (para. 56).

[243]UNCITRAL Legislative Guide: part three, chap. III, paras. 24-27, and recommendations 243 *(b)* and *(c)*.

[244]Ibid., para. 20 and recommendation 241.

[245]Ibid., para. 20.

[246]In *In re Maxwell Communication Corp.*, 93 F.3d 1036, (2nd Cir. 1996) (Nos. 1527, 1530, 95-5078, 1528, 1531, 95-5082, 1529, 95-5076, and 95-5084), and Cross-Border Insolvency Protocol and Order Approving Protocol in *In re Maxwell Communication Corp.* between the United States Bankruptcy Court for the Southern District of New York, No. 91B 15741 (Bankr. S.D.N.Y. Jan. 15, 1992) and the High Court of England and Wales, Chancery Division, Companies Court, No. 0014001 of 1991 (31 December 1991).

[247]See UNCITRAL Practice Guide, chap. III.

[248]See also *In re Olympia & York Developments Ltd*, Ontario Court of Justice, Toronto, No. B125/92 (26 July 1993) (1993), 20 C.B.R. (3d) 165) and United States Bankruptcy Court for the Southern District of New York. Nos. 92-B-42698-42701(Bankr. S.D.N.Y. July 15, 1993) (cross-border insolvency protocol and order approving protocol).

In a procedural sense, the hearing was conducted simultaneously.[249] Each judge heard argument on substantive issues with which his court was concerned prior to deciding on an appropriate outcome. While the parties and the judge in the other jurisdiction saw and heard what occurred during substantive argument in the other, they did not actively participate in that part of the hearing.

197. At the conclusion of substantive argument in each court (with the consent of the parties), the two judges adjourned the hearing to speak to each other privately (by telephone), following which the joint hearing was resumed and each judge pronounced orders in the respective proceedings. In doing so, while one judge confirmed that they had agreed on an outcome, it was clear that a decision had been reached independently by each judge in respect of only the proceeding with which he was dealing.[250]

198. Reports from those involved in such hearings suggest that returns to creditors have been maximized considerably as a result of each court obtaining greater information about what is happening in the other jurisdiction and making positive attempts to coordinate proceedings in a manner that will best serve the interests of creditors.

199. A different example is the efforts of courts to cooperate by containing the effects of their decisions, when those decisions conflict with decisions of another States courts. In *Perpetual Trustee Company Ltd v Lehman Bros. Special Financing Inc*,[251] a series of requests led to an English court responding to the United States of America court in a form that explained the steps and decisions taken in England and inviting the United States judge not to make formal orders, at that time, that might be in conflict with those made in England.[252] Knowing that its decision would directly conflict with that of the English court, the United States court declared its view of the law, but did not require immediate compliance by the parties. The conflict was

[249] *In re PSI Net Inc.*, Ontario Superior Court of Justice, Toronto, No. 01-CL-4155 (10 July 2001) and the United States Bankruptcy Court for the Southern District of New York, No. 01-13213, (Bankr. S.D.N.Y. July 10, 2001) (cross-border insolvency protocol and order approving protocol).

[250] Transcript of conference in *In re PSI Net Inc*. between United States Bankruptcy Court, Southern District of New York and Superior Court of Justice of Ontario, 26 September 2001, on file with the UNCITRAL secretariat. The official court record in the Bankruptcy Court for the Southern District of New York notes that the transcript was filed on October 12, 2001. A copy resides in those records, and the practice is to make the transcript available on the public docket after a waiting period. The document is also part of the public record in Canada and thus publically available.

[251] [2009] EWHC 2953. In *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd.,* ([2011] UKSC 38), the English Supreme Court summarized communications between the English and United States courts as follows (para. 33):

"Following communications between the High Court in England and the Bankruptcy Court in New York, it was agreed that, in order to limit potential conflict between decisions in the two jurisdictions, relief would be limited to declaratory relief: *Perpetual Trustee Co. Ltd v BNY Corporate Trustee Services Ltd*. [2010 2 BCLC 237]; *In re Lehman Bros Holdings Inc* (2010) 422 BR 407 (Bankr. S.D.N.Y.)."

[252] *Perpetual Trustee*, paras. 41-50.

discussed by the courts but not resolved, although part of it was subsequently settled in the United States case.

200. Another example of cooperation is the exchange of correspondence containing or responding to requests for assistance from one of the courts involved in the proceeding. In *In re Lehman Brothers Australia Limited,*[253] the Australian court discussed the impact of the decisions in the United States and English Lehman cases on the statutory responsibilities of the liquidator of the Australian entities and a request by those liquidators that the court communicate with the United States court. The Australian court declined to do so at that time on the basis that it might pre-empt the United States court's decision on certain matters; impinge on the principle of comity which is based on common courtesy and mutual respect and be seen by the United States judge as an unwarranted interference; the application had been made *ex parte* and all concerned parties had not been heard; and cooperation between the Australian court and any foreign court would generally occur within a framework or protocol that had previously been approved by the court, and was known to the parties in the particular proceeding. Nevertheless, the Australian judge agreed that it might be appropriate to write to the United States judge to inform him of the present application and to ask whether a protocol for future communication might be established. A draft of the letter to be sent to the United States court was appended to the judgement.

201. Cooperation can also be achieved through cross-border insolvency agreements in which the parties to them and any appointed representative of the court liaise to coordinate the insolvency proceedings in issue.[254]

202. Article 26, on international cooperation between insolvency representatives to administer assets of insolvent debtors, reflects the important role that such persons can play in devising and implementing cross-border insolvency agreements, within the parameters of their authority. The provision makes it clear that an insolvency representative acts under the overall supervision of the competent court. The court's ability to promote cross-border agreements to facilitate the coordination of proceedings is an example of the operation of the "cooperation" principle.[255]

---

[253] *Parbery; in the matter of Lehman Brothers Australia Limited* (in liq) [2011] FCA 1449 [CLOUT case no. 1215].

[254] For examples of the use of this technique, see the UNCITRAL Practice Guide, chap. II, paras, 2-3. As indicated in the Practice Guide, cases using this technique have included *Maxwell Communication*, (see para. 195 above); *In re Matlack Sys. Inc.*, Superior Court of Justice of Ontario, No. 01-CL-4109 and the United States Bankruptcy Court for the District of Delaware, No. 01-01114 (Bankr. D. Del. May 24, 2001); and *In re Nakash*, United States Bankruptcy Court for the Southern District of New York, No. 94B 44840 (Bankr. S.D.N.Y. May 23, 1996) (cross-border insolvency protocol and order approving protocol) and the District Court of Jerusalem, No. 1595/87 (23 May 1996). Notes on the agreements used in these cases are included in the case summaries in annex I to the UNCITRAL Practice Guide.

[255] UNCITRAL Model Law, art. 26, paras. 1 and 2, as well as any other national law having an impact on the practicalities of cooperation.

203. In 2000, the American Law Institute developed the Court-to-Court Communication Guidelines[256] as part of its work on transnational insolvency in the countries of the North American Free Trade Agreement (NAFTA). A team of judges, lawyers and academics from the three NAFTA countries—Canada, Mexico and the United States—worked jointly on that project. The Court-to-Court Communication Guidelines are intended to encourage and facilitate cooperation in international cases. They are not intended to alter or change the domestic rules or procedures that are applicable in any country, nor are they intended to affect or curtail the substantive rights of any party in proceedings before the courts. The Guidelines have been endorsed by a number of courts in different countries and used in a number of cross-border cases.[257]

204. In relation to cooperation, there is an important difference between the terms of the UNCITRAL Model Law and those of the EC Regulation. The EC Regulation does not contain any provision for court-to-court communication. Rather, duties are placed on insolvency representatives in both main and secondary proceedings commenced in a Member State: "to communicate information to each other", "to cooperate with each other" and for the liquidator in the secondary proceedings to give the insolvency representative in the main proceeding "an early opportunity of submitting proposals" on that proceeding or the use of assets in the secondary proceeding.[258]

3. Coordination

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] *after recognition of a foreign main proceeding*

After recognition of a foreign main proceeding, a proceeding under *[identify laws of the enacting State relating to insolvency]* may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

[256]Available in 14 languages from www.iiiglobal.org/component/jdownloads/?task=viewcategory&catid=394 [last visited 2 January 2014].

[257]A cross-border insolvency agreement endorsed by courts in Ontario, Canada and Delaware, United States of America in *In re Matlack Sys. Inc* (see footnote 254 above) demonstrates how the Court-to-Court Guidelines were adapted for use in an actual case. The Guidelines have also been adopted in a number of other cross-border insolvency agreements (see the case summaries in annex I to the UNCITRAL Practice Guide).

[258]EC Regulation, art. 31.

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] *and a foreign proceeding*

Where a foreign proceeding and a proceeding under *[identify laws of the enacting State relating to insolvency]* are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,

(i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and

(ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;

(b) When the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,

(i) Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and

(ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in this State;

(c) In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

205. Articles 28 and 29 address concurrent proceedings, specifically the commencement of a local insolvency proceeding after recognition of a foreign main proceeding and the manner in which relief should be tailored to ensure consistency between concurrent proceedings.

206. Article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of a local insolvency proceeding concerning the same debtor as long as the debtor has assets in the State.

207. Ordinarily, the local insolvency proceeding of the kind envisaged in the article would be limited to the assets located in the State; however, in some situations a meaningful administration of the local proceeding may

have to include certain assets abroad, especially when there is no foreign proceeding necessary or available in the State where the assets are situated.[259] In order to allow such limited cross-border reach of a local proceeding, article 28 provides that the effects of the proceedings may extend, to the extent necessary, to other property of the debtor that should be administered in the proceedings in the enacting State.

208. Two restrictions are included in article 28 concerning the possible extension of the effects of a local insolvency proceeding to assets located abroad:

(a) The extension is permissible "to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27"; and

(b) Those foreign assets must be subject to administration in the enacting State "under the law of [the enacting State]".

209. Those restrictions emphasize that any local insolvency proceeding instituted after recognition of a foreign main proceeding deals with only the assets of the debtor in the State in which the local proceeding is started, subject only to the need to encourage cooperation and coordination in respect of the foreign main proceeding.

210. Article 29 provides guidance to the court on the approach to be taken to cases in which the debtor is subject to a foreign proceeding and a local insolvency proceeding at the same time. The salient principle is that the commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. This principle is essential for achieving the objectives of the UNCITRAL Model Law in that it allows the receiving court, in all circumstances, to provide relief in favour of the foreign proceeding.

211. Nevertheless, article 29 maintains the pre-eminence of the local insolvency proceeding over the foreign proceeding. This has been done in the following ways:

(a) Any relief to be granted to the foreign proceeding must be consistent with the local proceeding;[260]

(b) Any relief that has already been granted to the foreign proceeding must be reviewed and modified or terminated to ensure consistency with the local proceeding;[261]

[259]For example, if the local establishment has an operating plant in a foreign jurisdiction, if it would be possible to sell the debtor's assets in the enacting State and the assets abroad as a "going concern" or if assets were fraudulently transferred abroad from the enacting State.

[260]UNCITRAL Model Law, art. 29, subpara. *(a)* (i).

[261]Ibid., art. 29, subpara. *(b)*(i).

(c) If the foreign proceeding is a main proceeding, the automatic effects pursuant to article 20 are to be modified and terminated if inconsistent with the local proceeding;[262]

(d) If a local proceeding is pending at the time a foreign proceeding is recognized as a main proceeding, the foreign proceeding does not enjoy the automatic effects of article 20.[263]

212. Article 29 avoids establishing a rigid hierarchy between the proceedings since that would unnecessarily hinder the ability of the court to cooperate and exercise its discretion under articles 19 and 21.

213. Article 29, subparagraph *(c),* incorporates the principle that relief granted to a representative of a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding or must concern information required in that proceeding. This principle is also expressed in article 21, paragraph 3, and is restated in article 29 to place emphasis on the need for its application when coordinating local and foreign proceedings.

Article 30. Coordination of more than one foreign proceeding

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) Any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;

(b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

---

[262]Ibid., art. 29, subpara. *(b)*(ii). Those automatic effects do not terminate automatically, since they may be beneficial and the court may wish to maintain them.

[263]Ibid., art. 29, subpara. *(a)*(ii).

214. Article 30 deals with cases in which the debtor is subject to insolvency proceedings in more than one foreign State and foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State. The provision applies whether or not an insolvency proceeding is pending in the enacting State. If, in addition to two or more foreign proceedings, there is a proceeding in the enacting State, the court will have to act pursuant to both articles 29 and 30.

215. The objective of article 30 is similar to that of article 29. It is designed to aid cooperation through proper coordination. Consistency of approach will be achieved by appropriate tailoring of the relief to be granted or by modifying or terminating relief already granted.

216. Unlike article 29 (which as a matter of principle gives primacy to the local proceeding), article 30 gives preference to the foreign main proceeding, if there is one. In the case of more than one foreign non-main proceeding, the provision does not, in and of itself, treat any of them preferentially. Priority for the foreign main proceeding is reflected in the requirement that any relief in favour of a foreign non-main proceeding (whether already granted or to be granted) must be consistent with the foreign main proceeding.[264]

217. Relief granted under article 30 may be terminated or modified if another foreign non-main proceeding is revealed after the order is made. An order terminating or modifying earlier relief may be made only if it is "for the purpose of facilitating coordination of the proceedings".[265]

218. In relation to concurrent proceedings, there are particular rules relating to payment of debts.

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under *[identify laws of the enacting State relating to insolvency]* regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

[264]Ibid., art. 30, subparas. *(a)* and *(b)*.
[265]Ibid., art. 30, subpara. *(c)*.

219. The rule set forth in article 32 (sometimes referred to as the "hotch-pot" rule) is a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to avoid situations in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions.

220. For example, assume an unsecured creditor has received 5 per cent of its claim in a foreign insolvency proceeding but is also participating in an insolvency proceeding in the enacting State, where the rate of distribution is 15 per cent. In order to put the creditor in a position equal to the other creditors in the enacting State, the creditor would receive only 10 per cent of its claim in the enacting State. Implicitly, article 32 empowers the receiving court to make orders to give effect to that rule.

221. Article 32 does not affect the ranking of claims as established by the law of the enacting State, and is solely intended to establish the equal treatment of creditors of the same class. To the extent claims of secured creditors or creditors with rights in rem are paid in full, a matter that depends on the law of the State in which the proceeding is conducted, those claims are not affected by the provision.

222. The expression "secured claims"[266] is used to refer generally to claims guaranteed by particular assets, while the words "rights in rem" are intended to indicate rights relating to a particular property that are also enforceable against third parties. A given right may fall within the ambit of both expressions, depending on the classification and terminology of the applicable law. The enacting State may use another term or terms for expressing these concepts.

[266]The UNCITRAL Legislative Guide, in paragraph 12 *(nn)* of the glossary, explains "secured claim" as meaning "a claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor's default".

Annex I

Case summaries[a]

1. *ABC Learning Centres Limited (In re)*
445 B.R. 318 (Bankr. D. Del. 2010) [CLOUT case no. 1210]

2. *Ashapura Minechem Ltd*
First instance: Case No. 11-14668 (Bankr. S.D.N.Y 22 November 2011); on appeal: 480 B.R. 129 (S.D.N.Y. 2012) [CLOUT case no. 1313]

3. *Atlas Shipping A/S (In re)*
404 B.R. 726 (Bankr. S.D.N.Y. 2009) [CLOUT case no. 1277]

4. *Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd (In re)*
First instance: 374 B.R. 122 (Bankr S.D.N.Y. 2007) [CLOUT case no. 760]; on appeal: 389 B.R. 325 (S.D.N.Y. 2008) [CLOUT case no. 794]

5. *Betcorp Ltd (In re) (in liquidation)*
400 B.R. 266 (Bankr. D. Nev. 2009) [CLOUT case no. 927]

6. *British American Ins. Co. Ltd (In re)*
425 B.R. 884 (Bankr. S.D. Fla. 2010) [CLOUT case no. 1005];

7. *Chow Cho Poon (Private) Limited (Re)*
(2011) NSWSC 300 (15 April 2011) [CLOUT case no. 1218]

8. *Cinram International Inc (Re)*
2012 ONSC 3767 (Ont. SCJ [Commercial List]) [CLOUT case no. 1269]

9. *Condor Ins. Ltd (In re) (Fogarty v Petroquest Resources Inc.)*
601 F.3d 319, (5th Cir. 2010) [CLOUT cases no. 928, 1006]

[a]Most cases listed below can be found (in the original language) on the website of INSOL International at: http://www.insol.org/page/297/uncitral-model-law (last visited 2 January 2014).

10. *Ephedra Products Liability Litigation (In re)*
349 B.R. 333 (S.D.N.Y. 2006) [CLOUT case no. 765]

11. *Eurofood IFSC Ltd (Re)*
[2006] Ch 508 (ECJ)

12. *Fairfield Sentry Ltd (In re)*
First instance: 440 B.R. 60 (Bankr. S.D.N.Y. 2010); on appeal: No. 10 Civ. 7311 (S.D.N.Y. 16 September 2011) [CLOUT case no. 1316]

13. *Gainsford, in the matter of Tannenbaum v Tannenbaum*
(2012) FCA 904 [CLOUT case no. 1214]

14. *Gerova Financial Group, Ltd. (In re)*
482 B.R. 86 (Bankr. S.D.N.Y. 2012) [CLOUT case no. 1275]

15. *Gold & Honey, Ltd (In re)*
410 B.R. 357 (Bankr. E.D.N.Y. 2009) [CLOUT case no. 1008]

16. *HIH Casualty and General Insurance Ltd (Re)*
[2005] EWHC 2125; first appeal [2006] EWCA Civ 732; second appeal: McGrath v Riddle [2008] UKHL 21

17. *Interedil, Srl*
[2011] EUECJ C-396/09, [2012] Bus LR 1582

18. *Lightsquared LP (Re)*
2012 ONSC 2994 (Ont. SCJ [Commercial List]) [CLOUT case no. 1204]

19. *Massachusetts Elephant & Castle Group, Inc.*
2011 ONSC 4201 (Ont. SCJ [Commercial List]) [CLOUT case no. 1206]

20. *Metcalfe & Mansfield Alternative Investment (In re)*
421 B.R. 685 (Bankr. S.D.N.Y. 2010) [CLOUT case no. 1007]

21. *Millennium Global Emerging Credit Master Fund Limited et al*
First instance: 458 B.R. 63 (Bankr. S.D.N.Y. 2011); on appeal: 474 B.R. 88 (S.D.N.Y. 2012) [CLOUT case no. 1208]

22. *Ran (In re)*
Lavie v. Ran 406 B.R. 277 (S.D. Tex. 2009) [CLOUT case no. 929], affirming *In re Ran*, 390 B.R. 257 (Bankr. S.D. Tex. 2008), on remand from *Lavie v Ran*, 384 B.R. 469 (S.D. Tex. 2008). Affirmed by *In re Ran*, 607 F.3d 1017 (5th Cir. 2010) [CLOUT case no. 1276]

23. *Rubin v Eurofinance SA*
First instance: [2009] EWHC 2129 (Ch); on appeal: [2010] EWCA Civ 895; second appeal: [2012] UKSC 46 [CLOUT case no. 1270]

24. *Sivec Srl (In re), as successor in liquidation to Sirz Srl*
476 B.R. 310 (Bankr. E.D. Okla. 2012) [CLOUT case no. 1312]

25. *SNP Boat Service, S.A. v. Hotel le St. James*
First instance: 435 B.R. 446 (Bankr. S.D. Fla. 2011); on appeal: 483 B.R. 776 (S.D. Fla. 2012) [CLOUT case no. 1314]

26. *Stanford International Bank Ltd*
[2009] EWHC 1441 (Ch); on appeal [2010] EWCA Civ. 137, [CLOUT case no. 1003]

27. *think3*
Case no. 1757 of 2012 Appeal against dismissal order on petition for recognition of and assistance for foreign insolvency proceedings and administration order (Case no. of the court of first instance: 3 and 5 of 2011 at the Tokyo District Court) [Unofficial English translation on file with the UNCITRAL secretariat; see http://www.insol.org/page/304/japan]

28. *Juergen Toft (In re)*
453 B.R. 186 (Bankr. S.D.N.Y. 2011) [CLOUT case no. 1209]

29. *Vitro S.A.B. de C.V. (In re)*
701 F.3d 1031 (5th Cir. 2012) [CLOUT case no. 1310]

30. *Williams v Simpson*
[2011] B.P.I.R. 938 (High Court of New Zealand, Hamilton, 17 September 2010)

Williams v Simpson (no. 5)
High Court of New Zealand, Hamilton, 12 October 2010 [CLOUT case no. 1220]

1. ABC Learning Centres Limited

The debtor was the Australian parent company of a group of 38 subsidiaries, which had owned and operated child care centres in Australia, New Zealand, the United Kingdom, Canada and the United States of America. In November 2008, the boards of directors of the debtor and its 38 subsidiaries resolved

that since the companies were likely to become insolvent, they should enter into voluntary administration in Australia and administrators were appointed. The commencement of the voluntary administration breached the terms of certain loan agreements, and the lenders exercised their rights under the Australian Corporations Act as secured creditors to appoint receivers to represent their interests and commence receivership proceedings. In June 2010, creditors resolved to liquidate the companies and the administrators were appointed as liquidators. The receivership proceedings were conducted concurrently with the liquidation. In 2008 and 2009, litigation was commenced in the United States against certain of the debtor companies. In 2010, the liquidators sought recognition in the United States under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States) of the Australian liquidation proceedings as foreign main proceedings. The court found that the liquidation proceedings were "foreign proceedings" for the purposes of Chapter 15 of the United States Bankruptcy Code and accorded recognition as foreign main proceedings.

2. *Ashapura Minechem Ltd*

In October 2011, the foreign representative of the debtor, a mining and industrial business headquartered in Mumbai, sought recognition in the United States of America under Chapter 15 of the United States Bankruptcy Code of proceedings commenced in India and pending before the Board for Industrial and Financial Reconstruction, an agency authorized to function as an administrative tribunal under the Sick Industrial Companies (Special Provisions) Act 1985. The United States court considered that although the Indian legislation in question did not include a formal mechanism for participation by unsecured creditors, in practice the manner in which those creditors could participate in the proceedings demonstrated that the proceedings were collective for the purposes of section 101(23) of the United States Bankruptcy Code [article 2 MLCBI]. Although the public policy exception was argued by several creditors as a ground for not recognizing the Indian proceedings, the court found that they had not discharged the burden of proof on that issue and recognition of the application could not be refused on that ground.

3. *Atlas Shipping A/S*

The Danish insolvency representatives of insolvency proceedings commenced in Denmark in 2008 applied in the United States of America for vacation of certain maritime attachments that foreign creditors had obtained, both before and after commencement of the insolvency proceedings, on funds the debtor

held in New York banks. Under Danish law, all such attachments lapse on the commencement of insolvency proceedings and no further attachments may be levied against the debtor's assets. The United States court noted that, in deciding whether to grant a foreign representative post-recognition relief additional to that automatically available under section 1520 of Chapter 15 of the United States Bankruptcy Code [article 20 MLCBI], the court was to be generally guided by principles of comity and cooperation with foreign courts. The logical reason for that, the court noted, was that "deference to foreign insolvency proceedings will often facilitate the distribution of the debtor's assets in an equitable, orderly, efficient and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." The court found that dissolving the attachments was consistent with granting comity to the Danish proceedings, both under the provisions applicable before the commencement of Chapter 15 and under Chapter 15. More specifically, the court found that the type of relief sought fell within the terms of sections 1521 *(a)*(5) and 1521 *(b)* of Chapter 15 [article 21, subparagraph 1 *(e)* and paragraph 2 MLCBI], allowing the foreign representative to collect property in the United States and distribute it in a foreign case. The United States court concluded that all the attachments should be vacated and the garnished funds turned over to the insolvency representatives for administration in the Danish proceedings.

4. Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd

The joint insolvency representatives of two debtors subject to insolvency proceedings in the Cayman Islands applied for recognition of the proceedings in the United States of America under Chapter 15 of the United States Bankruptcy Code. In its reasoning, the United States court first noted that it had to make an independent determination as to whether the foreign proceeding met the definitional requirements of sections 1502 and 1517 of Chapter 15 [articles 2 and 17 MLCBI]. The court discussed the requirements of a foreign main proceeding and examined the presumption of section 1516 *(c)* of Chapter 15 [article 16, paragraph 3 MLCBI] that the debtor's registered office is the centre of its main interests. The court clarified that the presumption should be applied only in cases without any serious controversy, permitting and encouraging fast action in clear cases, and that the burden of proof was on the foreign representative. Examining the type of evidence that was needed to rebut the presumption, the court referred to article 8 of the Model Law, which directed that interpretation of the Model Law be made in accordance with its international origin and the need to promote uniformity in its application. The court looked to the interpretation of the concept of "centre of main interests" in the European Union context, noting the decision of the European Court of Justice in the *Eurofood* case that the

"centre of main interests" presumption might be rebutted "particular[ly] in the case of a 'letterbox' company not carrying out any business in the territory of the member State in which its registered office is situated". The United States court held that, in the instant case, the foreign representatives themselves provided the evidence to the contrary: there were no employees or managers in the Cayman Islands; the investment manager for the funds was located in New York; the administrator running the back-office operations of the funds was in the United States, along with the funds' books and records; and, prior to the commencement of the foreign proceedings, all of the funds' liquid assets were located outside the Cayman Islands. The court also noted that the investor registries and accounts receivable were located outside the Cayman Islands and that no counterparties to master repurchase and swap agreements were based in the Cayman Islands. Examining whether the Cayman proceedings might constitute foreign non-main proceedings according to section 1502 (5) of Chapter 15 [article 2, subparagraph *(c)* MLCBI] on the basis of an establishment, the court noted that the debtors did not conduct any (pertinent) non-transitory economic activity in the Cayman Islands, nor did they have any funds on deposit there before the Cayman Islands insolvency proceedings commenced. The court denied recognition on the basis that the foreign proceedings were not pending in a country where the debtors had either their "centre of main interests" or an establishment. That decision was affirmed on appeal.

5. Betcorp Ltd (in liquidation)

At its incorporation in 1998, Betcorp operated only in Australia, but it later expanded its operations to include the provision of online gambling services in the United States of America. This core part of its business was ended with the passage of the Unlawful Internet Gambling Enforcement Act (2006), which prohibited online gambling in the United States. The company halted its operations in the United States and ceased all operations shortly thereafter. At a meeting in September 2007, the shareholders voted overwhelmingly to appoint liquidators and put the company into voluntary winding up in Australia. According to the evidence presented to the court, the company was solvent. Following commencement in the United States of a lawsuit against Betcorp for copyright infringement, the Australian insolvency representatives sought recognition of the Australian proceeding in the United States under Chapter 15 of the United States Bankruptcy Code, with a view to resolving the copyright claims in the Australian winding-up proceeding. The United States court found that the Australian proceeding satisfied the requirements of section 101 (23) of the United States Bankruptcy Code [article 2, subparagraph *(a)* MLCBI] and recognized it as a foreign main proceeding.

6. British American Ins. Co. Ltd

The debtor was an insurance company chartered under the laws of the Bahamas, with branch operations in many other countries, including Saint Vincent and the Grenadines. Proceedings were commenced in both the Bahamas and Saint Vincent and the Grenadines, with insolvency representatives appointed in both of those proceedings. Both insolvency representatives applied in the United States of America for recognition of their respective proceedings under Chapter 15 of the United States Bankruptcy Code and for relief under sections 1520 and 1521 of Chapter 15 [articles 20 and 21 MLCBI] and coordination of multiple foreign proceedings under section 1530 [article 30 MLCBI]. The difficult issue of the case concerned whether the Bahamian proceeding constituted a main or non-main proceeding. The court looked at management of the debtor's affairs (conducted from a wholly owned subsidiary in Trinidad and Tobago), the location of the debtor's primary assets and of the majority of its creditors (neither of which was in the Bahamas), and the perception of third parties. On the evidence, the court found that the debtor's centre of main interests was not in the Bahamas. The court also found that the debtor had no establishment in the Bahamas and accordingly, the Bahamian proceedings could not be recognized as either a foreign main or non-main proceeding. It was undisputed that, at the time of the filing of the recognition application, the debtor had no business operation in the Bahamas other than the foreign representative's activities pursuant to his appointment. With respect to Saint Vincent and the Grenadines, however, evidence demonstrated that the debtor owned property in that country, where it conducted business; retained employees at its branch there; performed insurance business activity; maintained an account in that country relating to its insurance business there; and had existing policyholders. The court concluded that because the debtor had an establishment in Saint Vincent and the Grenadines, that proceeding was a foreign non-main proceeding. The court denied relief under section 1530 of Chapter 15, on the basis that it had only recognized a single foreign non-main proceeding.

7. *Chow Cho Poon (Private) Limited*

In 2007, the Singapore High Court ordered the liquidation of Chow Cho Poon (CCP), a company incorporated in Singapore, on the basis that it was just and equitable to do so (a decision not based upon the insolvency of the debtor). Having discovered that CCP had bank assets in Australia, the liquidator appointed in Singapore made various requests with respect to those assets, which the Australian bank in question declined to implement, pending recognition in Australia of the liquidator's appointment. Although that recognition was sought under other legislation, the court considered the impact of those

provisions on the Cross-Border Insolvency Act 2008 (enacting the Model Law in Australia). In particular, the court considered whether the Singapore proceeding was a foreign proceeding within the meaning of article 2 of the Model Law. The court found that the liquidator was a foreign representative within article 2, that the liquidation was a judicial proceeding and that the assets of the company were subject to control or supervision by a foreign court. Two issues remained for consideration: whether CCP was a debtor and whether the proceeding was one pursuant to "a law relating to insolvency". Although the court indicated that its instinctive reply to those two questions was negative, a consideration of the decisions of courts in England (*Stanford International Bank Ltd*) and the United States (*Betcorp* and *ABC Learning*) led it to conclude there was a clear basis upon which "the whole of the Singapore Companies Act, or at least the whole of the winding up provisions, might be classified as "a law relating to insolvency", even though the particular winding up was ordered on the just and equitable ground alone and apparently without any finding (express or implied) of insolvency." On the second issue, the court noted that in none of the decisions considered was any separate attention given to the question of whether the company subjected to the winding up was properly described as a "debtor", each court apparently content to work on the basis that an entity subject to a "foreign proceeding" was, for that reason alone, within the relevant "debtor" concept.

8. Cinram International Inc

The Cinram Group was a replicator and distributor of CDs and DVDs with an operational footprint across North America and Europe. Having experienced financial difficulties, several Canadian incorporated entities of the group commenced insolvency proceedings in Canada seeking extensive relief to enable them to put in place various restructuring measures, as well as authorization for one of the debtor entities to act as foreign representative to pursue recognition of the Canadian proceedings in the United States of America. In addition to the Canadian incorporated entities, the group included entities incorporated in the United States and Europe, although the latter were not to form part of the insolvency proceedings. The parties in the Canadian proceedings contended that the centre of main interests of the group was Canada, providing extensive evidence in support of that claim. The court commenced the proceedings and granted the relief sought. With respect to the issue of centre of main interests, the court outlined in its order the evidence provided by the Canadian debtors, noting that it was doing so for informational purposes only. The court said it clearly recognized that it was the function of the receiving court—in this case, the United States Bankruptcy Court for the District of Delaware—to make the determination on the location of the centre of main interests and to determine whether the

Canadian proceeding is a "foreign main proceeding" for the purposes of Chapter 15 of the United States Bankruptcy Code.

9. Condor Ins. Ltd (Fogarty v Petroquest Resources, Inc.)

Following recognition in the United States of America under Chapter 15 of the United States Bankruptcy Code of insolvency proceedings commenced under Nevis law against a Nevis insurance company, the Nevis representatives of the debtor brought an action in the United States under Nevis law to avoid allegedly fraudulent transfers made to another company. The defendant sought to dismiss the action on the grounds that sections 1521 and 1523 of Chapter 15 [articles 21 and 23 MLCBI] did not authorize the foreign representatives of a foreign main or non-main proceeding to commence avoidance actions, notwithstanding recognition of that proceeding, but rather permitted a foreign representative to bring such an action only following commencement of a liquidation or reorganization proceeding under United States law. The United States court agreed and dismissed the complaint, a decision that was affirmed on the first appeal. The foreign representatives appealed that decision, arguing that sections 1521 and 1523 limited the powers of a foreign representative to bring an avoidance action under United States law but not under foreign avoidance laws. The second appeal reversed the decision on the first appeal. The second appeal court found that sections 1521 and 1523 only expressly precluded, in a Chapter 15 case, specified avoidance actions under United States law, absent an application for commencement of insolvency proceedings under other chapters of the Bankruptcy Code (e.g. Chapters 7 or 11). Because neither section precluded a foreign representative from bringing an avoidance action in the United States under foreign law, the court concluded that it did not necessarily follow that the United States Congress had intended to deny the foreign representative the use of powers of avoidance under applicable foreign law. After looking at the language of the statute and its legislative history, the court considered practical concerns. Absent its decision in the case, the Nevis representatives would have been unable to avoid the transactions at issue; since foreign insurance companies were ineligible for relief in a Chapter 7 or 11 proceeding under United States insolvency law, the ordinary course of commencing a Chapter 7 or 11 proceeding was not available. The court concluded that Congress had not intended to restrict the powers of the United States court to apply the law of the country where the main proceeding was pending, and thus nothing in Chapter 15 precluded such a result.

10. Ephedra Products Liability Litigation

The Canadian insolvency representative of a Canadian debtor applied for recognition of the Canadian insolvency proceeding as a foreign main

proceeding in the United States of America, under Chapter 15 of the United States Bankruptcy Code. Multidistrict product liability litigation was pending against the same debtor in the United States. After recognition of that proceeding as a foreign main proceeding in the United States, the Canadian court approved a claims resolution procedure for streamlined assessment and valuation of all product liability claims against the debtor. The Canadian insolvency representative then applied to the United States court for recognition and enforcement of that order. Objections were raised on the grounds that the claims resolution procedure was manifestly contrary to the public policy of the United States pursuant to section 1506 of Chapter 15 [article 6 MLCBI], in that it would deprive the creditors of due process and trial by jury. The United States court agreed that the claims resolution procedure might be read as permitting the claims officer to refuse to receive evidence and to liquidate claims without granting interested parties an opportunity to be heard. Following amendment of the claims resolution procedure to provide that opportunity, the court concluded that due process would be satisfied by the amended process. As for the contention that the denial of the right to trial by jury was manifestly contrary to the public policy of the United States, the court held that neither section 1506 nor any other law prevented a court from recognizing and enforcing a foreign insolvency procedure for liquidating claims simply because the procedure did not include a right to trial by jury. In reaching that conclusion, the court looked both to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency and to United States case law on the enforcement of foreign judgements, both of which stressed that a finding that recognition would be "manifestly contrary" to national public policy considerations must be justified by exceptional circumstances.

11. Eurofood IFSC Ltd

A wholly owned subsidiary of Parmalat, which was incorporated in Italy and operated through subsidiary companies in more than 30 countries, Eurofood was incorporated and registered in Ireland with the principal objective of providing financing facilities for companies in the Parmalat group. In December 2003, certain insolvency proceedings were initiated with respect to Parmalat in Italy. In January 2004, a creditor applied to the Irish courts for the commencement of insolvency proceedings against Eurofood. In February 2004, the Italian court ruled that insolvency proceedings should be commenced with respect to Eurofood in Italy, declaring it to be insolvent and determining that the debtor's centre of main interests was in Italy. In March 2004, the Irish court ruled that, according to Irish law, the insolvency proceedings regarding Eurofood had commenced in Ireland on the date on which the application for commencement had been submitted, namely 27 January

2004, and that those proceedings were main proceedings. The Italian insolvency representative appealed the Irish decision, the Irish appeal court then referring certain questions to the European Court of Justice for a preliminary ruling. With respect to the question concerning the determination of the centre of main interests of a debtor, the European Court of Justice ruled that, if a debtor was a subsidiary company, with its registered office and that of its parent company in two different member States, the presumption laid down in article 3 (1) of European Council Regulation No. 1346/2000 on insolvency proceedings—that the centre of main interests of that subsidiary was situated in the member State where its registered office was situated—could be rebutted only if factors that were both objective and ascertainable by third parties indicated that a different situation existed. That could be the case particularly if a company did not carry out any business in the territory of the member State in which its registered office was situated. By contrast, if a company carried on its business in the territory of the member State where its registered office was situated, the mere fact that its economic choices were or could be controlled by a parent company in another member State was not enough to rebut the presumption laid down by the Regulation.

12. Fairfield Sentry Ltd

The debtor companies were incorporated and maintained their registered offices in the British Virgin Islands (BVI) as vehicles for mainly non-United-States of America persons and certain tax-exempt United States entities to invest with Bernard L. Madoff Investment Securities LLC. The debtors had ceased doing business some months before their shareholders and creditors applied, in the BVI in 2009, for the appointment of liquidators to each of them. In 2010, recognition of the BVI proceedings was sought in the United States under Chapter 15 of the United States Bankruptcy Code as either main or non-main proceedings. The United States court of first instance found that the debtors' centre of main interests was in the BVI, since that was the location of the debtors' nerve centre—the place where the debtors maintained their headquarters and directed, controlled and coordinated the corporation's activities. In looking at the time at which the centre of main interests assessment should be made, the court noted that even courts that had focused on the time of the application for recognition (*In re Ran, Betcorp* and *British American Insurance*) "would likely support a totality of circumstances approach where appropriate." The court went on to say that the emerging jurisprudence did not preclude looking into a broader temporal centre of main interests assessment in which there might have been "an opportunistic shift to establish a centre of main interests (i.e. insider exploitation, untoward manipulation, overt thwarting of third party expectations)". The court noted that, where a debtor had ceased trading, the debtor's centre of main interests

might become lodged with the insolvency representative and that that fact, together with the location of the registered office, supported the debtors' centre of main interests being located in the BVI. The decision was affirmed on appeal to the District Court and is now on further appeal.[b]

13. *Gainsford, in the matter of Tannenbaum v Tannenbaum*

The South African insolvency representatives of Tannenbaum, a South African citizen who had moved to Australia in 2007, sought recognition of the South African proceedings in Australia under the Cross-Border Insolvency Act 2008 (CBIA), as well as various orders relating to examination of the affairs of the debtor and his wife and other specified persons and entities. The court considered what would constitute the debtor's habitual residence for the purposes of sections 17(2) *(a)* and 16(3) of the CBIA [articles 17(2) *(a)* and 16(3) MLCBI], noting the decision in *Williams v Simpson* (see below) and the interpretation of that term as used in the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. The court made two points. First, application of the expression "habitual residence" permitted consideration of a wide variety of circumstances that bear upon where a person is said to reside and whether that residence is to be described as habitual. Secondly, the past and present intentions of the person under consideration will often bear upon the significance to be attached to particular circumstances, such as the duration of a person's connections with a particular place of residence. Since Tannenbaum had taken a deliberate decision to quit South Africa in 2007, had lived and worked in Australia since 2007 and had his habitual residence in Australia, the fact that he retained his South African citizenship and had not made any steps towards enrolment onto the Australian electoral roll was not determinative. Since the debtor was not a habitual resident of South Africa and did not have an establishment in South Africa, the foreign proceedings could not be recognized as either main or non-main proceedings. Relief was granted under other applicable legislation.

14. *Gerova Financial Group, Ltd*

Both entities of the Gerova group were registered in Bermuda. After a securities analyst published a report claiming Gerova was in effect a Ponzi scheme, Gerova was sued in the United States of America and subsequently ceased all business by May 2011. In October 2011, three creditors applied to commence insolvency proceedings in Bermuda. The proceedings were

[b]As at 15 April 2013, the final date for decisions included in this update.

adjourned at the request of Gerova, which managed to settle the claims of two of those creditors and successfully disputed the claims of the third. A fourth creditor was substituted as an applicant and presented an amended application, which the court declined to stay or dismiss. It did, however, give Gerova the opportunity to pay the fourth creditor's debt in full. The debtor having failed to do so, the court ordered commencement of insolvency proceedings against the two Gerova entities in July and August 2012. The liquidators sought recognition of the Bermudan proceedings in the United States under Chapter 15 of the United States Bankruptcy Code; an appeal against the July order of the Bermudan court was pending at the time. Recognition was opposed by several creditors on the basis that *(a)* it was unnecessary, including because it was opposed by a significant number of creditors, *(b)* the order for commencement was subject to appeal, and *(c)* for these reasons recognition would be covered by the public policy exception in section 1506 of Chapter 15 [article 6 MLCBI]. The court found that the Bermudan proceedings were foreign main proceedings, that there was nothing in section 1507 of Chapter 15 [article 7 MLCBI] that conditioned recognition on a cost-benefit analysis or approval by a majority of creditors; that it was for the Bermudan court to decide whether the proceedings should be commenced and not for the receiving court to condition recognition on a re-examination of that need; that nothing in the language of section 1517 of Chapter 15 [article 17 MLCBI] required the Bermudan decision to be final or non-appellable; that since the order of the Bermudan court was sufficient to enable the liquidators to take up their duties, section 1518 of Chapter 15 [article 18 MLCBI] would require the liquidators to notify the United States court if that order was reversed on appeal; and that nothing in the present case violated a matter of fundamental importance that would invoke the public policy exception.

15. Gold & Honey, Ltd

In July 2008, a receivership proceeding was commenced in Israel by the debtor's principal lender, but due to the occurrence of certain events, the appointment of a receiver was denied by the Israeli court. In September 2008, reorganization proceedings were commenced in the United States of America and the debtor's principal lender was notified of that commencement. Notwithstanding the commencement of the proceedings in the United States and the automatic application of a stay on such commencement, the principal lender continued its application for appointment of a receiver in the Israeli court, arguing that the automatic stay did not apply to its actions or to its attempt to have a receiver appointed. In October 2008, the United States court determined, on an application by the debtor and on the basis of a hearing at which the principal lender was represented, that the automatic

stay applied to the debtor's property wherever located and by whomever held. While the court did not reach the issue of whether the stay applied specifically to the Israeli receivership or whether it had *in personam* jurisdiction over the principal lender, it did advise the principal lender that if it proceeded with the receivership proceeding in Israel, it did so at its own peril. The principal lender continued with the receivership application and in later in October 2008, the Israeli court determined that it had jurisdiction and in November 2008 appointed receivers to liquidate the debtor's assets in Israel, despite the proceedings in the United States and the worldwide stay. In early January 2009, the principal lender sought an order from the United States court vacating the automatic stay with respect to the Israeli receivership or dismissing the United States insolvency proceedings. In late January 2009, the Israeli receivers applied for recognition of the Israeli proceedings in New York under Chapter 15 of the United States Bankruptcy Code in order to transfer assets located in New York to Israel for application in the Israeli proceeding. The United States court denied recognition, finding: *(a)* that the Israeli representatives had not met the burden of showing that the Israeli proceeding was a collective proceeding and that the debtor's assets and affairs were subject to the control or supervision of a foreign court pursuant to the definition in section 101 (23) of the United States Bankruptcy Code [article 2, subparagraph *(a)* MLCBI]; *(b)* that the Israeli representatives had been appointed in violation of the automatic stay; and *(c)* that the threshold required to establish the public policy exception to recognition in section 1506 of Chapter 15 [article 6 MLCBI] had been met. Accordingly, recognition was denied.

16. HIH Casualty and General Insurance Ltd; McGrath v Riddell

The HIH group was a large enterprise group involved in various insurance and reinsurance businesses in Australia, England and the United States of America, among other countries. Until its collapse in March 2001, the HIH group was the second largest insurance group in Australia. The case concerned four members of the group, each of which was involved to a greater or lesser extent in the insurance and reinsurance business in the United Kingdom, conducted in various ways, including through branches or locally incorporated companies. Although the majority of the assets of the companies were located in Australia, there were also significant assets in England. Insolvency proceedings commenced in Australia and in England. The English insolvency representatives sought direction from the English courts as to how the English assets of the debtors were to be dealt with given the differences between the Australian and English insolvency laws and priority schemes. Australian insolvency law gave priority to insurance creditors with

respect to reinsurance recoveries, while English law did not recognize such a priority and required pari passu distribution to all creditors. The Australian insolvency representatives obtained a letter of request from the Australian court seeking assistance from the English court (the case did not involve the legislation enacting the Model Law in either Australia or Great Britain). The Australian insolvency representatives requested that any assets collected in England be remitted to the Australian court for distribution in accordance with Australian insolvency law and priority schemes. At first instance, the English court ruled that it could not remit the English assets to Australia because the priority and distribution order was different from that applicable in England. On appeal, the court ruled that, while it had the power to remit the assets, it declined to do so because that would prejudice the interests of the non-reinsurance creditors. On a second appeal, the court ruled that the power to remit the assets existed and that it should be exercised in that case. Different views were expressed by the court as to the source of the power, but the judges were unanimous on the question of remitting the funds (see paras. 178-180 above).

17. Interedil, Srl

Interedil was registered in Italy until July 2001 when it transferred its registered office to the United Kingdom, was removed from the register of companies in Italy and added to the register of companies in the United Kingdom. At the time of the transfer, Interedil was being acquired by a British group of companies and a few months later its title to properties in Italy was transferred to a British company as part of that acquisition. In 2002, Interedil was removed from the United Kingdom register of companies. In October 2003, a creditor applied to commence insolvency proceedings against Interedil in Bari, Italy. Interedil challenged the application on the basis that only the courts of the United Kingdom had jurisdiction and sought a ruling on jurisdiction from the superior court in Italy. Without waiting for that ruling, the Bari court commenced insolvency proceedings in May 2004. In June 2004, Interedil lodged an appeal against that order. In May 2005, the Italian superior court ruled on the first application, ordering that the Bari court had jurisdiction on the basis that the presumption that the centre of main interests of a debtor was its registered office could be rebutted, in this case by the presence of immovable property in Italy, a lease agreement in respect of two hotels, a contract with a bank and the fact that the Italian companies register had not been notified of the transfer of the registered office. The Bari court then referred several questions to the European Court of Justice for a preliminary ruling. With respect to the question concerning rebuttal of the registered office presumption, the ECJ ruled that a debtor's main centre of interests must be determined by attaching greater importance to the place

of its central administration, which must be established by objective factors ascertainable by third parties. Where management, including the making of management decisions and supervision are conducted in the same place as the registered office in a manner ascertainable by third parties, the presumption cannot be rebutted. The court said that where the central administration was not in the same place as the registered office, the factors cited in the present case were not sufficient to rebut the presumption unless a comprehensive assessment of factors made it possible to establish, in a manner ascertainable to third parties, that the actual centre of management and supervision was located in that other place. It went on to hold that where a debtor company's registered office is transferred before an application to commence insolvency proceedings, the centre of main interests is presumed to be the place of the new registered office.

18. Lightsquared LP

The debtor included Lightsquared and some 20 of its affiliates—sixteen were incorporated and had their headquarters in the United States of America, three were incorporated in various provinces of Canada and one was incorporated in Bermuda. They each commenced voluntary reorganization proceedings in the United States and in May 2012 Lightsquared, as foreign representative of the debtor, sought recognition in Canada under the Companies Creditors Arrangement Act 1985 (CCAA) (enacting the Model Law in Canada) of the United States proceedings as foreign main proceedings, recognition of certain orders of the United States court and certain ancillary relief. The Canadian court considered the facts concerning the organization and structure of the debtor entities in order to determine the location of the centre of main interests of the Canadian entities. The judge concluded that where it was necessary to go beyond the registered office presumption, the following principal factors, considered as a whole, would tend to indicate whether the location in which the proceeding commenced was the debtor's centre of main interests: (i) the location is readily ascertainable by creditors; (ii) the location is the one in which the debtor's principal assets or operations are found; and (iii) the location is where the management of the debtor takes place. On the basis of those factors, the judge found the centre of main interests of the Canadian entities to be in the United States, recognized the foreign proceedings as foreign main proceedings, recognized the orders of the United States court and granted the ancillary relief sought.

19. Massachusetts Elephant & Castle Group, Inc.

The debtors operated and franchised full-service British-style pubs in the United States of America and Canada. In June 2011, Chapter 11 proceedings

commenced against the debtors in the United States and recognition of those proceedings was sought in Canada under the Companies Creditors Arrangement Act 1985 (CCAA). Except for three group members incorporated in Canada, the remaining 11 debtor companies were incorporated in the United States. The Canadian court considered the factors relevant to determining the location of the centre of main interests of the three Canadian companies, finding that the following three factors were usually significant: *(a)* the location of the debtor's headquarters or head office functions or nerve centre, *(b)* the location of the debtor's management, and *(c)* the location which significant creditors recognize as being the centre of the company's operations. While other factors might be relevant in specific cases, the court took the view that they should be considered to be of secondary importance and only to the extent that they related to or supported the three prime factors. Applying those factors to the facts, the Canadian court noted that: the head office of all of the Chapter 11 debtors was in Boston; the group functioned as an integrated North American business, all decision-making for which was centralized at the head office in Boston; and all members of the debtors' management were located, as were the human resources, accounting/finance, other administrative functions and information technology functions in Boston. The court concluded that the centre of main interests of the Canadian companies was located in Boston, recognized the United States proceedings as foreign main proceedings and granted relief additional to the mandatory relief available on recognition, primarily recognizing certain orders of the United States court in the Chapter 11 proceedings.

20. Metcalfe & Mansfield Alternative Investment

In March 2008, insolvency proceedings commenced against the debtors in Canada to restructure all outstanding third-party (non-bank-sponsored) asset-backed commercial paper obligations of the debtors. In June 2008, the Canadian court entered an amended sanction order and a plan implementation order, after the plan had been approved by 96 per cent (in number and value) of all participating note holders. The orders were upheld on appeal in August 2008 and became effective in January 2009. Interim cash distributions were made to note holders in January and May 2009, with final cash distributions authorized by the Canadian court. In November 2009, the Canadian insolvency representative applied for recognition of the Canadian proceedings in the United States of America as foreign main proceedings under Chapter 15 of the United States Bankruptcy Code and for enforcement of the Canadian orders as post-recognition relief in the United States. Recognition was granted. The Canadian orders included a third-party non-debtor release and injunction that was broader than might have been allowed under United States law. With respect to the enforcement of those orders, the court

considered section 1507 of Chapter 15 [article 7 MLCBI], which required consideration of a list of factors in determining whether to grant additional assistance to a foreign representative following recognition of a foreign proceeding. The court noted that post-recognition relief under that provision was largely discretionary and turned on subjective factors that embodied principles of comity, making reference to the decision in *Bear Stearns*. The court also noted that section 1506 of Chapter 15 [article 6 MLCBI] placed a limitation on recognition if granting recognition of foreign proceedings would be manifestly contrary to the public policy of the United States. The court noted that principles of comity did not require the relief available in the United States and the foreign proceedings to be identical, but that the key determination was whether the procedures in Canada met the fundamental standards of fairness of the United States. The United States court found that the Canadian orders fulfilled those fundamental standards of fairness and granted the request for their enforcement.

21. Millennium Global Emerging Credit Master Fund Limited et al

The two debtors (a feeder fund and a master fund) were offshore investment funds incorporated in Bermuda that invested in sovereign and corporate debt instruments from issuers in developing countries. After incorporation of the master fund, the feeder fund transferred substantially its entire asset to it, in exchange for a 97 per cent ownership interest in the master fund. In October 2008, the Funds ran into severe cash flow problems and failed to meet various margin calls. The Fund directors applied for commencement of liquidation proceedings in Bermuda and in 2009 the court commenced the proceeding and appointed the foreign representatives as liquidators of both Funds. The liquidators sought informal discovery from several entities based in the United States of America, but when attempts to negotiate informal production of documents failed, they sought recognition of the Bermudan proceedings in the United State under Chapter 15 of the United States Bankruptcy Code. At first instance, the United States court held that a debtor's centre of main interests should be determined by reference to the date of the commencement of the foreign proceeding and that both debtors' centre of main interests at that date was in Bermuda. The finding as to the location of the centre of main interests was challenged on the basis that a number of facts concerning the arrangement of the debtors' affairs pointed to the centre of main interests as being in the United Kingdom. The finding with respect to timing was not challenged. On appeal, the court assessed the circumstances against five factors (the location of the debtor's headquarters, the location of those who manage the debtor, the location of the debtor's primary assets, the location of the majority of the debtor's creditors who

would be affected by the case, and the jurisdiction whose law would apply to most disputes) and the expectations of creditors and other interested third parties in terms of the ascertainability of the Funds' centre of main interests. The court concluded that although some of those factors might support a centre of main interests in the United Kingdom, the preponderance of evidence supported Bermuda as the centre of main interests of the debtors, irrespective of whether centre of main interests was to be determined by reference to the date of the commencement of the foreign proceeding or the date of the filing of the Chapter 15 application.

22. Ran

The debtor had been the chief executive officer of an Israeli company. After the company encountered financial difficulties, the debtor left Israel in April 1997 and moved to the United States of America. In July 1997 involuntary insolvency proceedings were instituted against the debtor in Israel. The Israeli court declared the debtor insolvent, appointed an insolvency representative and ordered the liquidation of the debtor's estate. In 2006, the Israeli representative applied in the United States for recognition of the Israeli proceeding as either a foreign main or non-main proceeding under Chapter 15 of the United States Bankruptcy Code. The United States court denied the application, and the Israeli representative appealed. The appeal court remanded the case for further factual findings. On remand, the lower court again declined to recognize the foreign proceeding as either a foreign main or foreign non-main proceeding. Following a further appeal, the refusal of recognition was affirmed. The decision not to recognize the debtor's centre of main interests as located in Israel was based on the facts that the debtor: *(a)* had left Israel nearly a decade before the application for recognition was made; *(b)* had established employment and residence in the United States; *(c)* maintained his finances exclusively in the United States; and *(d)* indicated no intention of returning to Israel. With respect to the denial of recognition as a non-main proceeding, the decision was based on the debtor not having an establishment in Israel within the definition in section 1502 (5) of Chapter 15 [article 2, subparagraph *(c)* MLCBI]. The foreign representative's argument that the foreign proceeding itself constituted an activity that would satisfy that definition was rejected.

23. Rubin v Eurofinance SA

The representatives of insolvency proceedings commenced in the United States of America in 2007 against The Consumers Trust sought recognition of those proceedings in England under the Cross-Border Insolvency Regulations 2006

(enacting the Model Law in Great Britain), and enforcement of a judgement of the United States court holding Eurofinance liable for the debts of The Consumers Trust. The Consumers Trust was a business trust, recognized as a legal entity under United States law. In 2009, the English court at first instance recognized the foreign insolvency proceedings as main proceedings, but dismissed the application for enforcement of the judgement. The first appeal against the dismissal of the application for enforcement was allowed, the court concluding that ordinary rules for enforcing or not enforcing foreign judgements *in personam* did not apply to insolvency proceedings and that the mechanisms available in insolvency proceedings to bring actions against third parties for the collective benefit of all creditors were integral to the collective nature of insolvency and not merely incidental procedural matters. The orders against Eurofinance were therefore part of the insolvency proceedings and for the purpose of the collective enforcement regime of the insolvency proceedings. As such, the orders were not subject to the ordinary rules of private international law preventing the enforcement of judgements because the defendants were not subject to the jurisdiction of the foreign court. On a second appeal, the Supreme Court rejected the approach of the appeal court and dismissed the application for enforcement of the judgement. The court held that the orders were subject to the ordinary rules of private international law and that none of the conditions for common law enforcement had been met. The court also considered that articles 21 and 25 of the Model Law were concerned with procedural matters and did not impliedly empower the courts to enforce a foreign insolvency judgement against a third party.

24. Sivec Srl

The debtor obtained recognition in the United States of America of an Italian reorganization proceeding as a foreign main proceeding under Chapter 15 of the United States Bankruptcy Code and modification of the automatic stay to permit litigation in the United States of two potentially offsetting claims. That litigation resulted in a judgement for the Italian debtor on the first claim and a judgement in favour of the United States creditor (the creditor) on the second. The creditor then sought relief from the automatic stay to set off the two amounts, and the Italian debtor requested enforcement of the reorganization proceeding, which would apparently require payment of the first judgement by the creditor, but give it no ability to claim in the Italian case on the second judgement, as it had not filed a claim within the time limits (it alleged it had never received appropriate notice). The United States court determined that it would not accord comity to the Italian proceedings, as the Italian debtor "had failed to provide information regarding Italian law, the status of the Italian bankruptcy case or meet its burden of proof in requesting comity." The court expressed particular concern about lack of notice to the creditor,

found that basic elements of due process were lacking and that there was a failure to provide protection of a United States creditor's interests. Exercising what it called "broad latitude to fashion the appropriate relief in this case," the court determined that the creditor should have stay relief to exercise setoff or recoupment rights under United States law.

25. SNP Boat Service, S.A. v. Hotel le St. James

SNP Boat Service was a French company that entered into a contract with a third party requiring it to accept a trade-in of property owned by St James, a Canadian company. Issue was taken with performance of the contract and the dispute led to litigation in France and Canada. An insolvency proceeding commenced in France for SNP, in which St James lodged a claim. In the Canadian litigation, the court entered a default judgement in favour of St James, which sought to enforce it against SNP's property in the United States of America. Before that property could be sold, the foreign representative sought recognition of the French proceeding in the United States under Chapter 15 of the United States Bankruptcy Code. Recognition was granted and a stay with respect to the sale of the United States property ordered. The property was subsequently released to the foreign representative, but its removal from the jurisdiction of the court was prohibited and its sale made subject to approval of the court. The foreign representative then sought approval to repatriate the property to France to be handled under the French proceeding. St. James objected, claiming that, amongst other things, it would not receive "sufficient protection" of its interests in the French proceeding under section 1522 *(a)* of Chapter 15 [article 22, paragraph 1 MLCBI]. The lower court ordered discovery to determine whether St. James' interests as a creditor were sufficiently protected in the French proceeding and ultimately denied the repatriation request, directed the property be handed over to the relevant local official and dismissed the Chapter 15 proceeding. On appeal, the court held that it was not precluded from satisfying itself that the interests of foreign creditors in general were sufficiently protected before remitting property to the foreign jurisdiction. However, it rejected the idea that it could inquire into the individual treatment the creditor would receive in France, concluding that "a bankruptcy court is without jurisdiction to inquire whether a particular creditor's interests are sufficiently protected in any specific foreign proceeding." The court concluded that both the discovery order and the denial of the repatriation request were an abuse of discretion and remanded the case to the lower court for further proceedings.

26. Stanford International Bank Ltd

In February 2009, the United States of America's Securities Exchange Commission filed a complaint against the owner of a group of companies

("Mr. X") and companies belonging to Mr. X, including company "Y", alleging, among other things, securities fraud. On the same day, a United States court appointed a receiver over the assets of the group of companies belonging to Mr. X, including company Y, and of Mr. X himself. Mr. X was a national of both the United States and Antigua and Barbuda, and company Y was incorporated and had its registered office in Antigua and Barbuda. In April 2009, the court of Antigua and Barbuda made a winding-up order and appointed two liquidators for company Y. Both the United States receiver and the liquidators of Antigua and Barbuda applied for recognition in England under the Cross-Border Insolvency Regulations 2006 (CBIR) (enacting the Model Law in Great Britain). Each of them claimed that the proceedings in which they had been respectively appointed were "foreign main proceedings" pursuant to the CBIR. The English court recognized the Antigua and Barbuda proceeding as a foreign main proceeding, finding that it satisfied all aspects of the definition of "foreign proceeding" and that, following the test in *Eurofood*, the presumption that the centre of main interests of company Y was at the place of its registered office, i.e. Antigua, had not been rebutted. With respect to the United States proceeding, the English court took the view that the Securities Exchange Commission receivership was not a collective proceeding pursuant to an insolvency law (and thus not a foreign proceeding that could be recognized under the CBIR), because the intervention by the Securities Exchange Commission was to "prevent a massive ongoing fraud" and thus prevent detriment to investors rather than to reorganize the debtor or to realize assets for the benefit of all creditors, as required by article 2, subparagraph *(a)*, of the Model Law. That decision was upheld on appeal.

27. think3

The debtor (think3.Inc), which was the successor of various companies originally established in Italy and the United States of America, was incorporated in the United States, with a branch office in Italy and subsidiaries in six countries, including Italy and Japan. Insolvency proceedings commenced in Italy in April 2011, followed by Chapter 11 proceedings in the United States in May 2011. On 1 August 2011, recognition of the Italian proceedings was sought in the United States. On 11 August 2011, recognition of the United States proceedings was sought in Japan under the Act on the Recognition of and Assistance for Foreign Insolvency Proceedings 2000 (enacting the Model Law in Japan) and granted the same day, together with certain relief. In October 2011, recognition of the Italian proceedings was also sought in Japan, on the basis that the debtor's principal place of business (the term used in the Japanese legislation enacting the Model Law, which is considered to have substantively the same meaning as centre of main interests) was in

Italy, not the United States.[c] In determining the factors to be considered with respect to the debtor's principal place of business, the Japanese court at first instance looked to the work being undertaken by UNCITRAL to revise the Guide to Enactment of the Model Law. It found that while it was appropriate to take into consideration all of the various factors that had been raised by different courts around the world, emphasis should be placed on the location of the head office functions, the key assets, the actual place of business of the debtor, the debtor's business management and whether that location was perceivable to creditors. With respect to timing, the court took the view that the determination should be made by reference to the time at which the very first insolvency proceeding concerning the debtor was filed or when that proceeding commenced. Having considered the complex facts of the debtor's recent history in the light of the various factors to be taken into account, the court concluded that the debtor's principal place of business was the United States. That decision was affirmed on appeal.

28. Juergen Toft

The debtor, who was the subject of insolvency proceedings in Germany, had refused to cooperate with the foreign representative, hidden his assets and relocated to an unknown country. The foreign representative had obtained a mail interception order relating to postal and electronic mail in the German proceedings, as well as *ex parte* recognition of the German proceedings and enforcement of the German mail interception order in England. The foreign representative sought recognition of the German proceedings in the United States of America under Chapter 15 of the United States Bankruptcy Code, together with *ex parte* relief enforcing the mail interception order in the United States and compelling certain service providers to disclose and deliver to him all of the debtors emails currently stored on their servers, as well as those received in the future. On the basis that such relief would not be available to an insolvency representative under United States law and that it would contravene certain legislation relating to privacy and wiretapping leading to criminal liability, the United States court denied the relief sought as being manifestly contrary to the public policy of the United States under section 1506 of Chapter 15 [article 6 MLCBI]. That denial was without prejudice to the right of the foreign representative to seek recognition after providing notice as required under United States law.

[c]See footnote 160 to para. 125 above.

29. Vitro S.A.B. de C.V.

Vitro was a holding company that together with its subsidiaries constituted the largest glass manufacturer in Mexico. Between 2003 and 2007, Vitro borrowed a significant sum, predominantly from investors in the United States of America, which was evidenced by three series of unsecured notes, which variously fell due in 2012, 2013 and 2017 and was guaranteed by substantially all of its subsidiaries. The guarantees, which were governed by New York law, provided that the guarantors would not be released, discharged or otherwise affected by any settlement or release as the result of any insolvency, reorganization or bankruptcy proceeding affecting Vitro and that disputes would be litigated in New York. In 2008, Vitro announced its intention to restructure its debt and stopped making payments on the unsecured notes. In 2009, Vitro entered into certain agreements with one of its largest creditors, which resulted in Vitro generating a large amount of intercompany debt. That debt was not disclosed to the holders of the unsecured notes until approximately 300 days after the completion of the transactions, which took those transactions outside Mexico's 270 day suspect period, during which they would have been subject to additional scrutiny before a business enters insolvency. Between 2009 and 2010, Vitro engaged in several rounds of reorganization negotiations, but its proposals were rejected by creditors. In December 2010, Vitro made an application under Mexico's Business Reorganization Act. Despite an initial rejection of the application because Vitro could not reach the required 40 per cent creditor approval threshold necessary to support such an application without having to rely on the intercompany claims, that decision was overturned on appeal and Vitro was declared bankrupt in April 2011. A reorganization plan was then negotiated with the recognized creditors (including those holding intercompany debt), which provided, inter alia, for extinguishment of the unsecured notes and discharge of the obligations owed by the guarantors. The plan was ultimately approved by the requisite percentage of creditors and approved by the Mexican court in February 2012. That approval decision was then appealed. Creditors dissatisfied with the reorganization attempted to collect on the unsecured notes and guarantees in various ways. On one action commenced in New York, the court held that New York law applied to the guarantees and that non-consensual release, discharge or modification of the obligations in the guarantees was prohibited. In April 2011, recognition of the Mexican proceeding was sought in the United States under Chapter 15 of the United States Bankruptcy Code and ultimately granted as a foreign main proceeding. That decision was appealed. In March 2012, Vitro's foreign representatives sought various orders for relief in the United States, including enforcement of the Mexican reorganization plan and an injunction prohibiting certain actions in the United States against Vitro, which were denied. That decision was appealed on the ground that the court erred as a matter

of law in refusing to enforce the plan because it novated guarantee obligations of non-debtor parties. On appeal, the United States court affirmed the order recognizing the Mexican proceeding and the order denying the relief sought on the ground that although, in exceptional circumstances, the court could under Chapter 15 enforce an order extinguishing the obligations of non-debtor parties, Vitro had failed to demonstrate the existence of exceptional circumstances in this case.

30. Williams v Simpson; Williams v Simpson (No. 5)

On 9 September 2009, insolvency proceedings commenced against Mr. Simpson (the debtor) in England. The English proceedings commenced on the basis of a debt owed by the debtor to the applying creditor, which stated in its petition that the debtor's centre of main interests was not within a member State of the European Union and on the basis that a creditor could apply for commencement of insolvency proceedings in respect of a debtor who had "carried on business in England and Wales". On 10 September 2010, the insolvency representative (Mr. Williams) applied for recognition of the English proceeding in New Zealand under the Insolvency (Cross-border) Act 2006 (enacting the Model Law in New Zealand) and sought provisional relief. On 17 September, the provisional relief was granted on certain terms, with additional relief being granted over the following days.[d] The recognition application was heard on 1 October 2010. The court found that, while the English proceeding was a foreign proceeding as required by the Model Law, it was neither a foreign main proceeding—since the debtor's habitual residence was in New Zealand—nor a foreign non-main proceeding, as the test for an establishment under the Model Law was not met. The court found that, while under English law the debtor was subject to the insolvency laws of that country on the basis that he was still in the process of winding up business activities there, that was not a reason for holding that, in fact, he had a place of operations there from which he presently carried out the activity required under the definition of an establishment. Accordingly, the court declined to recognize the foreign proceedings. The court was, however, able to grant assistance in aid of the English proceedings under section 8 of the New Zealand law, a provision that could be applied in the rare circumstances in which the provisions enacting the Model Law were not available. That assistance was to enable the insolvency representative to collect and realize assets owned by the debtor in New Zealand, subject to any further directions that might be required in relation to the distribution of any proceeds of sale.

[d]See also footnote 192 to para.153 above on the interim relief granted.

Annex II

Decision of the United Nations Commission on International Trade Law and General Assembly resolution 66/96

A. Decision of the Commission

1. At its 934th meeting, on 1 July 2011, the United Nations Commission on International Trade Law adopted the following decision:

"*The United Nations Commission on International Trade Law*,

"*Noting* that increased trade and investment leads to a greater incidence of cases where business is conducted on a global basis and enterprises and individuals have assets and interests in more than one State,

"*Noting also* that, where the subjects of insolvency proceedings are debtors with assets in more than one State, there is generally an urgent need for cross-border cooperation in, and coordination of, the supervision and administration of the assets and affairs of those debtors,

"*Considering* that cooperation and coordination in cross-border insolvency cases has the potential to significantly improve the chances for rescuing financially troubled debtors,

"*Believing* that the UNCITRAL Model Law on Cross-Border Insolvency[a] (the Model Law) contributes significantly to the establishment of a harmonized legal framework for addressing cross-border insolvency and facilitating coordination and cooperation,

"*Acknowledging* that familiarity with cross-border cooperation and coordination and the means by which it might be implemented in practice is not widespread,

[a]*UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*, United Nations publication, Sales No. E.99.V.3, part one.

"*Convinced* that providing readily accessible information on the interpretation of and current practice with respect to the Model Law for reference and use by judges in insolvency proceedings has the potential to promote wider use and understanding of the Model Law and facilitate cross-border judicial cooperation and coordination, avoiding unnecessary delay and costs,

"1. *Adopts* the *UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective* (the Judicial Perspective) as contained in document A/CN.9/732 and Add.1-3 and authorizes the Secretariat to edit and finalize the text in the light of the deliberations of the Commission;

"2. *Requests* the Secretariat to establish a mechanism for updating the Judicial Perspective on an ongoing basis in the same flexible manner as it was developed, ensuring that its neutral tone is maintained and that it continues to meet its stated purpose;

"3. *Requests* the Secretary-General to publish, including electronically, the text of the Judicial Perspective, as updated or amended from time to time in accordance with paragraph 2 of this decision, and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available;

"4. *Recommends* that the Judicial Perspective be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings;

"5. *Also recommends* that all States continue to consider implementation of the Model Law."

B. General Assembly resolution 66/96

2. On 9 December 2011, the General Assembly adopted the following resolution:

Model Law on Cross-Border Insolvency: The Judicial Perspective

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of

the law of international trade in the interests of all peoples, in particular those of developing countries,

Noting that, where individuals and enterprises conduct their businesses on a global basis and have assets and interests in more than one State, the efficient conduct of the insolvency of those individuals and enterprises requires cross-border cooperation in, and coordination of, the supervision and administration of those assets and affairs,

Considering that the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency[a] contributes significantly to the establishment of a harmonized legal framework for effectively administering cross-border insolvency and facilitating cooperation and coordination,

Acknowledging that familiarity with cooperation and coordination in cross-border insolvency cases and how the Model Law may be implemented in practice is not widespread,

Convinced that providing readily accessible information on the interpretation of and current practice with respect to the Model Law for reference and use by judges in insolvency proceedings has the potential to promote wider use and understanding of the Model Law and facilitate cross-border judicial cooperation and coordination, avoiding unnecessary delay and costs,

Noting with satisfaction the completion and adoption on 1 July 2011 of the United Nations Commission on International Trade Law Model Law on Cross- Border Insolvency: The Judicial Perspective by the Commission at its forty-fourth session,[b]

Noting that the preparation of the Model Law on Cross-Border Insolvency: The Judicial Perspective was the subject of consultation with Governments, judges and other insolvency professionals,

1. *Expresses* its appreciation to the United Nations Commission on International Trade Law for the completion and adoption of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency: The Judicial Perspective;[b]

2. *Requests* the establishment by the Secretariat of the United Nations of a mechanism for updating the Model Law on Cross-Border Insolvency:

---

[b]*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 198.

The Judicial Perspective on an ongoing basis in the same flexible manner as that in which it was developed, ensuring that it maintains a neutral tone and continues to meet its stated purpose;

3. *Requests* the Secretary-General to publish, including electronically, the text of the Model Law on Cross-Border Insolvency: The Judicial Perspective, as updated or amended from time to time in accordance with paragraph 2 of the present resolution, and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available;

4. *Recommends* that the Model Law on Cross-Border Insolvency: The Judicial Perspective be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings;

5. *Also recommends* that all States consider the implementation of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency.[a]

82nd plenary meeting

9 December 2011

V.14-00242