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

(Updated 2022)

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: uncitral.un.org
Email: uncitral@un.org

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

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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 or the Commission) on 1 July 2011. The project originated 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 information and guidance for judges with respect to questions arising under the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI). In 2010, the Commission agreed that the UNCITRAL secretariat should be mandated to develop a guidance text in 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.[2]

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 the Commission by consensus on 1 July 2011 (see annex II.A). On 9 December 2011, the United Nations General Assembly adopted resolution 66/96, in which it expressed its appreciation to the Commission for completing and adopting *The Judicial Perspective* (see annex II.B).

The Judicial Perspective was updated in 2013 to reflect the revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (GE), adopted by the Commission in 2013 as the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (GEI),[3] and jurisprudence applying and interpreting the MLCBI issued between July 2011 and 15 April 2013. The updates were prepared at that time by the Secretariat in consultation with a board of experts established in accordance with the Commission's decision of 1 July 2011.[4] Members of the board were: Leif Clark (United States of America),

[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: https://uncitral.un.org/en/colloquia/insolvency.

[2] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 261.

[3] The GEI is available at: https://uncitral.un.org/en/texts/insolvency.

[4] See annex II.A, para. 2.

Miodrag Đordević (Slovenia), Allan Gropper (United States), 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.[5]

The text was further updated in 2022 to reflect developments in the jurisprudence applying and interpreting the MLCBI and to align the text with the Digest of Case Law on the MLCBI completed in 2020. The updates were prepared in consultation with a board of experts established in accordance with the Commission's decision of 1 July 2011.[4] Members of the board were: Martin Glenn and Allan Gropper (United States), Paul Heath (New Zealand), Myriam Mailly (France), Geoffrey Morawetz (Canada), Alastair Norris (United Kingdom) and Kannan Ramesh (Singapore). The Commission, at its fifty-fifth session, in 2022, approved the updates transmitted to it by Working Group V (Insolvency Law)[6] and authorized the secretariat to publish the updated publication in the six languages of the United Nations and to keep the publication up-to-date so that it continued fulfilling its intended purpose.[7]

[5] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 209.
[6] A/CN.9/1094, paras. 12-15.
[7] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 191.

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I. Introduction

A. Purpose and scope

1. The present text discusses the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) from a judge's perspective. Recognizing that some enacting States have amended the MLCBI 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 MLCBI and its accompanying Guide to Enactment (GE) as endorsed by the United Nations General Assembly in December 1997.[2] The GE has been revised to include additional guidance with respect to the interpretation and application of selected aspects of the MLCBI relating to the debtor's "centre of main interests" (COMI) in the light of the emerging jurisprudence interpreting the MLCBI 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" (GEI).[3]

2. Although the present text makes references to decisions given in a number of jurisdictions, there is no intention to critique the decisions, beyond pointing out issues that a judge may want to consider should a similar case come before them. Nor has any attempt been made to provide references to all relevant decisions touching on the interpretation issues raised by the MLCBI. 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 MLCBI.

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

[2] General Assembly resolution 52/158.

[3] Available at: https://uncitral.un.org/en/texts/insolvency. The GE adopted in 1997 is no longer available on the UNCITRAL website. Courts have considered the issue of whether either guide should take priority or how to utilize the GEI. An extensive analysis of that issue is set out in the review decision in *Sturgeon* (case no. 32), paras. 71-84 of the judgment. In some States, that issue is influenced by the legislation enacting the MLCBI, which makes specific reference to the GE. In *Zetta Jet* (case no. 39, para. 37 of the judgment), for example, the court sets out a conflict test. In another case, *Fibria Cellulose S/A v Pan Ocean Co. Ltd* [2014] EWHC 2124 (Ch), CLOUT 1482, the court decided to refer to the GE, but noted that the relevant text had not been altered in the GEI. In *Sturgeon*, the court concluded that by withdrawing the GE from circulation, it could be inferred that the body that produced the MLCBI, with the assistance of many experienced insolvency practitioners, Government bodies of enacting States and in consultation with the judiciary, intended the GEI to provide a useful and updated tool for interpretation. A number of other English decisions postdating the introduction of the GEI support its use as a tool for interpretation: *Re Videology* (case no. 35); *OGX Petroleo e Gas S.A.* [2016] EWHC 25 (Ch), CLOUT 1622; *The OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia* [2018] EWCA 2802, CLOUT 1822; and *In re Agrokor* [2018] Bus LR 64, CLOUT 1798.

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 MLCBI. As a matter of principle, such an approach would run counter to 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 MLCBI 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 MLCBI, as distinct from providing an article-by-article analysis.[4]

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 MLCBI, the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the Practice Guide).[5] Their use in the present document is consistent with their use in those texts:

(a) "CLOUT": refers to the case law on UNCITRAL texts reporting system. Abstracts of cases dealing with the MLCBI are available in the six official languages of the United Nations at https://uncitral.un.org/en/case_law;

(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;[6]

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

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

[4] An article-by-article analysis of the jurisprudence interpreting the MLCBI is provided in the Digest.

[5] These UNCITRAL texts are available at: https://uncitral.un.org/en/texts/insolvency.

[6] These agreements are discussed in some detail in the 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 MLCBI;

(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 annex I, only a short-form reference is included in the text; for example, 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). Full citations for these cases are included 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 judgment cited in that annex. Additional cases are referred to in the footnotes, but not included in annex I.

(b) References to texts

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

(a) "MLCBI": UNCITRAL Model Law on Cross-Border Insolvency (1997);

(b) "Guide to Enactment and Interpretation" (GEI): 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;[7]

(c) "Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law, parts one and two (2004), part three (2010), part four (2013 as expanded in 2019) and part five (2021);

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

(e) "The Digest": Digest of Case Law on the MLCBI (2021);

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

(f) "EIR": European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings;[8]

(g) "EIR recast": Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast);[9]

(h) "European Convention": Convention on Insolvency Proceedings of the European Union (EU) (1995);[10]

(i) "Virgos-Schmit Report": M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996.[11]

II. Background

A. Scope and application of the MLCBI

8. In December 1997, the General Assembly endorsed the MLCBI, developed and adopted by UNCITRAL. The MLCBI was accompanied by the GE, which provided background and explanatory information to assist those preparing the legislation necessary to implement the MLCBI and judges and others responsible for its application and interpretation. As noted above, the GE was revised to include additional guidance with respect to the interpretation and application of selected aspects of the MLCBI relating to COMI and was adopted by the Commission on 18 July 2013 as the GEI.[12]

9. The MLCBI 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. It was

[8] *Official Journal of the European Communities*, L 160, vol. 43, 30 June 2000, 1.

[9] *Official Journal of the European Communities,* L 141, vol. 58, 5 June 2015, 19.

[10] For information on the history of the Convention and its relevance to the MLCBI, see below paras. 97-100; see also the report of the European Parliament of 23 April 1999 on the Convention on Insolvency Proceedings of the European Union (1995) available at: Report on the Convention on Insolvency Proceedings of 23 November 1995 – Committee on Legal Affairs and Citizens' Rights | A4-0234/1999 | European Parliament (europa.eu) (accessed on 25 July 2022).

[11] In anticipation of adoption of an insolvency convention by European Union member States, that explanatory report was prepared to provide guidance on various concepts in the draft convention, in particular COMI. Notwithstanding the demise of the Convention, the report has been accepted generally as an aid to interpretation of the concept COMI that was subsequently used in EIR. The report is available at: https://globalinsolvency.com/resource-article/virgos-schmit-report-convention-insolvency-proceedings-now-regulation-insolvency (accessed on 25 July 2022).

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

ascertained by the UNCITRAL secretariat that as at 25 July 2022, 55 jurisdictions across 52 States have enacted legislation based on the MLCBI.[13]

10. The MLCBI is designed to apply where:[14]

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

(b) Assistance is sought in a foreign State in connection with a proceeding under the laws of the enacting State relating to insolvency;

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

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

11. The MLCBI anticipates that a representative (the foreign representative) will have been appointed to administer the insolvent debtor's assets in one or more

[13] The following information is taken from the UNCITRAL website (as of 25 July 2022): https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status. Australia (2008), Bahrain (2018), Benin* (2015), Brazil (2020), Burkina Faso* (2015), Cameroon* (2015), Canada (2005), Central African Republic* (2015), Chad* (2015), Chile (2013), Colombia (2006), Comoros* (2015), Congo* (2015), Côte d'Ivoire* (2015), Democratic Republic of the Congo* (2015), Dominican Republic (2015), Equatorial Guinea* (2015), Gabon* (2015), Ghana (2020), Greece (2010), Guinea* (2015), Guinea-Bissau* (2015), Israel (2018), Japan (2000), Kenya (2015), Malawi* (2015), Mali* (2015), Mauritius (2009), Mexico (2000), Montenegro (2002), Morocco (2018), Myanmar (2020), New Zealand (2006), Niger* (2015), Panama (2016), Philippines (2010), Poland (2003), Republic of Korea (2006), Romania (2002), Senegal* (2015), Serbia (2004), Seychelles (2013), Singapore (2017), Slovenia (2007), South Africa (2000), Togo* (2015), Uganda (2011), United Arab Emirates – Abu Dhabi Global Market (2015) and Dubai International Financial Centre (2019), United Kingdom of Great Britain – Great Britain (2006) and overseas territories of the United Kingdom of Great Britain and Northern Ireland – British Virgin Islands (2003) and Gibraltar (2014), United States of America (2005), Vanuatu (2013) and Zimbabwe (2018). The asterix indicates States enacting the MLCBI in the Acte uniforme portant organisation des procédures collectives d'apurement du passif (OHADA), 10 September 2015 at Grand-Bassam, Côte d'Ivoire. Disclaimer: A model law is created as a suggested pattern for lawmakers to consider adopting as part of their domestic legislation. Since States enacting legislation based upon a model law have the flexibility to depart from the text, the above list is only indicative of the enactments that were made known to the UNCITRAL secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted. 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.

[14] MLCBI, art. 1, para. 1.

States or to act as a representative of the foreign proceedings at the time an application under the MLCBI is made.[15]

12. The MLCBI requires an enacting State to specify the court or other competent authority that has the power to deal with issues arising under the MLCBI.[16] Acknowledging that some States will nominate administrative rather than judicial bodies, the definition of "foreign court" includes both judicial and other authorities competent to control or supervise a foreign proceeding.[17]

13. The MLCBI 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 MLCBI.[18]

14. The MLCBI is built on four principles:

(a) The "access" principle: This principle establishes the circumstances in which a "foreign representative"[19] has rights of access to the court (the receiving court) in the enacting State from which recognition and relief is sought. It also refers to access by foreign creditors to proceedings under the laws of the enacting State relating to insolvency;[20]

(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;[21]

(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.[22] If a proceeding is recognized as a "main" proceeding, automatic relief follows.[23] Additional discretionary relief is

[15] Ibid., art. 2, subpara. *(d)*; see also MLCBI, art. 5 envisaging that an enacting State would specify persons authorized to act in a foreign State on behalf of a proceeding commenced under the laws of the enacting State relating to insolvency, as permitted by applicable foreign law. The Digest discusses cases interpreting the provision, noting that since it does not require the appointment of the foreign representative to be made by the foreign court, it is sufficiently broad to include appointments made by some other special agency. The Digest also notes the types of body or person that may be appointed: synopsis of case law for art. 2, subpara. *(d)*.

[16] Ibid., art. 4.

[17] Ibid., art. 2, subpara. *(e)*, definition of "foreign court"; Digest, synopsis of case law for art. 2, subpara. *(e)*.

[18] Ibid., art. 1, para. 2; see also the GEI, paras. 55-60, which discuss this question in more detail, and Digest, synopsis of case law for art. 1, para. 2.

[19] As defined by art. 2, subpara. *(d)* of the MLCBI; Digest, synopsis of case law for art. 2, subpara. *(d)*.

[20] Ibid., arts. 9-14; Digest, synopsis of case law for those articles.

[21] Ibid., art. 17; Digest, synopsis of case law for art. 17, para. 2.

[22] Ibid., art. 19; Digest, synopsis of case law for art. 19.

[23] Ibid., art. 20; Digest, synopsis of case law for art. 20.

available in respect of "main" proceedings, and relief of the same character may be given in respect of a proceeding that is recognized as "non-main";[24]

(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.[25]

15. Those principles are designed to meet the following public policy objectives:[26]

(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 Practice Guide.[27] 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.[28]

17. In 2021, the Digest was published, which was prepared to facilitate access to the growing number of cases applying and interpreting the MLCBI that had been

[24] Ibid., art. 21; Digest, synopsis of case law for art. 21.

[25] Ibid., arts. 25, 26, 27, 29 and 30; Digest, synopsis of case law for arts. 25-27 and 29-30.

[26] Preamble to the MLCBI; see also the GEI, para. 3 and Digest, synopsis of case law for the Preamble.

[27] General Assembly resolution 64/112; the text of the Practice Guide is available at: https://uncitral.un.org/en/texts/insolvency/explanatorytexts/practice_guide_cross-border_insolvency.

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

collected in CLOUT and to draw attention to emerging trends in interpretation. On the basis of article 8 of the MLCBI, which provides that in the interpretation of the MLCBI "regard is to be had to its international origin", the Digest aims to promote uniformity in the application of the MLCBI by encouraging judges to consider how it has been applied by courts in enacting States.

B. A judge's perspective

18. While the MLCBI emphasizes the desirability of a uniform approach to its interpretation based on its international origin,[29] 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.[30] In any event, any court considering legislation based on the MLCBI is likely to find the international jurisprudence of assistance to its interpretation.

19. In approaching their tasks, judges[31] have 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 the court. Their 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[32] 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.

20. Some differences in approach to the interpretation of the terms of the MLCBI (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 MLCBI than would be the case

[29] In States that enact the MLCBI 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" (MLCBI, art. 8). The Digest (synopsis of case law for art. 8) discusses cases in which courts in States that have enacted art. 8 have looked beyond their own jurisdictions to foreign interpretations of the MLCBI and other extrinsic materials for interpretative guidance, especially where provisions of the MLCBI are unclear or ambiguous.

[30] Indeed, the MLCBI 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 MLCBI (art. 3 and paras. 91-93 of the GEI).

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

[32] That is, authorities that come within the definition of "foreign court" (MLCBI, art. 2, subpara. *(e)*; Digest, synopsis of case law for art. 2, subpara. *(e)*).

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[33] or have the authority to develop particular aspects of the law for which there is no codified rule.[34]

21. These different approaches could affect a receiving court's inclination to act on the MLCBI's principle of cooperation between courts and coordination of multiple proceedings.[35] If the domestic law of the enacting State incorporates the cooperation and coordination provisions of the MLCBI, there will be a codified recognition of steps that can be taken in that regard.

22. Without the explicit adoption of such provisions,[36] 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 MLCBI's emphasis on cooperation and coordination.

23. 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. Those principles assume even greater importance in cases where court-to-court communications take place.[37]

24. Unlike an insolvency representative directly involved in the administration of an insolvency 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.[38] Judges who have not experienced proceedings of this type before might require assistance from

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

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

[35] MLCBI, arts. 25-27, 29 and 30; see also paras. 195-227 below.

[36] For example, the EIR, while requiring cross-border cooperation among insolvency representatives, made no reference to cooperation between courts.

[37] See also paras. 195-213 below.

[38] MLCBI, art. 17, para. 3, emphasizes the need for speedy resolution of applications for recognition of a foreign proceeding.

the foreign representative,[39] generally through legal counsel. That assistance could include succinct, yet informative, briefs and evidence.

25. 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.

26. Over 80 judges from some 40 States, attending a judicial colloquium in Vancouver, Canada, in June 2009,[40] 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 MLCBI. 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.[41] 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. A similar mechanism was used for updating the publication in 2022 as noted in the preface.

C. Purpose of the MLCBI

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

28. As mentioned above, the MLCBI respects differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather it

[39] As defined in the MLCBI, art. 2, subpara. *(d)*; Digest, synopsis of case law for art. 2, subpara. *(d)*.

[40] For reports of the judicial colloquiums, see above, footnote 1 to the Preface.

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

provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways. These include:

(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.

29. The GEI 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.[42] 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.[43] While the MLCBI 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 MLCBI does, however, suggest various ways in which cooperation might be implemented.[44]

[42] MLCBI, arts. 25 and 26. See also the Practice Guide.

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

[44] MLCBI, art. 27; see also the Practice Guide, chap. II and Digest, synopsis of case law for art. 27.

30. 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 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 MLCBI

A. The "access" principle

31. The MLCBI 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;[45]

(b) Recognition of the foreign proceeding in the enacting State,[46] so that the foreign representative may:

(i) Participate in an existing insolvency proceeding in that State;[47]

(ii) Apply for relief under the MLCBI;[48] or

(iii) To the extent that domestic law permits, intervene in any proceeding to which the debtor is a party.[49]

32. Article 2 of the MLCBI defines both "foreign proceeding" and "foreign representative".[50]

[45] MLCBI, art. 11, and the GEI, paras. 112-114.

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

[47] Ibid., art. 12, and paras. 115-117, which make it clear that the purpose of art. 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 art. 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).

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

[49] Ibid., art. 24, and paras. 204-208; see footnote 47 above on the use of the term "intervene".

[50] See Digest, synopsis of case law for art. 2, subparas. *(a)* and *(d)*.

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;

33. 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.[51] A "foreign representative" is entitled, as of right, to apply directly to the receiving court.[52]

34. 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.[53] A question of that type arose in *Rubin v Eurofinance* (case no. 28). 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 origin of the MLCBI, a "parochial interpretation" of the term "debtor" would be "perverse".[54] The judge raised a separate question as

[51] The definition of the term "foreign court" is discussed in para. 12 above.

[52] MLCBI, art. 9.

[53] The term "debtor" is not defined in the MLCBI. See also the discussion of this term in the Digest, synopsis of case law for art. 2, section "Other issues: Use of the term 'debtor'".

[54] *Rubin v Eurofinance* (first instance), paras. 39-40.

to whether the relief provisions of the MLCBI 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.[55]

35. 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.[56] 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 MLCBI.

36. In *Stanford International Bank* (case no. 31), the English first-instance court expressed the view that a receiver appointed in the United States 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.[57] 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.[58]

37. The MLCBI 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.[59] 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)*.[60] 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[61] to administer a qualifying reorganization or liquidation of the debtor's assets or affairs, or to act as a representative of the foreign proceeding.

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[55] Ibid., para. 41.

[56] MLCBI, art. 5.

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

[58] See a further discussion of this case at para. 79-80 below.

[59] See the definition of "foreign representative" in the MLCBI, art. 2, subpara. *(d)* and Digest, synopsis of case law for art. 2, subpara. *(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 art. 2 (see *Lightsquared* (case no. 21), 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 art. 18 of the MLCBI.

[60] See Digest, synopsis of case law for art. 18.

[61] For the purposes of the MLCBI, art. 2, subpara. *(d)*.

38. 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[62]) in a foreign State;

(b) The proceeding is "collective" in nature;[63]

(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";[64] 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".[65]

39. The foreign representative's ability to seek early recognition (and the consequential ability to seek relief)[66] 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".[67] 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 decision on recognition is pending.[68]

B. The "recognition" principle

1. Introductory comment

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

[62] See the discussion of interim and final orders in *Gerova* (case no. 15) in footnote 93 below.
[63] See paras. 74-81 below; Digest, synopsis of case law for art. 2, subpara. *(a)*, section "Collective proceeding".
[64] MLCBI, art. 2, subpara. *(e)*, and para. 12 above; Digest, synopsis of case law for art. 2, subpara. *(e)*.
[65] MLCBI, art. 2, subpara. *(d)*; Digest, synopsis of case law for art. 2, subpara. *(d)*.
[66] Ibid., arts. 19-24.
[67] Ibid., art. 17, para. 3.
[68] See paras. 157-167 below.

certainty to the process and enables the receiving court, once recognition has been given, to determine questions of relief in a timely fashion.

41. What follows is a general outline of the recognition principle. A more detailed discussion of its component parts is contained in paragraphs 63-150 below.

2. Evidential requirements

42. A foreign representative will make an application under the MLCBI in order to seek recognition of the foreign proceeding. Article 15 of the MLCBI 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.[69] The MLCBI 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.

[69] MLCBI, art. 2, subpara. *(a)*.

3. Power to recognize a foreign proceeding

43. The power of the receiving court to recognize a foreign proceeding is derived from article 17 of the MLCBI.

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.

44. 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.

45. The foreign representative has a continuing duty of disclosure. They must inform the receiving court promptly of any substantial change in the status of the recognized foreign proceeding or of their appointment and any other foreign proceeding regarding the same debtor of which the foreign representative becomes aware.[70]

46. 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".[71] The former is a foreign proceeding that is taking place in the State where the debtor has COMI,[72] 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".[73] Implicitly, the MLCBI 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.[74] It might be noted, however, that some States that have enacted the MLCBI do provide additional powers to the

[70] Ibid., art. 18; see Digest, synopsis of case law for art. 18; see also paras. 60-62 below. More generally, the English court in *OGX Petroleo e Gas S.A.* [2016] EWHC 25 (Ch), CLOUT 1622, recognized that since many applications for recognition are made on an *ex parte* basis, there must be full and frank disclosure to the court in all respects.

[71] Ibid., see definition of these terms in art. 2, subparas. *(b)* and *(c)*; Digest, synopsis of case law for art. 2, subparas. *(b)* and *(c)*.

[72] This term is not defined in the MLCBI; see discussion in paras. 96-139 below.

[73] MLCBI, art. 2, subpara. *(f)*, see paras. 140-150 below and Digest, synopsis of case law for art. 2, subpara. *(f)*.

[74] See the GEI, paras. 85 and 156.

courts under other law[75] to assist foreign proceedings that might include types of proceedings not subject to recognition under the MLCBI.

47. *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 for recognition under either category because the evidence failed to establish either that the debtor's COMI was situated in the Cayman Islands or that some non-transitory activity occurred there. Accordingly, those proceedings were not recognized. This case is discussed further below at paragraphs 109-112.

4. Reciprocity

48. There is no requirement of reciprocity in the MLCBI. 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 MLCBI, have included reciprocity provisions in relation to recognition.[76]

5. The "public policy" exception

49. The receiving court retains the ability to refuse to take any action covered by the MLCBI, 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.[77] 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 MLCBI.

50. 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

[75] 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.

[76] For example, Mauritius, Mexico, Romania, South Africa and Uganda.

[77] MLCBI, art. 6; see Digest, synopsis of case law for art. 6.

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. 12), 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, was held not to be "manifestly contrary to the public policy of the United States". The United States court held 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.[78]

51. For the applicability of the public policy exception in the context of the MLCBI, 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.

52. 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.[79]

53. Other than in the context of the public policy exception, the MLCBI 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.[80]

54. Application of the public policy exception has been considered in several cases in addition to *Ephedra*. In *Gold & Honey* (case no. 16), a court in the United States refused recognition of Israeli proceedings on several grounds, including that

[78] *Ephedra*, pp. 336-337; in *Agrokor D.D.* [2017] EWHC 2791 (Ch), the English court found that the fact that the priorities of the Croatian law in reorganizing or liquidating the company were different from those that apply or would apply under English law, was not enough to support recognition being denied on the public policy ground: at [131].

[79] For example, see para. 54 below.

[80] See para. 42 above.

of public policy. In that case, after insolvency proceedings had been commenced in the United States and after the automatic stay (pursuant to article 20 MLCBI) 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".[81] 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",[82] the United States judge considered that the high threshold required to establish the public policy exception had been met. The court abstained from hearing any issues relating to rights to property in Israel, implicitly recognizing that the Israeli case would proceed.

55. In the Singapore case of *Zetta Jet* (case no. 39), a moratorium issued in Singapore enjoining further action in proceedings in the United States under chapter 11 of the United States Bankruptcy Code was not observed. Although in such circumstances recognition would normally be refused, the Singapore court nevertheless granted recognition for the limited purpose of applying to set aside or appeal the Singapore injunction, characterizing the recognition as a form of modification under article 17, paragraph 4 MLCBI or as a form of relief under article 21, paragraph 1 MLCBI. In a subsequent decision in *Zetta Jet*[83] granting full recognition to the foreign proceeding, the Singapore court held that the COMI of the Singapore subsidiary on the applicable date[84] (the date on which the petition for recognition was filed) was in the United States and that prior actions that contravened the Singapore injunction did not rise to the level of a public policy violation that would preclude recognition.

56. In *Toft* (case no. 34), a court in the United States 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

[81] *Gold & Honey*, p. 371.

[82] Ibid., p. 372.

[83] *Re Zetta Jet Pte. Ltd* [2019] SGHC 53 (4 March 2019).

[84] See discussion on the applicable date below, paras. 132 to 138, and Digest, synopsis of case law for art. 17, section "Timing with respect to the consideration of COMI and habitual residence".

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 recognized 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.[85]

57. Application of the public policy exception has also been considered in cases involving bad faith or failure on the part of the foreign representative to make full and frank disclosure of material facts to the receiving court. In *Creative Finance* (case no. 10), it was argued that the proceedings for which recognition was sought in the United States were commenced in the British Virgin Islands in bad faith. The receiving court found that the issue of recognition turned on compliance with the requirements of article 17 of the MLCBI and declined recognition on the basis that the proceedings were neither main nor non-main proceedings. On the question of bad faith, the court observed that, although it was offended by the conduct of the debtors, there was no precedent for applying the article 6 public policy exception on the sole ground of misbehaviour.[86]

58. In *Ivan Cherkasov* (case no. 7), the applicant for recognition did not disclose to the receiving English court facts relating to the decision by the Government of the United Kingdom not to assist in criminal proceedings in the originating State on the basis that to do so would be likely to prejudice the sovereignty, security, *ordre public* or other interests of the United Kingdom. The English court found that when seeking recognition full and frank disclosure must be made to the court in relation to the consequences of recognition on third parties who were not before the court, including from intended future applications enabled by recognition. The recognition order was dismissed *ab initio*.[87]

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

59. 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

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

[86] *Creative Finance*, pp. 515-516; Digest, synopsis of case law for art. 6, section "Public policy: full and frank disclosure and bad faith". See also, more generally, footnote 70 above, reference to *OGX Petroleo e Gas S.A.* [2016] EWHC 25 (Ch), CLOUT 1622, where the English court recognized that, since many applications for recognition are made on an *ex parte* basis, there must be full and frank disclosure to the court in all respects.

[87] *Ivan Cherkasov*, para. 89; Digest, synopsis of case law for art. 6, section "Public policy: full and frank disclosure and bad faith".

"main" proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor[88] and an automatic "freeze" of those assets,[89] subject to certain exceptions.[90]

7. Review or rescission of recognition order

60. 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".[91] In some instances, modification or termination of the decision to recognize will be affected by the obligation of the foreign representative under article 18 to notify the court of changes in the status of the foreign proceeding or the foreign representative's appointment.

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

(a) If the recognized foreign proceeding has been terminated;[92]

[88] MLCBI, art. 20, subparas. 1 *(a)* and *(b)*; Digest, synopsis of case law for art. 20, para. 1.

[89] Ibid., art. 20, subpara. 1 *(c)*; Digest ibid.

[90] Ibid., art. 20, para. 2; Digest, synopsis of case law for art. 20, para. 2. Recognition of "main" and "non-main" foreign proceedings is discussed in more detail in paras. 96-150 below.

[91] Ibid., art. 17, para. 4; Digest, synopsis of case law for art. 17, para. 4. Reviewing the recognition decision may present the court with a fuller record of whether recognition was appropriate in the first instance, although a decision to modify recognition might need to be carefully considered, particularly if any disputed issues remain subject to foreign court proceedings. In *Sturgeon* (case no. 32), paras. 33-47 of the judgment, the court reviewed a recognition order granted on an *ex parte* basis. The application for review sought termination of the recognition order under art. 17, subpara. 1*(a)* on the basis that the grounds for granting the order were fully lacking at the time because the solvent liquidation of *Sturgeon* was not a "foreign proceeding" for the purpose of art. 2, subpara. *(a)*. See also *In re Cozumel Caribe, S.A. de C.V.*, 508 B.R. 330 (Bankr. S.D.N.Y. 2014); and *SNP Boat Service* (case no. 30).

[92] See *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2017] FCA 331, CLOUT 1799; *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2018] FCA 153, paras. 27-29: The foreign proceeding which had been recognized in Australia had subsequently been terminated without the Australian court being informed. The Australian court noted that while the obligation under art. 18 would require it to be notified of the change in the status of the foreign proceeding, a difficulty might arise because that obligation fell upon the foreign representative who may no longer be in office. In *Yakushiji (No. 2)* (case no. 38), paras. 17, 20-22, the Australian court found that in such a circumstance the obligation to inform the court might appropriately fall upon the debtor. In that case, the receiving court was given notice of a "substantial change" in the status of the foreign proceeding, i.e., that it had been terminated by the Japanese court following acceptance of the rehabilitation plan. A consequence of acceptance of the plan was the resignation of the officers who had previously been designated as representatives of the two companies. As the protection previously ordered under MLCBI was no longer appropriate, vacation of those orders was sought. The court considered that in the case of a substantial change of that kind, where the foreign representative(s), to whom the obligation under art. 18 of the MLCBI applied, were no longer in place, it was appropriate for the companies to advise the court under art. 18.

(b) If the order commencing the foreign insolvency proceeding has been reversed by an appellate court in that State;[93]

(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.[94]

62. 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 MLCBI.

C. The process of recognition

1. Introductory comments

63. For a relevant proceeding to qualify as a "foreign proceeding", the foreign representative must persuade the receiving court that the proceeding:

(a) Is a collective judicial or administrative proceeding in a foreign State;[95]

(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.[96]

[93] In *Gerova* (case no. 15), certain creditors argued that the foreign proceeding should not be recognized in the United States 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 [art. 17 or art. 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 [art. 18 MLCBI] would require them to advise the court accordingly (p. 94).

[94] See GEI, paras. 164-166.

[95] Very little consideration has been given to the meaning of the words "foreign State". In one case that did consider this term, *In the matter of NMC Healthcare Ltd* [2021] EWHC 1806 (Ch), recognition was sought in England for an administration taking place in the Abu Dhabi Global Market (ADGM), a special financial free zone within the United Arab Emirates (the UAE) owing its existence to the federal laws of the UAE. The court found that while the ADGM was not itself a "foreign State", the foreign proceeding was taking place in a "foreign State", the UAE, which had multiple applicable laws.

[96] MLCBI, art. 2, subpara. *(a)*, definition of "foreign proceeding".

64. 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.[97]

65. 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.

66. 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 its COMI. This question is discussed in some detail below.[98]

67. 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

[97] Ibid., art. 17, para. 2, which identifies the need to determine the status of the foreign proceeding that the receiving court is recognizing; Digest, synopsis of case law for art. 2, subpara. *(a)*.

[98] See paras. 96-139 below.

activity with human means and goods or services".[99] 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.

68. As noted above,[100] 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.[101] In contrast, only discretionary relief is available to a foreign representative in respect of a "non-main" proceeding.[102]

69. 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;[103]

(b) All documents submitted in support of the application for recognition are authentic, whether or not they have been "legalized";[104]

(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 debtor's COMI.[105]

70. Notwithstanding the presumption found in article 16, paragraph 1, expert evidence may be relevant to the assessment of whether the proceeding for which recognition has been sought is a "foreign proceeding" for the purposes of the MLCBI. Expert evidence may also be relevant to the assessment of COMI or establishment, which are primarily factual inquiries to be undertaken on the basis of evidence before the court. 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.[106]

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[99] MLCBI, art. 2, subpara. *(f)*; Digest, synopsis of case law for art. 2, subparas. *(c)* and *(f)*; see also the discussion in paras. 140-150 below. It might be noted that difficulties have arisen in cases where a debtor is no longer trading in any State (and thus no establishment could be proved), but nevertheless has assets and debts to be addressed. In such cases, the MLCBI has not been available to deal with those assets and debts, as recognition could not be granted: see e.g., *Williams v Simpson (No. 5)* (case no. 37). As noted above in para. 46, assistance in such cases might be available under other laws of the receiving State.

[100] See para. 59 above.

[101] MLCBI, art. 20; see also paras. 168-176 below.

[102] Ibid., art. 21; see also paras. 177-194 below.

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

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

[105] Ibid., art. 16, para. 3; see paras. 96-139 below.

[106] An illustration of that approach can be found in *Betcorp* (case no. 5), in which the United States 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).

71. 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 MLCBI, the focus is on individual entities and therefore on each and every member of an enterprise group as a distinct legal entity.[107] It may be that the COMI of each individual group member is found to be 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 COMI of the enterprise group as such under the MLCBI.

72. 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 relating to insolvency, proof that the debtor is insolvent.[108]

2. Elements of the definition of "foreign proceeding"

73. 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 assessed at the time the application for recognition is considered by reference to the date of commencement of the foreign proceeding.[109]

(a) "Collective judicial or administrative proceeding"

74. The MLCBI was intended to apply only to particular types of insolvency proceedings. The GEI indicates that the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all

[107] This point is emphasized by the Canadian court in *Lightsquared* (case no. 21), para. 29. In *In re Servicos de Petroleo Constellation S.A.*, 600 B.R. 237, 244 (Bankr. S.D.N.Y. 2019), the United States court said it was important to bear in mind that recognition is granted on an individual debtor by debtor basis. In *Agrokor D.D.* 591 B.R. 163, 184 (Bankr. S.D.N.Y. 2018), the United States court said that, while the enterprise group aspects of the foreign law governing the foreign special administration proceeding were novel, the recognition applications dealing with nine separate entities that each had their COMI in the foreign State did not push the boundaries of cross-border insolvency law. In the English case concerning the same group ([2017] EWHC 2791 (Ch) at [52]), the court rejected the argument that the proceeding was not a foreign proceeding because it dealt with the company and its associates (i.e. a group), rather than just the company itself, on the basis that, although a group proceeding could not be recognized as such under the English legislation enacting the MLCBI, a group proceeding as a proceeding in respect of a particular debtor could be recognized. In *Zetta Jet* (case no. 39), para. 19, the Singaporean court found that it was essential to observe the separate legal personalities of members of the group and to treat each entity on its own, unless sufficient reason was shown to deal with them as one (which in that case there was not). See also *Eurofood* (case no. 13), para. 37 (decided under the EIR) and *Mood Media Corp.*, 569 B.R. 556, 562-3 (Bankr. S.D.N.Y. 2017); Digest, synopsis of case law for art. 2, "Other issues: Enterprise groups".

[108] MLCBI, art. 31.

[109] See GEI, paras. 157-160 and paras. 132-138 below.

stakeholders of an insolvency proceeding.[110] It is not intended that the MLCBI 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[111] or conservation proceeding that does not also include provision for addressing the claims of creditors. The MLCBI 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 MLCBI. 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.[112]

75. In evaluating whether a given proceeding is collective for the purpose of the MLCBI, 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 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;[113] and to receive notice of the proceedings in order to facilitate that participation.

76. 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 MLCBI was also intended to cover circumstances in which a debtor (corporate or individual) retained some measure of

[110] Digest, synopsis of case law for art. 2, subpara. *(a)*, section "Collective proceeding".

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

[112] See paras. 94-95 below; Digest, synopsis of case law for art. 2, subpara. *(a)*.

[113] In *Ashapura Minechem* (case no. 2), the court at first instance in the United States 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.

control over its assets, albeit subject to supervision by a court or other competent authority.[114]

77. Judges may be asked to determine whether there is a "collective" insolvency proceeding that engages the MLCBI. Several cases may be of assistance.[115]

78. In *Betcorp* (case no. 5), a voluntary liquidation commenced under Australian law was held by a court in the United States to be an administrative proceeding falling within the scope of the MLCBI. Because the voluntary liquidation realized assets for the benefit of all creditors, the requisite aspect of a "collective" proceeding was held to be present.[116] In *Gold & Honey* (case no. 16), 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 rights and obligations of all creditors and was designed primarily to allow a certain party to collect its debts.[117] In *British American Ins. Co. Ltd* (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.[118]

79. In another case, *Stanford International Bank* (case no. 31), a receivership order made by a court in the United States 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.[119] That view was upheld on appeal, largely for the reasons given by the English lower court.[120]

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[114] GEI, para. 71, e.g., for a so-called debtor-in-possession.

[115] See Digest, synopsis of case law for art. 2, subpara. *(a)*, section "Collective proceeding".

[116] *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 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 MLCBI 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 MLCBI] 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 MLCBI "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].

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

[118] *British American Ins. Co. Ltd*, p. 902.

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

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

80. In a further decision concerning *Stanford International Bank*, a United States appellate court noted the language in other United States court opinions[121] 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. However, the court went on to find that the receivership in *Stanford* was a different type of receivership having been 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.[122]

81. In *ABC Learning Centres* (case no. 1), the court in the United States 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, debts and claims ranked equally and were to be paid pro rata; that adequate notice was to be given to all 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.[123]

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

82. The MLCBI 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

[121] For example, *British American Ins. Co. Ltd* (case no. 6), p. 902 and *Ashapura Minechem* (case no. 2), pp. 136-137.

[122] *Stanford 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. In another case involving a receivership, *Innua Can., Ltd,* case no. 09-167362 (Bankr. D.N.J. Apr. 15, 2009), p. 4, the receiving court relied on art. 16, para. 1 of the MLCBI to recognize the foreign receivership as amounting to a foreign proceeding on the basis that the originating court had declared the receiver to be the foreign representative of a foreign proceeding and authorized the receiver to seek recognition of that proceeding in the receiving State.

[123] *ABC Learning Centres*, pp. 328-330.

to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained[124] and irrespective of whether the law that contained the rules related exclusively to insolvency.[125]

83. This aspect of article 2, subparagraph *(a)* has been considered by the courts in several cases concerning voluntary liquidation proceedings. In *Stanford International Bank* (case no. 31), 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 characterized as "pursuant to a law relating to insolvency".

84. In *Betcorp* (case no. 5), the court in the United States held that a voluntary liquidation commenced under Australian law was "pursuant to a law relating to insolvency" because when the nature of the relevant 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. In *Chow Cho Poon* (case no. 8), 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".

[124] GEI, para. 73.

[125] See Digest, synopsis of case law for art. 2, subpara. *(a)*, section "Pursuant to a law relating to insolvency". The growing popularity of schemes of arrangement and the number of jurisdictions that provide that statutory vehicle raises a question of whether they are covered by the MLCBI as arising "pursuant to a law relating to insolvency". In *Syncreon Group B.V.* 2019 ONSC 5774, para. 28, the Canadian court recognized an English scheme of arrangement as a foreign proceeding for the purposes of the MLCBI, the proceeding being one pursuant to a law relating to insolvency, where insolvency was interpreted to include a company that "was reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring". Courts in the United States have recognized and enforced as foreign proceedings under chapter 15 of the United States Bankruptcy Code schemes of arrangement from the United Kingdom and South Africa (see, e.g., *In re Avanti Commun'c Group PLC*, 582 B.R. 603, 613 (Bankr. S.D.N.Y. 2018) and *In re Cell C Proprietary Ltd*, 542 B.R. 571 (Bankr. S.D.N.Y. 2017), respectively). However, it might be noted that the definition of foreign proceeding in sect. 101(23) of the United States Bankruptcy Code includes the words "or adjustment of debt" that do not appear in the definition of a "foreign proceeding" in art. 2 subpara. *(a)* of the MLCBI; the addition of those words may affect the recognition of schemes of arrangements in the United States.

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".

85. A different approach has been taken by the English court in *Sturgeon* (case no. 32). The case involved a company incorporated in Bermuda and a petition by its major shareholder for winding the company up on just and equitable grounds, because of a serious breakdown in the basis on which the company was set up and because investors were being denied their rights. On review of an earlier decision recognizing the foreign proceeding, the English court took the view, disagreeing with the finding in *Betcorp*, that a procedure for a solvent legal entity that did not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, was likely not one pursuant to a law relating to insolvency within the meaning intended by article 2, subparagraph *(a)*.

The GEI

86. Following consideration and discussion of this issue in UNCITRAL Working Group V (Insolvency Law) and the Commission, the GEI clarifies that the word "insolvency", as used in the MLCBI, refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent. A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2 subparagraph *(a)* are not insolvency proceedings within the scope of the MLCBI. 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 MLCBI only if the debtor is insolvent or in severe financial distress.[126]

[126] GEI, para. 48. It should be noted that recital 16 of the EIR recast provides: "This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency."

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

87. No distinction is drawn, in the definition of "foreign court",[127] 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 undertaken by non-judicial authorities would still fall within the definition of "foreign proceeding".[128]

88. The MLCBI 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 GEI 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.[129] 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.[130]

89. 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

[127] MLCBI, art. 2, subpara. *(e)*; see also para. 12 above.

[128] GEI, para 87. In *Ashapura Minechem* (case no. 2), for example, the Indian proceeding recognized in the United States 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 791, the Swiss Federal Banking Commission was held by the court in the United States to be a "foreign court" because it controlled and supervised liquidation of entities in the brokerage trade. In *ENNIA Caribe Holdings N.V.*, 594 B.R. 631, 639-640 (Bankr. S.D.N.Y. 2018), a case concerning the insolvency of an insurance company, the receiving court found that the body with oversight of the insurance industry was a body competent to control or supervise the assets and affairs of the debtor.

[129] Digest, synopsis of case law for art. 2, subpara. *(a)*, section "In which the assets and affairs of the debtor are subject to control or supervision by a foreign court".

[130] GEI, para. 74; Digest, synopsis of case law for art. 2, subpara. *(a)*, section "In which the assets and affairs of the debtor are subject to control or supervision by a foreign court". In *Agrokor D.D.* [2017] EWHC 2791 (Ch), the English court found that the control or supervision required can be potential rather than actual and/or indirect rather than direct: at [79]. Considering the various provisions of the extraordinary administration law of Croatia, which gave certain supervisory and other powers to the Croatian court, the court found that "once the proceeding has been commenced, and for so long as it lasts, it is under the control or supervision of the court, through the medium of the extraordinary administrator": at [93].

with respect to its implementation, the proceeding nevertheless remains open or pending and the court retains jurisdiction until implementation is completed.[131]

90. 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.[132]

91. The concept of "control or supervision" has received limited judicial attention to date.[133]

92. 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 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".[134]

93. 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)*.[135]

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[131] GEI, para. 75. In *Oversight & Control Commission of Avanzit, S.A.*, 385 B.R. 525, 535 (Bankr. S.D.N.Y. 2008), CLOUT 925, recognition of a Spanish insolvency proceeding, a *suspensión de pagos,* was sought in the United States. Recognition was opposed on the grounds that the Spanish proceeding was no longer a "foreign proceeding" for the purposes of the MLCBI, as the *convenio*, or plan of repayment, reached in the foreign proceeding had been approved by the Spanish court. Under Spanish law the foreign representative was not authorized to interfere in the debtor's operations, absent default under the terms of the *convenio*. The court found that sufficient jurisdiction remained over the debtor's affairs on the basis that the debtor was required to make payments under the *convenio* for two years and failure to comply with the terms of the *convenio* rendered the debtor subject to liquidation in the foreign court. The United States court said that although the Spanish court's level of control or supervision was reduced, it did not entirely cease and a "foreign proceeding", sufficient to justify recognition under chapter 15 of the United States Bankruptcy Code (implementing the MLCBI), still existed.

[132] *Gold & Honey* (case no. 16), p. 371; Digest, synopsis of case law for art. 2, subpara. *(a)*, section "In which the assets and affairs of the debtor are subject to control or supervision by a foreign court".

[133] See Digest, synopsis of case law for art. 2, subpara. *(a)*, section "In which the assets and affairs of the debtor are subject to control or supervision by a foreign court".

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

[135] *ABC Learning Centres*, pp. 331-332.

(d) "For the purpose of liquidation or reorganization"

94. 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.[136]

95. 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.[137] Such measures would generally satisfy neither the requirement for collectivity nor for control or supervision by the court.[138]

3. The main proceeding: COMI

(a) Introductory comments

96. To recognize a foreign proceeding as a "main" proceeding, the receiving court must determine that the debtor's COMI was situated within the State in which the foreign proceeding originated.[139] A review of the origin of the concept of COMI and the way in which it has been applied in decided cases may be of assistance to judges grappling with this issue.

[136] See Digest, synopsis of case law for art. 2, subpara. *(a)*, section "For the purposes of liquidation or reorganization". In *Agrokor D.D.* [2017] EWHC 2791 (Ch), the English court rejected the argument that the true purpose of the Extraordinary Administration Law (EA Law) of Croatia was not to reorganize the company's affairs, but to protect the company as a going concern in light of its systemic importance to the Croatian economy. The court said that the two purposes were not incompatible and that although the EA Law was designed to protect a systemically important Croatian business, it was also designed to reorganize the company's affairs; at [105]. In *Sturgeon* (case no. 32), the English court said it would be contrary to the stated purpose and object of the MLCBI to interpret "foreign proceeding" to include solvent debtors and more particularly to include actions that are subject to a law relating to insolvency but have the purpose of producing a return to members, not creditors.

[137] Such contractual arrangements would remain enforceable outside the MLCBI without the need for recognition; nothing in the MLCBI or GEI is intended to restrict such enforceability.

[138] See paras. 74-81 and 87-93 above.

[139] MLCBI, art. 2, subpara. *(b)*.

97. For the purposes of the MLCBI, a deliberate decision was taken not to define COMI. The notion was taken from the European Convention, for reasons of consistency.[140] At the time the MLCBI was finalized, the European Convention had not come into force, and it subsequently lapsed for lack of ratification by all European Union member States.[141]

98. Subsequently, the EIR applied to European Union member States (except Denmark) as a means of dealing with cross-border insolvency issues within the European Union. The concepts of "main proceedings" and COMI were carried forward into the text of the EIR.[142] The EIR stresses the need for the COMI to be "ascertainable by third parties".[143] The GEI notes that the notion of COMI corresponds to the formulation in article 3 of the EIR and acknowledges the desirability of "building on the emerging harmonization as regards the notion of a 'main' proceeding".[144] Although the concepts in the two texts are similar, they serve different purposes. The determination of COMI under the EIR and its successor EIR recast relates to the jurisdiction in which main proceedings should be commenced. The determination of COMI under the MLCBI relates to the effects of recognition, principal among those being the relief available to assist the foreign proceeding.

99. Recitals (12) and (13) of the EIR 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

[140] See GEI, para. 81.

[141] 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.

[142] EIR, recitals (12) and (13) are set out in para. 99 below. They correspond, respectively, to recital (23) and art. 3, para. 1 (reproduced in para. 102 below) of the EIR recast.

[143] Ibid., recital (13); EIR recast, recitals (28), (30) and art. 3, para. 1. Recital 28 provides, in particular, that "When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means."

[144] GEI, 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 EIR does not define COMI (see recital 13 below). During discussion in the UNCITRAL working group negotiating the MLCBI, it was noted that the selection of the concept of COMI 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 the use of the MLCBI 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).

secondary proceedings[145] 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."

100. In anticipation of ratification of the European Convention by all European Union member States, an explanatory report on the European Convention was prepared (the Virgos-Schmit Report).[146] That report provided guidance on the concept of "main insolvency proceedings" and, notwithstanding the subsequent demise of the European Convention, has been accepted generally as an aid to interpretation of the term COMI in the EIR.

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

"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

[145] The EIR refers to "secondary proceedings", while the MLCBI uses "non-main proceedings".
[146] See subpara. 7 *(i)* above.

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."

102. Article 3, paragraph 1 of the EIR recast explains COMI as follows:

"The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. 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. The presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings."

"In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings."

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

103. There have been a number of court decisions that consider the meaning of the phrase "centre of main interests", either in the context of interpretation of the EIR, or its successor the EIR recast, or the national laws based on the MLCBI, and which identify the factors relevant to rebutting the presumption in article 16,

paragraph 3 of the MLCBI 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.[147]

104. The leading European decision is *Eurofood* (case no. 13), 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 COMI in the State of its registered office or that of the parent company.

105. 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 EIR, the presumption is found in article 3, paragraph 1:[148]

> "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."

106. 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".[149]

107. 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.[150] In contrast, it took the view that "the mere fact" that a parent company made economic choices (for

[147] For example, under chapter 15 of the Bankruptcy Code of the United States (the chapter enacting the MLCBI), 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.

[148] Compare with MLCBI, art. 16, para. 3. See also Virgos-Schmit Report, para. 75.

[149] *Eurofood*, para. 34.

[150] Ibid., para. 35.

example, for tax reasons) as to where the registered office of the subsidiary might be situated would not be enough to rebut the presumption.[151]

108. *Eurofood* places significant weight on the need for predictability in determining the COMI of a debtor. In the subsequent case of *Interedil* (case no. 18), 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.[152]

109. In *Bear Stearns* (case no. 4), the United States court considered the question of determination of the COMI of a debtor under the MLCBI. The application for recognition involved a company registered in the Cayman Islands which had been placed into provisional liquidation in that jurisdiction.

110. The court identified the rationale for the change made to the presumption by the United States legislation enacting the MLCBI, that is, replacing "proof" with "evidence".[147] The judge said, by reference to the legislative history of the provision:

> "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."

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

[152] *Interedil*, para. 59. In the subsequent case of *Re Leitzbach* [2018] EWHC 1544 (Ch), the High Court in England considered COMI as used in the EIR and summarized the required features as follows: (a) a person or entity could only have one COMI at any one time; (b) in the case of an individual it was where they could be contacted and would normally be their habitual residence; (c) an individual was free to relocate their COMI and the question was whether they had in substance done so or whether the change was illusory; (d) a debtor was not bound to advertise their COMI but nor could they conceal it; (e) the location of COMI was an objective question of where the debtor carries on the regular administration of his or her affairs in a way that was ascertainable by third parties (the debtor's subjective view not being determinative); (f) "regular administration" required a degree of continuity and permanence, a sense of normality and a stable link with the forum; and (g) the motive for a change of COMI might invite the scrutiny of the evidence by the court in examining its genuineness.

111. 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".[153]

112. 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 COMI was in some place other than the registered office.[154] 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. The decision in *Bear Stearns* was affirmed on appeal.

113. The decision in *Bear Stearns* was substantially limited by subsequent authority in which United States courts have held that the reorganization or liquidation activities of the debtor can properly be considered in determining its COMI. In *Morning Mist* (case no. 25), the court held that the decision in *Bear Stearns* was correct in recognizing a proceeding filed in the British Virgin Islands as a foreign main proceeding based on the fact that more than 18 months before the petition for recognition and more than seven months before the British Virgin Islands case was filed the debtor had effectively ceased business, severed its relations with its investment manager in New York, and had begun a winding up process. The court concluded that it was appropriate to consider those activities in connection with a determination as to COMI and that "the debtors' most feasible 'nerve centre' had existed for some time in the BVI [British Virgin Islands]."[155] There was a similar result in *British American Ins. Co. Ltd* (case no. 6).

114. The appellate court in *Morning Mist* also listed the following factors that a court can take into account in assessing COMI:[156]

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

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

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

[154] Ibid; as to the burden of proof, see discussion relating to the GEI under section (c) below and Digest, synopsis of case law for art. 16, para. 3.

[155] Ibid., at [64], citing *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193-94 (2010) in which 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.

[156] It should be noted that the assessment of COMI in the United States is made at the time of the opening of the recognition proceedings. The issue of the time at which the assessment is to be made is discussed further below in section (e).

(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 the debtor and creditors.[157]

115. Further decisions are those of the English courts at first instance and on appeal in *Stanford International Bank* (case no. 31). 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*.

116. At first instance, the judge accepted a submission that ascertainment by third parties was an overarching consideration, following the approach set out in *Eurofood*.[158] The judge made that decision in the context of the Cross-Border Insolvency Regulations 2006 (enacting the MLCBI in Great Britain), rather than under the EIR. 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.[159] In doing so, the judge declined to follow an earlier decision of his own in which he had applied the "head office functions" test.

117. The judge observed that the difference in approach, in relation to rebuttal of the presumption, between courts in the United States 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.[160]

118. The judge expressed some doubt about whether the factors listed in *Bear Stearns*[161] 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

[157] *Morning Mist* (case no. 25) at [137], citing *In re SphinX Ltd*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006). In *LATAM Airlines Group S.A./Technical Latam S.A.* (Case No. C-8553-2020, 20 August 2020), the court in Chile rebutted the presumption that the debtor, although registered in that jurisdiction, had COMI there, in favour of another jurisdiction where a substantial part of the debtor's business and its reorganization took place and where the shares of the debtor were traded and whose law governed financing obtained by the debtor through the issuance of international bonds.

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

[159] Ibid., para. 62.

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

[161] See para. 114 above.

or internationally.[162] 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.

119. The decision in *Stanford International Bank* was upheld on appeal. In the principal judgment, the presiding judge held that there was a clear correlation between the words used in the MLCBI and the EIR, both in relation to COMI and the presumption.[163] 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[164] (concerning ascertainability) was equally apposite for MLCBI 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.[165] Subsequent cases under the MLCBI have confirmed the requirement of ascertainability.[166]

120. In the case of a natural person, the COMI is presumed, in accordance with article 16, paragraph 3 of the MLCBI, to be the person's "habitual residence".[167] In *Williams v Simpson (No. 5)* (case no. 37), 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."[168] Although the debtor had carried on

[162] *Stanford International Bank* (first instance), para. 67; compare with the list of factors set out at para. 114 above.

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

[164] Virgos-Schmit Report, para. 75; see para. 101 above.

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

[166] *Ackers v Saad* ([2010] FCA 221), CLOUT 1219; *Gerova* (case no. 15); *Lightsquared* (case no. 21); *Massachusetts Elephant & Castle* (case no. 22); *Millennium Global* (case no. 24). In *NIKI Luftfahrt* (36n IN 6433/17, 84 T 2/18 (14 Dec 2018)), the court in Berlin held that social media may be used to help determine the ascertainability of COMI by third parties.

[167] See Digest, synopsis of case law for art. 16, para. 3.

[168] *Williams v Simpson (No. 5)*, para. 42, adopting the definition of "habitual residence" in *Basingstoke v Groot* [2007] NZFLR 363 (CA) on the basis that that definition had been used in another international instrument, the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. See also *Gainsford* (case no. 14), paras. 40-41 of the judgment. In *Kapila* (case no. 20), the Australian court was faced with an individual debtor who it found to be "a transnational insolvent with multifarious litigation and entrepreneurial activities spread over numerous jurisdictions whose ambulatory behaviour made it difficult to identify his habitual residence, if indeed he had one"; 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 1274 and *Pirogova* (case no. 26). Some of the factors relevant to determining the COMI of a corporation were found to be useful in instances where the debtor was an individual – see Digest, synopsis of case law for art. 16, section "COMI with respect to individuals: habitual residence". In the European Union, in *MH v OJ* (2020 EUCJ C-253/19 and [2021] 1WLR 2498), the court held COMI was to be established by an overall assessment of all the objective criteria ascertainable by third parties, and in particular creditors; that in the case of an individual not exercising an independent business or professional activity, the rebuttable presumption was that his or her COMI was the place of habitual residence; and that that presumption was not rebutted merely because their only immovable property was located in a State other than that of their habitual residence.

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.

(c) The GEI

121. The GEI responds to uncertainty and unpredictability that has arisen with respect to interpretation of the concept of COMI. It notes that where the debtor's COMI coincides with its place of registration, no issue concerning rebuttal of the presumption in article 16, paragraph 3 of the MLCBI will arise. In reality, however, the debtor's COMI 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.[169] The court of the receiving State will be required to consider independently where the debtor's COMI is located and whether the requirements of the MLCBI 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,[170] although that order clearly is not binding on the receiving court. In those cases where the debtor's COMI does not coincide with its place of registration, the COMI will be identified by factors that indicate to those who deal with the debtor (especially creditors) where it is located.

122. The GEI proposes 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 COMI. The factors are the location: *(a)* where the central administration of the debtor takes place, and *(b)* which is readily ascertainable by creditors,[171] analysed by reference to the date of commencement of the foreign proceedings.

123. When these principal factors do not yield a ready answer regarding the debtor's COMI, 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 a holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's COMI, which is readily ascertainable by creditors.

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[169] GEI, paras. 141-144.

[170] As an example, the Canadian court in *Cinram International* (case no. 9) outlined in its judgment the factors that the applicants had submitted to indicate that the location of the debtors' COMI was Canada. The court said it had included that outline with respect to the COMI in its judgment "for informational purposes only". The court clearly recognized that it was the function of the receiving court – in that case, the United States Bankruptcy Court for the District of Delaware – to make the determination on the location of the COMI and to determine whether the Canadian proceeding was a "foreign main proceeding" for the purposes of chapter 15 (para. 42).

[171] GEI, para. 145; as to the timing, see also paras. 132-138 below.

124. 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.[172]

125. The GEI 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.[173]

126. Several cases decided during the revision of the GE (between 2010 and 2013) considered the factors determining COMI and adopted the approach of focusing upon a few principal factors. In *Massachusetts Elephant & Castle* (case no. 22), 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 COMI, 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.[174]

127. Those factors were followed in *Lightsquared* (case no. 21),[175] where the Canadian judge also observed that while in most cases these principal factors will all point to a single jurisdiction as the COMI, 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,

[172] GEI, para. 147. For a discussion of cases considering those factors see Digest, synopsis of case law for art. 16, para. 3, section "COMI with respect to corporate debtors: relevant factors".

[173] GEI, para. 147.

[174] *Massachusetts Elephant & Castle*, paras. 30-31.

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

consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

128. In *Think3* (case no. 33),[176] the Japanese court was required to determine whether the foreign main proceeding was a proceeding commenced in the United States 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 GE 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 COMI

129. A debtor's COMI 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.[177] 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 122 and 124 above more carefully and to take account of the debtor's circumstances more broadly. In particular, the test that the COMI is readily ascertainable to third parties may be harder to meet if the move of the COMI occurs in close proximity to the commencement of proceedings.

130. In *Interedil* (case no. 18), decided under the EIR, the ECJ considered the impact of the move of the debtor's registered office before commencement of the

[176] In the Japanese legislation enacting the MLCBI, the phrase "principal place of business" is used rather than COMI and there is no presumption with respect to registered office that is equivalent to art. 16, para. 3 of the MLCBI. 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 COMI and judicial precedents in other countries regarding COMI and the trend of discussion in UNCITRAL are to be considered and examined [chap. 3, issue 2-2 (2), p. 19].

[177] 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 COMI. In other examples, the move of the COMI may have been designed to thwart the legitimate expectations of creditors and third parties. See, e.g., *In re Ocean Rig UDW Inc*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017), appeal dismissed for lack of appellate standing, 585 B.R. 31 (S.D.N.Y. 2018), affirmed, 764 F. Appx. 46 (2d Cir. 2019). The principal debtor was a holding company formed in the Marshall Islands that had taken steps to move its COMI from the Marshall Islands to the Cayman Islands, changing its registration, establishing an office there and filing schemes of arrangement in the Cayman court. It took those steps in order to establish jurisdiction in the Cayman Islands and to put in effect a restructuring of debt supported by their creditors. On their petition to obtain recognition in the United States of the Cayman proceedings as foreign main proceedings, the Ocean Rig debtors established that they had never performed any business in the Marshall Islands, that they had publicly disclosed their change of COMI, that they had the support of most of their creditors, that they had bank accounts and books and records and personnel in the Cayman Islands, and that no evidence in the record suggested any location for their COMI other than the Cayman Islands. Based on those findings the United States court held that the debtors had not manipulated their COMI in bad faith, rather demonstrating a legitimate, good faith purpose for the shifting of COMI (570 B.R. at 706-07).

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 COMI is presumed to be the place of the new registered office.[178] The EIR recast includes a rule concerning movement of COMI within a three-month period prior to the request for commencement of an insolvency proceeding for companies and legal persons and six months for natural persons.[179]

131. 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 COMI for the purposes of the MLCBI, since the time relevant to that determination is the date of commencement of the foreign proceeding, as discussed below.

(e) Date at which to determine COMI

132. The MLCBI does not expressly indicate the date by reference to which the COMI (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 MLCBI.

133. 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 COMI should be determined was the time at which the application for recognition was made.[180] 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

[178] *Interedil*, para. 59.

[179] See para. 102 above. In *Galapagos BidCo* (Case No. C-723/20), the ECJ ruled that the court of a European Union member State with which a request to open main insolvency proceedings has been lodged retains exclusive jurisdiction to open such proceedings where COMI is moved to another European Union member State after that request has been lodged, but before that court has delivered a decision on it. Consequently, insofar as the EIR recast remains applicable to that request, the court of another European Union member State with which another request is lodged subsequently for the same purpose cannot, in principle, declare that it has jurisdiction to open main insolvency proceedings until the first court has delivered its decision and declined jurisdiction.

[180] *Betcorp*, pp. 290-292.

non-main proceeding": "means a foreign proceeding ... taking place in a State where the debtor has an establishment".[181]

134. Other courts have held that the relevant date for determining COMI is the date on which the foreign proceeding commenced. In *Millennium Global* (case no. 24), 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 COMI is viewed as equivalent to a debtor's principal place of business, an interpretation used by a number of courts, COMI 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.[182] That holding was disapproved by the appellate court in *Morning Mist* (case no. 25).

135. The date of the making of the application for commencement of the foreign proceeding or the commencement of that proceeding was followed by the Japanese court at first instance in *Think3* (case no. 33) and affirmed on appeal.[183] 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.[184]

136. A third possibility that has been identified is the date the court is called upon to make a decision on the application for recognition. That approach places emphasis on the flexible nature of the MLCBI as evidenced by article 18 and the desirability of considering actual facts relevant to the court's decision, rather than setting an arbitrary determination point.[185]

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[181] The approach in *Betcorp* has been followed in a number of cases, including *British American Ins. Co. Ltd* (case no. 6); *Gainsford* (case no. 14) with respect to the time at which to determine habitual residence; *Morning Mist* (case no. 25); *Ran* (case no. 27); and *Zetta Jet* (case no. 39). See Digest, synopsis of case law for art. 17, para. 2, section "Timing with respect to the consideration of COMI and habitual residence", subsection (a).

[182] *Millennium Global* (first instance), pp. 71 and following; the issue of the date at which to determine COMI and establishment was not considered by the appeal court in that case, but was considered by an appellate court in *Morning Mist*, see para. 134 above.

[183] *Think3*, Tokyo High Court, chap. 3-2, p. 6; Tokyo District Court, chap. 3, issue 2-1, pp. 12-14.

[184] That approach has been followed in a number of cases including *Kapila* (case no. 20), *Stanford International Bank* (case no. 31) and *Videology* (case no. 35). See Digest, synopsis of case law for art. 17, para. 2, section "Timing with respect to the consideration of COMI and habitual residence", subsection (b).

[185] That approach has been followed in several cases including *In the matter of Legend International Holdings Inc* [2016] VSC 308, CLOUT 1619 and *Moore, as Debtor-in-possession of Australian Equity Investors* [2012] FCA 1002, CLOUT 1477. See Digest, synopsis of case law for art. 17, para. 2, section "Timing with respect to the consideration of COMI and habitual residence", subsection *(c)*.

137. In *Interedil* (case no. 18), decided under the EIR, the ECJ held that it is the location of the debtor's COMI at the date on which the request to open insolvency proceedings was lodged that is relevant for determining the court having jurisdiction.

138. The GEI indicates that having regard to the evidence required to accompany the application for recognition under article 15 and the relevance accorded to the decision commencing the 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 COMI.[186] 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,[187] where, as may occur in cases of reorganization, it is not the debtor entity that continues to have a COMI, 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 MLCBI.

(f) Abuse of process

139. 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 MLCBI itself that suggests that extraneous circumstances should be taken into account on a recognition application. The MLCBI 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,

[186] GEI, para. 159.

[187] In *Morning Mist* (case no. 25), the court at first instance in the United States 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 COMI (pp. 64-65). In *British American Ins. Co. Ltd* (case no. 6), the court suggested that a debtor's COMI 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).

the MLCBI does not explicitly prevent receiving courts from applying domestic law, particularly procedural rules, to respond to a perceived abuse of process.[188]

4. Non-main proceedings: "establishment"

(a) Introductory comments

140. In order for a proceeding to be recognized as a "non-main proceeding", a debtor must have "an establishment" in the foreign jurisdiction. The term "establishment" forms part of the MLCBI's definition of "foreign non-main proceeding". It is also used, in the EIR and the EIR recast, to assist courts of European Union member States to determine whether jurisdiction exists to open secondary insolvency proceedings when the COMI is in another European Union member State. Article 3, paragraph 2, of the EIR recast 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 it 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."

141. The EIR recast, article 2, subparagraph (10) includes a definition of "establishment" which states:

> "'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets."

[188] See discussion of abuse of process above under art. 6 (part III, section B "The 'recognition' principle", subsection 5. "The public policy exception"). Several of the United States cases that have used the date of the opening of chapter 15 recognition proceedings as the applicable date for determining COMI have stated that the court can nevertheless consider whether the debtor had changed COMI to the disadvantage of creditors during the period between the commencement of the original insolvency proceedings and the date of the chapter 15 petition for recognition: see, e.g., *Morning Mist* (case no. 25) at [139] (there is a "look backward to thwart manipulation") and *Ran* (case no. 27) at [1022] (no evidence the debtor had changed his residence to escape responsibility for his debts).

142. The GEI notes[189] that the definition of "establishment" in the MLCBI was inspired by article 2, paragraph *(h)*, of the EIR. The Virgos-Schmit Report 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."[190]

143. Whether an "establishment" exists is largely a question of fact; no presumption is provided in the MLCBI. 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 or services" within the relevant State.[191] 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.[192] As with the definition of "foreign proceeding", the various elements of the definition of "establishment" should be read as a whole rather than being broken down into discrete elements, as each element may colour the others.[193]

(b) Court decisions on interpretation of "establishment"

144. The term "establishment" has been discussed by some of the authorities.[194] In *Bear Stearns* (case no. 4),[195] "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,

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[189] GEI, para. 88.

[190] Virgos-Schmit Report, para. 71.

[191] MLCBI, art. 2, subpara. *(f)*.

[192] In *Office Metro Limited* [2012] EWHC 1191 (Ch), [para. 33], a case decided under the EIR, the court said that the concept of "non-transitory" was intended to encapsulate such things as "the frequency of the activity; whether it is planned or accidental or uncertain in its occurrence; the nature of the activity; and the length of time of the activity itself".

[193] *Videology Limited* (case no. 35), para. 79 quoting the relevant part from *Trustees of the Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA* [2015] 1 WLR 2399.

[194] Digest, synopsis of case law for art. 2, subparas. *(c)* and *(f)*.

[195] *Bear Stearns* (first instance), pp. 131-132; see also *Ran* (case no. 27), pp. 285- 288 and *British American Ins. Co. Ltd* (case no. 6), pp. 914-916.

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.[196]

145. 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 *Videology* (case no. 35), the court indicated that the requirement that activities should be carried on with the debtor's assets and human agents suggests a business activity consisting of dealings with third parties and not acts of internal administration.[197] In *Interedil* (case no. 18), decided under the EIR, 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".[198]

146. In *Ran* (case no. 27), 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 MLCBI, and the requirement, in the context of corporate debtors, for there to be a place of business.[199] 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 an establishment".[200] 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.[201]

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

[197] Para. 79.

[198] Paras. 5 and 64. The concept of "establishment" is also used in the context of value-added tax (VAT). For example, in *Titanium Ltd v Bundesfinanzgericht Austria* (Case C-931/19), the court confirmed that an "establishment" was a business characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplied.

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

[200] *Ran* (5th Cir. 2010), p. 1027.

[201] Ibid., p. 1028.

147. Similarly, in *Pirogova* (case no. 26), the receiving court held that the evidence provided by the foreign representative asserting the debtor's connection to Russia – specifically, the ownership of an apartment, utility bills relating to the apartment, 100 per cent ownership of a Russian company currently in liquidation, membership in a club and ownership of two cars in Russia – was insufficient to demonstrate that the debtor had a place of operations in Russia from which non-transitory economic activity was conducted. The court said that even if it were to conclude that the ownership of a single asset was sufficient to constitute a place of operations, it must also be proved that the debtor carried out non-transitory activities from that place.[202]

148. In *Williams v Simpson (No. 5)* (case no. 37), 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.

149. In *Kapila* (case no. 20), the receiving court was faced with an individual debtor who it found to be "a transnational insolvent with multifarious litigation and entrepreneurial activities spread over numerous jurisdictions whose ambulatory behaviour made it difficult to identify his habitual residence, if indeed he had one". However, the court held that his business dealings in the United States were sufficient to constitute an establishment and the proceedings commenced in the United States could thus be recognized as foreign non-main proceedings.[203]

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

150. As noted above, the MLCBI does not expressly indicate the relevant date for determining the COMI of the debtor. The same is true with respect to determining the existence of an establishment. The GEI suggests that the date of commencement of the foreign proceeding is the appropriate date for determining the existence of an establishment for the debtor.[204]

[202] *Pirogova*, p. 417; see also *Gainsford* (case no. 14), paras. 48-52.
[203] *Kapila*, paras. 56-57.
[204] GEI, para. 160.

D. Relief

1. Introductory comments

151. Three types of relief are available under the MLCBI:

(a) Interim (urgent) relief that can be sought at any time after the application to recognize a foreign proceeding has been made;[205]

(b) Automatic relief consequent upon recognition of a foreign proceeding as a "foreign main proceeding";[206] and

(c) Discretionary relief consequent upon recognition of the foreign proceedings as either a main or non-main proceeding.[207]

152. The MLCBI 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.

153. By virtue of the definition of "foreign proceeding",[208] the effects of recognition extend to foreign "interim proceedings".[209] That solution is necessary because interim proceedings are not distinguished from other insolvency proceedings merely because they are of an interim nature.

154. 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.

155. Nothing in the MLCBI 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.[210]

156. Consideration of the particular statute enacting the MLCBI is required in order to determine whether any type of relief (automatic or discretionary) envisaged

[205] MLCBI, art. 19.

[206] Ibid., art. 20.

[207] Ibid., art. 21.

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

[209] 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.

[210] MLCBI, 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.

by the MLCBI has been removed or modified in the enacting State.[211] 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 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.[212] That decision was also followed in *Metcalfe & Mansfield* (case no. 23), in which a United States court was asked to enforce certain orders for relief issued by a Canadian court, orders that were arguably 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.[213]

2. Interim relief [214]

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

[211] States that have enacted legislation based on the MLCBI 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 MLCBI.

[212] *Atlas Shipping* (case no. 3), p. 738.

[213] *Metcalfe & Mansfield* (case no. 23), pp. 697-698.

[214] The summary that follows is based substantially on the GEI, paras. 170-175. See also Digest, synopsis of case law for art. 19.

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.

157. 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 may tailor it to the case at hand.[215] 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.

158. Article 19 authorizes the court to grant the type of relief that is usually available only in collective insolvency proceedings,[216] as opposed to the "individual" type of relief that may be granted before the commencement of insolvency proceedings under domestic rules of civil procedure.[217] Nevertheless, discretionary

[215] 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. 49-58 above. In *Tri-Continental Exchange* (349 B.R. 627 (Bankr. E.D. Cal. 2006), CLOUT 766), which involved recognition in the United States of proceedings commenced in Saint Vincent and the Grenadines, the receiving court considered whether to impose additional conditions, in accordance with arts. 6 and 22, on the relief sought by the foreign representatives, i.e. that they be entrusted under art. 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 additional conditions beyond that 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, art. 22, para. 3, enabled it to revise its position and exercise its authority under art. 22, para. 2, to impose conditions on the entrustment under art. 21, subpara. 1 *(e)*, to the foreign representatives. Those conditions could include the giving of a security or the filing of a bond.

[216] I.e. the same type of relief available under art. 21.

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

"collective" relief under article 19 is somewhat narrower than the relief available under article 21.[218]

159. The restriction of interim relief to relief available on 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.[219] 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. One of the factors to be taken into account in granting interim relief, however, is the likelihood that, in due course, a recognition order will be made.[220]

160. The urgency of the measures is alluded to in the opening words of article 19, paragraph 1 of the MLCBI. Subparagraph *(a)* restricts a stay to execution proceedings, and subparagraph *(b)* refers to perishable assets and assets susceptible to devaluation or otherwise in jeopardy.[221] Otherwise, the measures available under article 19 are essentially the same as those available under article 21.

[218] In *Halo Creative & Design Limited v Comptoir des Indes Inc*, case no. 14C 8196 (N.D. Ill Oct. 2, 2018), the interim relief sought was a stay on litigation which, the United States court noted, was available under art. 21 MLCBI only when the foreign proceedings had been recognized.

[219] See also the discussion of *Rubin v Eurofinance* (case no. 28) in paras. 185-186 below.

[220] See, for example, *Williams v Simpson* (17 September 2010) (case no. 37) and *Whittman v UCI Holdings Ltd* [2016] NZHC 1228, in which the court said that while a strong likelihood of the substantive application succeeding was not necessary for the interim relief to be granted, nevertheless the likelihood of substantive success was a relevant consideration in granting interim relief (adopting *Tucker, Aero Inventory (UK) Ltd v Aero Inventory (UK) Limited* [2009] FCA 1354).

[221] For example, *Tucker* (20 November 2009) (2009) 76 ACSR 19; (2009) FCA 1354, CLOUT 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 art. 20 would commence. A further example is the case of *Williams v Simpson* (17 September 2010) (case no. 37). 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 art. 19] extended only to property known to exist and readily locatable". It went on to say that "the flexibility inherent in art. 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 art. 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.

161. Article 19 relief is provisional in nature. The relief terminates when the application for recognition is decided upon;[222] however, the court is given the opportunity to extend the relief.[223] 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.

162. 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.[224] 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.[225]

163. 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.

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.

164. 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

[222] MLCBI, art. 19, para. 3.
[223] Ibid., art. 21, subpara. 1 *(f)*.
[224] Ibid.; see also arts. 29 and 30.
[225] Ibid., art. 15, para. 3.

that may be affected by such relief.[226] This balance is essential to achieve the objectives of cross-border insolvency legislation.

165. Several cases have considered issues relating to adequate protection of creditors.[227] In *Jaffé v. Samsung Electronics* (case no. 19), the issue was whether a German trustee could, based on German law, reject patent licences issued to parties in the United States, or whether those parties were entitled to the protection against rejection available under the United States Bankruptcy Code, section 365(n). The appeal court ruled in favour of the licensees, basing its decision on the "sufficient protection"[228] mandated by section 22 of the MLCBI and finding that "the bankruptcy court reasonably exercised its discretion in balancing the interests of the licensees against the interests of the debtor and that application of section 365(n) was necessary to ensure the licensees under [the foreign debtor's] United States patents were sufficiently protected."

166. In *Sivec* (case no. 29), 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 two potentially offsetting claims. This litigation resulted in a United States creditor seeking relief from the stay to permit set-off of the two judgments. 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 judgments. 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, 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.[229]

167. In *SNP Boat Service* (case no. 30), the concept of adequate protection was interpreted more narrowly. In that case, a Canadian creditor objected to the debtor in a French insolvency proceeding seeking to repatriate assets in the United States to

[226] See generally GEI, paras. 196-199 and Digest, synopsis of case law for art. 22. In *Tri-Continental Exchange* (349 B.R. 627 (Bankr. E.D. Cal. 2006), CLOUT 766), the court said that the standards that inform the analysis of [art. 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).

[227] See also cases discussed in the Digest, synopsis of case law for art. 22.

[228] Referred to in chapter 15 of the United States Bankruptcy Code (enacting the MLCBI) as "sufficient protection" instead of "adequate protection". This wording was used so as not to confuse the concept of adequate protection as used in the MLCBI with adequate protection as used otherwise in United States insolvency law. In the latter case, it generally means the protection of secured creditors against diminution in the value of their collateral by virtue of the stay of enforcement proceedings under the United States Bankruptcy Code. No change of substance was intended.

[229] *Sivec* (case no. 29), pp. 324-326.

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 MLCBI, 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."[230] 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.[231]

3. Automatic relief upon recognition of a main proceeding[232]

168. 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.

[230] *SNP Boat Service* (on appeal), pp. 783-784. The court identified three basic principles governing the concept of sufficient or adequate protection: (a) the just treatment of all holders of claims against the bankruptcy estate; (b) the protection of local claimants against prejudice and inconvenience in the processing of claims in the foreign proceeding; and (c) the distribution of proceeds of the foreign estate substantially in accordance with the order prescribed by local law [p. 786].

[231] 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."

[232] The summary that follows is based substantially on the GEI, paras. 176-188. See also Digest, synopsis of case law for art. 20.

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 [i*dentify laws of the enacting State relating to insolvency*] or the right to file claims in such a proceeding.

169. 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.

170. 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 MLCBI, 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.

171. 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.[233]

172. 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

[233] See MLCBI, art. 20, para. 2.

under certain conditions in some States.[234] Article 20, subparagraph 1 *(b)*, was added to make it abundantly clear that executions against the assets of the debtor[235] are covered by the stay.[236]

173. 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.[237] 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.

174. 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

[234] In *Fibria Cellulose S/A v Pan Ocean Co. Ltd* [2014] EWHC 2124 (Ch), paras. 67-70 and 75, CLOUT 1482, the English court concluded that the service of a notice to terminate a contract, in accordance with its terms, was not the commencement or continuation of an individual action or proceeding and thus the court did not have power to restrain its service under art. 21, subpara. 1*(a)*.

[235] In *Kim and Yu v STX Pan Ocean Co. Ltd* [2014] NZHC 845 [paras. 16-18], CLOUT 1481, the New Zealand court considered the meaning of "assets of the debtor" by reference to the definition of that term in the Legislative Guide, having regard to art. 8 of the MLCBI and provisions of the enacting legislation authorizing interpretation by reference to the MLCBI and any document relating to it originating from UNCITRAL or the working group that assisted in preparing the MLCBI.

[236] In *JSC BTA Bank* (434 BR 334 (Bankr. S.D.N.Y. 2010), CLOUT 1211), the court in the United States 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 COMI 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. In *Samsung Logix Corporation v DEF* [2009] EWHC 576 (Ch), where an arbitration hearing was scheduled to take place in England on the day following the English court's consideration of the recognition application, the court held the arbitration was stayed as a result of the recognition decision. In *OGX Petroleo e Gas S.A.* [2016] EWHC 25 (Ch), CLOUT 1622, where arbitration proceedings being conducted under a contract entered into after approval of the reorganization plan were not covered by that plan, the English court said the automatic stay was not intended to operate to prevent persons whose claims were not subject to the foreign proceedings from being able to pursue those claims against the debtor.

[237] See MLCBI, art. 20, para. 2.

of the stay and the suspension provided in the article is subject to the provisions of law of the enacting State relating to insolvency.[238]

175. 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.[239] If a local proceeding is initiated, article 29 deals with the coordination of the foreign and the local proceedings.[240]

176. Although the MLCBI does not specify the length of the duration of the automatic stay, several courts have considered that question. In *Yakushiji (No. 2)* (case no. 38), the Australian court said that the automatic stay would normally be coterminous with the stay applicable in the corresponding foreign proceeding and would thus cease when the foreign proceeding closed since at that point the purpose of the stay – to allow the debtor time to develop a plan and prevent creditors from pursuing alternative remedies – would no longer be applicable.[241] It has also been suggested that there may be situations in which continued enforcement of the stay after the closure of the foreign proceeding might be available, such as where the stay was violated prior to closure[242] or to allow the plan approved in the foreign proceeding to control distribution of the debtor's assets and prevent creditors from seeking to recover debts in excess of the amounts provided in the plan.[243]

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[238] The law of the United States, for example, exempts from the stay actions by 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. In Canada, the actions of the United Kingdom regulator violated the stay under the Companies' Creditors Arrangement Act. The regulator had served, in Canada, a "warning notice" issued under the United Kingdom legislation and this was found to be a step in a proceeding that constituted a breach of the stay order: *Re Nortel Networks Corp.* (2010) 65 C.B.R. (5th) 231 (Ont. S.C.J. [Commercial List]); affirmed (2010) 67 C.B.R. (5th) 21 (Ont. C.A.); leave to appeal to S.C.C. dismissed (2011), 2011 CarswellOnt 303 (S.C.C.).

[239] The right to apply to commence a local insolvency proceeding and to participate in it is, in a general way, dealt with in arts. 11 to 13 of the MLCBI.

[240] See paras. 219-222 below.

[241] *Yakushiji (No. 2)* (case no. 38), paras. 21-22; see also *Board of Directors of Rizzo-Bottiglieri-De-Carlini Armatori SpA v Rizzo-Bottiglieri-De-Carlini Armatori SpA* [2017] FCA 331 [paras. 17-19], CLOUT 178-179; *Daewoo Logistics Corp*., 461 B.R. 175, 179 (Bankr. S.D.N.Y. 2011), CLOUT 1315.

[242] *Daewoo Logistics Corp.*, 461 B.R. 175, 180 (Bankr. S.D.N.Y. 2011), CLOUT 1315.

[243] *Ho Seok Lee*, 348 B.R. 799, 803 (Bankr. W.D. Wash., 2006), CLOUT 754; compare *In Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802, paras. 97-101, CLOUT 1822, in which the English court observed that once the foreign proceeding had terminated, there would no longer be a foreign representative who could apply to the English court for assistance, nor would there be a foreign proceeding for which such assistance could be sought. On that basis, the court said, it would be anomalous if a stay granted before the termination of the foreign proceeding was permitted to remain in force indefinitely. The court declined to explore the approach in *Daewoo* and *Ho Seok Lee* on the basis that the background to the incorporation of the MLCBI in the United States differed significantly from that in Great Britain or Australia.

4. Post-recognition relief [244]

(a) The provisions of the MLCBI

177. 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.

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

[244] The present summary is taken substantially from the GEI, paras. 189-195. See also Digest, synopsis of case law for art. 21.

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.

178. 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.[245] 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.[246]

179. It is in the nature of discretionary relief that the court may tailor such relief to the case at hand.[247] This idea is reinforced by article 22, paragraph 2, according to

[245] In *In re CGG S.A.* 579 B.R. 716 (Bankr. S.D.N.Y. 2017), for example, the United States court recognized a French sauvegarde proceeding as a foreign proceeding and enforced the order of the French court confirming the sauvegarde plan as being appropriate relief under section 1521 and additional assistance under section 1507 of chapter 15 (arts. 21 and 7 MLCBI). See also T. com., Paris, 14 juin 2017, RG n° 2017033581 (order of the Commercial Court of Paris opening Sauvegarde proceedings against CGG SA) and T. com., Paris, 1er décembre 2017, RG n° 2017049128 (order of the Commercial Court of Paris approving the Sauvegarde Plan of CGG SA).

[246] Courts in the United States uniformly hold that relief available under art. 21 is not limited to relief that is available under the United States Bankruptcy Code, recognizing the well-established principle that the relief granted in the foreign proceeding and the relief available in the United States do not need to be identical. *In re Rede Energia*, S.A., 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014), the United States court held that chapter 15 "provides courts with broad, flexible rules to fashion relief that is appropriate to effectuate the objectives of the Chapter in accordance with comity", and noted the "well-established principle that the relief granted in the foreign proceeding and the relief available in the United States do not need to be identical". The court found that appropriate relief under sect. 1521 of chapter 15 (art. 21 MLCBI) included enforcing a foreign confirmation order. See also, *In re Oi, S.A.*, 587 B.R. 253 (Bankr. S.D.N.Y. 2018); and *In re Agrokor D.D.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018). The principle that relief granted by the foreign court may go beyond relief that would be available under the United States Bankruptcy Code has been applied in several cases involving third-party releases, which are not as broadly available under United States law as they may be under the laws of other States. In *Metcalfe & Mansfield* (case no. 23) the United States court found that the Canadian court had approved non-debtor relief in limited circumstances which were in accord with the narrow application of art. 7 by United States courts. Thus, the United States court concluded that the orders granted in the foreign proceeding should be enforced. A case to the contrary is *Vitro* (case no. 36), which nevertheless cited *Metcalfe & Mansfield* with approval. It should also be noted that *Vitro* contained particular facts that, it would appear, led the appellate court to deny relief. The court in that case also considered the relationship between relief sought under chapter 15, sect. 1507 (the United States version of art. 7 MLCBI, which is not standard since it elaborates on additional assistance that may be provided to the foreign representative), and relief sought under chapter 15, sect. 1521, which is substantially the same as art. 21 MLCBI.

[247] 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 215 above) and paras. 49-58 above; see also *Fibria Cellulose S/A v Pan Ocean Co. Ltd (In the matter of Pan Ocean Co. Ltd)* [2014] EWHC 2124 (Ch), CLOUT 1482, in which the English court discussed different outcomes in the United States and England with respect to the relief sought in the case of *Toft* (case no. 34).

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.

180. The "turnover" of assets to the foreign representative (or another person), as envisaged in article 21, paragraph 2, remains discretionary. The MLCBI contains several safeguards designed to ensure the protection of local interests before assets are turned over to the foreign representative.[248] In *Atlas Shipping* (case no. 3), the United States 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.[249] 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.

181. 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.

182. 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.

[248] Those safeguards include: the general statement of the principle of protection of local interests in art. 22, para. 1; the provision in art. 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 (see Digest, synopsis of case for art. 21, para. 2); and art. 22, para. 2, according to which the court may subject the relief it grants to conditions it considers appropriate (see Digest, synopsis of case law for art. 22, para. 2).

[249] *Atlas Shipping* (case no. 3), p. 742.

183. 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.

184. 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.[250] That is one of the reasons why the court may grant relief on such conditions as it considers appropriate.[251] 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.[252]

185. An example of a case in which relief was initially refused is *Rubin v Eurofinance* (case no. 28). 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 judgment entered in the United States. An issue arose as to whether relief of that type was contemplated by the MLCBI. At first instance, the judge accepted that the proceeding in which judgment was entered was "part and parcel" of chapter 11 insolvency proceedings in the United States.[253] 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[254] (which would justify relief) and a judgment 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 judgment could not be enforced under the terms of the MLCBI. For enforcement purposes, the usual rules of English private international law continued to apply.

186. That decision was affirmed by the Supreme Court (overturning the decision of the Court of Appeal[255]), which held that the judgments were subject to the

[250] See paras. 164-167 above.

[251] MLCBI, art. 22, para. 2.

[252] Ibid, art. 22, para. 3.

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

[254] 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.

[255] 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 judgment in question was for the purposes of the collective enforcement regime of the insolvency proceeding. As such, the court held, that judgment was governed by the private international law rules relating to insolvency and not by the ordinary private international law rules preventing enforcement of judgments because the defendants were not subject to the jurisdiction of the foreign court (*Rubin v Eurofinance* (on appeal), para. 61).

ordinary private international law rules preventing enforcement because the defendants were not subject to the jurisdiction of the foreign court. The court also held that there was nothing in the MLCBI that suggested it would apply to recognition and enforcement of foreign judgments against third parties.[256] The decision of the Supreme Court in *Rubin* was conjoined with an appeal in the case of *New Cap Reinsurance Corp Ltd & Anor V Grant and others*.[257] In that case, the Supreme Court held that the foreign judgment could be enforced because New Cap had submitted to jurisdiction by filing proofs of debt in the foreign insolvency proceedings.

(b) Approaches to questions of discretionary relief

187. 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, 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 MLCBI 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 MLCBI, neither statute was in force at the time that proceeding was commenced in England.[258]

188. 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;[259] that decision was upheld on appeal.[260] On a second appeal, the earlier decisions were overturned and relief was granted in favour of the Australian liquidators.[261]

[256] Article X in the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with the Guide to Enactment (2018) states that, notwithstanding any prior interpretation to the contrary, the relief available under article 21 of the MLCBI includes recognition and enforcement of a judgment.

[257] [2012] UKSC 46.

[258] 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.

[259] *HIH Casualty and General Insurance Ltd (2005)* (case no. 17).

[260] *HIH* (first appeal) (case no. 17).

[261] *McGrath v Riddell (HIH Casualty and General Insurance Ltd)* (case no. 17).

189. 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.[262] On that basis, the main proceeding in Australia should be allowed to have universal effect;[263]

(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 requirement to assist the Australian liquidators. There was no fundamental public policy consideration that would disentitle the Australian liquidators from obtaining relief;[264]

(c) The third approach relied on four specific factors to grant relief:[265]

(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.

(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*

[262] Compare the discussion of public policy in *Gold & Honey* in para. 54 above.
[263] *McGrath v Riddell (HIH Casualty and General Insurance Ltd)*, paras. 30, 36 and 63.
[264] Ibid., paras. 59, 62, 76 and 77.
[265] Ibid., para. 42.

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.

190. Article 23[266] 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 refers are likely to be identified in the legislation of the enacting State.

191. When the foreign proceeding has been recognized as a "non-main proceeding", it is necessary for the court to consider specifically whether any action to be taken under the article 23 authority relates to assets that "should be administered in the foreign non-main proceeding".[267] 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.

192. 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.[268] 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.

193. In *Condor Insurance (Fogarty v Petroquest Resources)* (case no. 11), 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.[269] Reversing the decisions of the first- and second-instance courts, the appellate court held that the Bankruptcy Court did

[266] See also GEI, paras. 200-203.

[267] MLCBI, art. 23, para. 2.

[268] Ibid., art. 23, para. 1.

[269] It should be noted that the United States adopted a non-standard provision relating to avoidance provisions. Section 1521(a)(7) of chapter 15 of the Bankruptcy Code provides that the court could grant "any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." Those are the avoidance provisions available under United States law; they are unavailable to a foreign representative under chapter 15, although they would be available to a foreign representative who brought a plenary proceeding under chapter 7 or chapter 11 of the Bankruptcy Code.

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. Although chapter 15 excepts avoidance powers under United States law from the relief that may be granted under the equivalent of article 21, subparagraph 1 *(g)*, chapter 15 does not 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.[270] 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.[271]

194. *Condor Insurance* has been applied in subsequent cases in the United States, permitting avoidance claims to be asserted under English law[272] and under Norwegian law.[273]

E. Cooperation and coordination[274]

1. Cooperation

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.

[270] *Condor Insurance* (on appeal), section III, pp. 321-329. See also Digest, synopsis of case law for art. 23.

[271] *Atlas Shipping*, p. 744.

[272] *Hosking v. TPG Capital Mgmt., L.P. (In re Hellas Telecomm. (Luxembourg) II SCA)*, 535 B.R. 543 (Bankr. S.D.N.Y. 2015).

[273] *Bankruptcy Estate of Norske Skodindustrier ASA v. Cyrus Capital Ptnrs, L.P. (In re Bankruptcy Estate of Norske Skodindustrier ASA)*, 629 B.R. 717 (Bankr. S.D.N.Y. 2021).

[274] The present summary is taken substantially from the GEI, paras. 209-223. See also Digest, synopsis of case law for arts. 25-27.

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;

(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*].

195. Articles 25 to 27 of the MLCBI 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[275] through fair and efficient administration of the insolvency estate.

196. Court cooperation and coordination are core elements of the MLCBI. Cooperation is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets[276] 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.[277] Cooperation leads to better coordination of the various insolvency proceedings, streamlining them with the object of achieving greater benefits for creditors.

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

198. While the EIR did not address the issue of cooperation, the EIR recast includes a provision on cooperation between courts. Article 42, paragraph 1 provides that courts "shall cooperate with any other court … to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings", while paragraph 3 indicates that cooperation may be implemented by any means the court considers appropriate, in particular: *(a)* coordination in the appointment of the insolvency practitioners; *(b)* communication of information by any means considered appropriate by the court; *(c)* coordination of the administration and supervision of the debtor's assets and affairs; *(d)* coordination of the conduct of hearings; and *(e)* coordination in the approval of protocols, where necessary.

199. The articles of the MLCBI leave the decision as to when and how to cooperate to the courts and, subject to the supervision of the courts, to the insolvency

[275] MLCBI, preamble, subpara. *(e)*.

[276] For example, when items of production equipment located in two States are worth more if sold together than if sold separately.

[277] See the Legislative Guide, part three: Treatment of enterprise groups in insolvency, recommendations 239-254 on promoting cross-border cooperation in enterprise group insolvencies, as well as the UNCITRAL Model Law on Enterprise Group Insolvency and Guide to Enactment (2019), chap. 2 (arts. 9-18), which deal with coordination and cooperation in the group context; see also para. 71 above.

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 MLCBI 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.

200. 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.

201. 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, which was held prior to adoption of the MLCBI. 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.

202. From those reports, a number of points emerged:[278]

(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;[279]

(b) Communication should be done openly, with advance notice to the parties involved[280] and in the presence of those parties, except in extreme circumstances;[281]

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

[279] Ibid., chap. III, paras. 21-34 and recs. 241-243.

[280] 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. 8), 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 art. 27 of the MLCBI contemplates cooperation to start by either a request from one court to another or by way of subscribing to an agreed plan (para. 56).

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

(c) Communications that might be exchanged are various and include formal court orders or judgments, informal writings of general information, questions and observations, and transcripts of court proceedings;[282]

(d) Means of communication include telephone, video link, facsimile and e-mail;[283]

(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.

203. Several cases below 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.

204. In *Maxwell Communication*,[284] a case pre-dating the MLCBI, judges in the United States and England raised independently with the parties' legal representative in each country the possibility that a cross-border insolvency agreement[285] 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.[286]

205. 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.[287] In a procedural sense, the hearing was conducted simultaneously. 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

[282] Ibid., para. 20 and rec. 241.

[283] Ibid., para. 20.

[284] 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).

[285] See the Practice Guide, chap. III.

[286] 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).

[287] *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).

actively participate in that part of the hearing. 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.[288]

206. Examples of joint hearings in cross-border insolvency cases have been steadily increasing.[289] 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.

207. A different example is the efforts of courts to cooperate by containing the effects of their decisions, when those decisions conflict with decisions of other States' courts. In *Perpetual Trustee Company Ltd v Lehman Bros. Special Financing Inc*,[290] a series of requests led to an English court responding to the United States 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.[291] 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 discussed by the courts but not resolved, although part of it was subsequently settled in the United States case.

208. 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*,[292] the Australian court

[288] 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 publicly available.

[289] See e.g., *Loo v Quinlan and Kelly (in their capacity as liquidators)* [2021] NZCA 561 [26 October 2021] and *Kelly, in the Matter of Halifax Investment Services Pty Ltd (in liq) (No 5)* [2019] FCA 1341 (*Re Halifax*), involving joint hearings in cross-border insolvency cases between Australia and New Zealand.

[290] [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* [2009] EWHC 2953 (Ch), [2010] 2 BCLC 237; *Re Lehman Brothers Holdings Inc* 422 BR 407 (US Bankruptcy Court, SDNY, 2010)."

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

[292] *Parbery; in the matter of Lehman Brothers Australia Limited (in liq)* [2011] FCA 1449, CLOUT 1215.

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 judgment.

209. The cross-border cases involving Nortel Networks Ltd, a company with operations in 140 jurisdictions throughout the world, demonstrate the importance of judicial cooperation and communication especially in complex international enterprise group insolvency cases. They also indicate that the complex of measures may need to be taken by the courts and the foreign representatives involved in those cases to achieve their effective, efficient and timely resolution:

(a) The parent companies commenced insolvency proceedings in Canada, where they were located, the European subsidiaries commenced in England, and the United States subsidiaries commenced in Delaware;

(b) The Delaware court recognized the Canadian and the English proceedings, respectively, as foreign main proceedings under chapter 15 of the United States Bankruptcy Code, on the premise that Canada was the COMI of the parent and the United Kingdom was the COMI of the subsidiaries doing business in the United Kingdom and Europe;[293]

(c) The three groups were able to affect a sale of much of their property worldwide on a going concern basis, pursuant to an Interim Funding Agreement, with the proceeds of sale to be escrowed pending further proceedings;

(d) A subsequent decision of the United States court stated that the proceeds of the sales were to be held in escrow "until the parties either agree on a consensual

[293] See Order dated February 27, 2009 in *In re Nortel Networks Corp*., Case No. 09 10164 (KG) (Bankr. D. Del.) (ch. 15 proceeding), relating to the Canadian proceedings, and Order, dated June 26, 2009, in *In re Nortel Networks UK Limited*, Case No. 09 11972 (KG) (Bankr. D. Del.) (ch. 15 proceeding), relating to the English proceedings. The monitor/administrators in the Canadian and English proceedings, respectively, were all associated with the same firm. There were also filings in France and Israel regarding subsidiaries located there.

allocation, or, in the absence of such an agreement, obtain a binding determination on the allocation pursuant to an agreed upon allocation protocol…to be determined (absent a consensual agreement) in a single cross jurisdictional forum";[294]

(e) The parties agreed to "negotiate in good faith to attempt to reach agreement on the terms that would govern the allocation protocol process", with the allocation to be based in part on "the respective contributions of the various Nortel entities to the value of the assets sold";

(f) Subsequent efforts to allocate the proceeds, with the help of mediators, were unsuccessful;

(g) The English administrator moved to compel arbitration of the allocation issues. This effort was denied by the United States court and affirmed on appeal,[295] where the court held that the Interim Funding Agreement in question did not constitute an agreement to arbitrate the parties' dispute regarding the allocation of the sale proceeds;[296]

(h) The competing parties then conducted a joint trial before the United States court and the Canadian court;

(i) In 2015, the United States and Canadian judges issued their respective decisions.[297] The decisions were substantively the same, although each judge relied on domestic law. The courts held that the escrowed proceeds (which had been considerably depleted on account of the costs of litigation) should be divided pro rata among all of the creditors of the debtor entities; therefore, for allocation purposes, each creditor would be entitled only to one allocation from the escrowed funds, even if it were entitled to claims in multiple estates (on account of guarantees, for example). The United States court rejected alternative methodologies, finding that a master research and development agreement did not govern allocation, and that allocation should not depend on the entity that held bare title to the underlying intellectual property or had contributed more or less to the group's revenue stream. It also held that this method of allocation did not amount to substantive consolidation of the estates;

(j) Subsequent to the two decisions, the parties engaged in another further mediation, reaching a resolution in early 2017. In the United States, the resolution was incorporated in a plan of reorganization confirmed by the Bankruptcy Court.[298] Plans were also confirmed or sanctioned (approved) in Canada and the United Kingdom, and distributions were scheduled after a delay of more than seven years.

[294] *In re Nortel Networks Corp*., 426 B.R. 84, 95 (Bankr. D. Del. 2010).

[295] *In re Nortel Networks Inc*, 737 F.3d 265, 267–68 (3d Cir. 2013).

[296] Id. at 272.

[297] See *In re Nortel Networks, Inc*, 532 B.R. 494 (Bankr. D. Del. 2015) and *Nortel Networks Corp. (Re),* 2015 ONSC 2987 (Super Ct. Ont. May 12, 2015).

[298] See dm.epiq11.com/nortel (last visited 30 December 2021).

210. 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.[299] 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.[300]

211. In 2000, the American Law Institute (ALI) developed the Court-to-Court Communication Guidelines as part of its work on transnational insolvency in the countries of the North American Free Trade Agreement (NAFTA). A joint study, commissioned by the ALI and the International Insolvency Institute (III) and intended to adapt those guidelines for global use,[301] resulted in the ALI-III Global Principles for Cooperation in International Insolvency Cases 2012 (ALI-III Global Principles and Guidelines 2012).[302] The ALI-III Global Principles and Guidelines 2012 include 37 Global Principles for Cooperation in International Insolvency Cases, and 18 Global Guidelines for Court-to-Court Communications in International Insolvency Cases. These Principles and Guidelines constitute a non-binding statement, drafted in a manner to be used both in civil law and common law jurisdictions around the world.

[299] For examples of the use of this technique, see the Practice Guide, chap. II, paras. 2-3. As indicated in the Practice Guide, cases using this technique have included *Maxwell Communication* (see para. 204 above); *In re Matlack Sys. Inc*, Superior Court of Justice of Ontario, Case No. 01-CL-4109 and the United States Bankruptcy Court for the District of Delaware, Case No. 01-01114 (Bankr. D. Del. May 24, 2001); and *In re Nakash*, United States Bankruptcy Court for the Southern District of New York, Case 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 Practice Guide. In addition, in *LATAM Airlines Group S.A./Technical Training LATAM S.A.* (Case No. C-8553-2020, 20 August 2020), following a suggestion made by the competent authorities of Chile, courts in Cayman Islands, Chile, Colombia and the United States implemented a cooperation protocol to facilitate an adequate and efficient administration of the relevant proceedings. The protocol addressed such procedural aspects as communication channels (phone calls, video conferences, etc.), joint hearings, translation requirements, safekeeping of confidential documents, submission of progress reports and joint hearings for the explanation of the said reports. Subsequently, the debtor submitted monthly reports before all the concerned courts summarizing the progress made in the United States chapter 11 proceedings.

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

[301] A cross-border insolvency agreement endorsed by courts in Ontario, Canada and Delaware, United States in *In re Matlack Sys. Inc* (see footnote 299 above) demonstrates how the Court-to-Court Guidelines have been adapted for use in an actual case. The Guidelines were also adopted in a number of other cross-border insolvency agreements (see the case summaries in annex I to the Practice Guide).

[302] Available at: www.iiiglobal.org/international-resource-library.

212. In October 2016, the Judicial Insolvency Network (JIN) held its inaugural conference in Singapore, which concluded with the issuance of a set of guidelines, drafted by the participants at that conference, titled "Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters" also known as the JIN Guidelines.[303] The Guidelines address key aspects of, and the modalities for, communication and cooperation among courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. The overarching aim of the Guidelines is the preservation of enterprise value and the reduction of legal costs.

213. As part of a European Union initiative called "European Cross-border Insolvency: Promoting Judicial Cooperation", a set of 26 European Union Cross-Border Insolvency Court-to-Court Cooperation Principles (EU JudgeCo Principles) and 18 European Union Cross-Border Insolvency Court-to-Court Communications Guidelines (EU JudgeCo Guidelines) were developed by judges and other experts.[304] The Principles, which are non-binding, aim to overcome present obstacles to cooperation for courts in European Union member States, and include the EU JudgeCo Guidelines to facilitate communications in individual cross-border cases. These texts have been developed in the context of the EIR recast, which by emphasizing court-to-court cooperation, calls for a more concrete and detailed approach to judicial cross-border cooperation (recital 45 and articles 41-44 and 56-59 of the EIR Recast).

2. Coordination of concurrent proceedings

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.

[303] The Guidelines are available at: www.jin-global.org/jin-guidelines.html (accessed 30 December 2021), as is a list of adopting jurisdictions, together with the texts of the various adoptions.

[304] An extended version of the text, with introduction and commentaries, is available at: www.tri-leiden.eu (accessed 30 December 2021).

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.

214. 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.[305]

215. 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.

[305] See Digest, synopsis of case law for arts. 28 and 29.

216. 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.[306] 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.

217. 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]".

218. 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.

219. 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 MLCBI in that it allows the receiving court, in all circumstances, to provide relief in favour of the foreign proceeding.

220. 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;[307]

(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;[308]

[306] 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.

[307] MLCBI, art. 29, subpara. *(a)*(i).

[308] 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 or terminated if inconsistent with the local proceeding;[309]

(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.[310]

221. 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.

222. 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.

[309] 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.

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

223. 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.

224. 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.

225. 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.[311]

226. 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".[312]

227. 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.

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

228. 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.[313] 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.

229. 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.

230. 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.

231. The expression "secured claims"[314] 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.

[313] Digest, synopsis of case law for art. 32.

[314] The Legislative Guide, in para. 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

1. *ABC Learning Centres Limited (In re)*
   728 F.3d 301 (3d Cir. 2013), cert. denied, 571 U.S. 1198 (2014), CLOUT 1338 and CLOUT 1210

2. *Ashapura Minechem Ltd (In re)*
   480 B.R. 129 (S.D.N.Y. 2012), CLOUT 1313 *affirming* Case No. 11-14668 (Bankr. S.D.N.Y. 22 November 2011) (first instance)

3. *Atlas Shipping A/S (In re)*
   404 B.R. 726 (Bankr. S.D.N.Y. 2009), CLOUT 1277

4. *Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd (In re)*
   389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794 (appeal) *affirming* 374 B.R. 122 (Bankr. S.D.N.Y. 2007), CLOUT 760 (first instance)

5. *Betcorp Ltd (In re) (in liquidation)*
   400 B.R. 266 (Bankr. D. Nev. 2009), CLOUT 927

6. *British American Ins. Co. Ltd (In re)*
   425 B.R. 884 (Bankr. S.D. Fla. 2010), CLOUT 1005

7. *Ivan Cherkasov, William Browder, Paul Wrench v Nogotkov Kirill Olegovich, The Official Receiver of Dalnyaya Step LLC (In Liquidation)* [2017] EWHC 3153 (Ch) (5 December 2017), CLOUT 1797

8. *Chow Cho Poon (Private) Limited (Re)*
   (2011) NSWSC 300 (15 April 2011), CLOUT 1218

9. *Cinram International Inc (Re)*
   2012 ONSC 3767 (Ont. SCJ [Commercial List]), CLOUT 1269

10. *Creative Finance Ltd (In re)*
    543 B.R. 498 (Bankr. S.D.N.Y. 2016), CLOUT 1624

11. *Condor Ins. Ltd (In re) (Fogarty v Petroquest Resources Inc)*
    601 F.3d 319 (5th Cir. 2010), CLOUT 1006 *reversing* 411 B.R. 314, *Condor Insurance Limited (In re)* (S.D. Miss. 2009), CLOUT 928

12. *Ephedra Products Liability Litigation (In re)*
349 B.R. 333 (S.D.N.Y. 2006), CLOUT 765

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

14. *Gainsford, in the matter of Tannenbaum v Tannenbaum*
(2012) FCA 904, CLOUT 1214

15. *Gerova Financial Group, Ltd (In re)*
482 B.R. 86 (Bankr. S.D.N.Y. 2012), CLOUT 1275

16. *Gold & Honey, Ltd (In re)*
410 B.R. 357 (Bankr. E.D.N.Y. 2009), CLOUT 1008

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

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

19. *Jaffé v Samsung Electronics Co. Ltd*
737 F.3d 14 (4th Cir. 2013), CLOUT 1337; 462 B.R. 165 (2011) and 433 B.R. 547 (2009), CLOUT 1212

20. *Kapila, Re Edelsten*
[2014] FCA 1112, CLOUT 1475

21. *Lightsquared LP (Re)*
2012 ONSC 2994 (Ont. SCJ [Commercial List]), CLOUT 1204

22. *Massachusetts Elephant & Castle Group, Inc (Re)*
2011 ONSC 4201 (Ont. SCJ [Commercial List]), CLOUT 1206

23. *Metcalfe & Mansfield Alternative Investment (In re)*
421 B.R. 685 (Bankr. S.D.N.Y. 2010), CLOUT 1007

24. *Millennium Global Emerging Credit Master Fund Ltd (In re)*
474 B.R. 88 (S.D.N.Y. 2012) *affirming* 458 B.R. 63 (Bankr. S.D.N.Y. 2011), CLOUT 1208 (first instance)

25. *Morning Mist Holdings Ltd v Krys (In re Fairfield Sentry Ltd)*
714 F.3d 127 (2d Cir. Apr. 16, 2013), CLOUT 1339 *affirming* 458 B.R. 665 (S.D.N.Y. 2011), CLOUT 1316 (second instance) *affirming* 440 B.R. 60 (Bankr. S.D.N.Y. 2010) (first instance)

26. *Pirogova (In re)*
593 B.R. 402 (Bankr. S.D.N.Y. 2018)

27. *Lavie v. Ran (In re Ran)*
607 F.3d 1017 (5th Cir. 2010), CLOUT 1276 *affirming* 406 B.R. 277 (S.D. Tex. 2009) CLOUT 929 and 390 B.R. 257 (Bankr. S.D. Tex. 2008)

28. *Rubin & Anor v Eurofinance SA and others*
[2012] UKSC 46, CLOUT 1270 (second appeal) *reversing* [2010] EWCA Civ 895 (appeal) *reversing* [2009] EWHC 2129 (Ch) (first instance)

29. *Sivec Srl (In re)*
476 B.R. 310 (Bankr. E.D. Okla. 2012), CLOUT 1312

30. *SNP Boat Service, S.A. v. Hotel le St. James*
483 B.R. 776 (S.D. Fla. 2012), CLOUT 1314 (appeal) 435 B.R. 446 (Bankr. S.D. Fla. 2011) (first instance)

31. *Stanford International Bank Ltd*
[2010] EWCA Civ. 137, CLOUT 1003 (appeal) *affirming* [2009] EWHC 1441 (Ch), CLOUT 923 (first instance)
Civil Action No. 3:09-CV-0721-N (N.D. Tex. 2012)

32. *Sturgeon Central Asia Balanced Fund Ltd (in liq) (In the matter of)*
[2020] EWHC 123 (appeal) *reversing* [2019] EWHC 1215 (Ch) (17 May 2019), CLOUT 1819 (first instance)

33. *Think3 Inc*
Case nos. 3 and 5 of 2011 Tokyo District Court (31 July 2012); Case no. 1757 of 2012 (appeal) Tokyo High Court (2 November 2012), CLOUT 1335

34. *Toft (In re)*
453 B.R. 186 (Bankr. S.D.N.Y. 2011), CLOUT 1209

35. *Videology Ltd (Re)*
[2018] EWHC 2186 (Ch) (16 August 2018), CLOUT 1823

36. *Vitro S.A.B. de C.V. (In re)*
701 F.3d 1031 (5th Cir. 2012), CLOUT 1310

37. *Williams v Simpson*
[2011] B.P.I.R. 938 (High Court of New Zealand, Hamilton, 17 September 2010); *Williams v Simpson (No. 5)* [2010] NZHC 1786 (2011) NZLR 380 (12 October 2010), CLOUT 1220

38. *Yakushiji (in his capacity as foreign representative of Kaisha) v Kaisha* [2015] FCA 1170, CLOUT 1620; *Yakushiji (in his capacity as foreign representative of Kaisha) v Kaisha (No. 2)* [2016] FCA 1277

39. *Zetta Jet Pte Ltd and Others (Re)*
[2018] SGHC 16 (24 January 2018), CLOUT 1815;
[2019] SGHC 53 (4 March 2019), CLOUT 1816

1. ABC Learning Centres Limited

The debtor was the Australian parent company of a group of 38 subsidiaries, which had owned and operated childcare centres in Australia, Canada, New Zealand, the United Kingdom and the United States. 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 MLCBI 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 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 satisfied their 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 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 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 COMI. The court stated 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 MLCBI, which directed that interpretation of the MLCBI 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 COMI in the European Union context, noting the ECJ decision in the *Eurofood* case that the COMI 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 COMI 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. 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 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 COMI 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. Ivan Cherkasov

Between 2010 and 2013, Russian authorities made at least 12 separate requests to authorities in the United Kingdom for mutual legal assistance in relation to Russian criminal proceedings against certain parties associated with a debtor company subject to liquidation proceedings in Russia. These requests were all rejected, the United Kingdom Government indicating with respect to several of them that "the United Kingdom is unable to provide any of the assistance requested as the Secretary of State is of the opinion that to do so is likely to prejudice the sovereignty, security, *ordre public*, or other essential interests of the United Kingdom". In April 2016, the Russian liquidation proceedings were recognized in England as foreign main proceedings. In support of the application for recognition, the foreign representative's

counsel told the English court that it gave rise to no public policy considerations, no reference having been made to either the criminal proceedings or the requests for mutual assistance. Subsequently, in August 2016, the foreign representative issued a statement indicating that he had not informed the recognizing court of the alleged fraud that was the subject of the criminal proceedings as part of the recognition application because he did not believe those allegations had any connection to the debtor or its liquidation. He went on to say that since it had now been alleged the liquidation proceedings were a "manifestation" of an alleged criminal scheme relating to a fraud, he considered it proper to bring those matters to the attention of the receiving court. The court directed that the recognition order should stand. In September 2017, the foreign representative applied, in the light of various events that had occurred since recognition was granted, to terminate the recognition. The English court had to determine: (a) whether it should hear and give a judgment on the allegation that the foreign representative in Russian insolvency proceedings concerning "DSL" breached its duties of full and frank disclosure when the foreign representative applied for recognition under the Cross-Border Insolvency Regulations 2006 (enacting the MLCBI in Great Britain – the CBIR), even though this issue was no longer a live issue; (b) if the matter of adequate disclosure should be entertained, whether the duties of the foreign representative were indeed breached; and (c) whether the recognition order that was previously granted should be set aside *ab initio* on the basis of material non-disclosure, or rather should be terminated at the foreign representative's request. The court held that although the parties agreed that the recognition order should no longer continue, it was not agreed whether it should be terminated now or declared to have never been valid. In addition, it was in the public interest for the court to decide on the issue in view of the serious allegations of wrongdoing. The court also observed that the foreign representative breached his full and frank disclosure duties when he applied for the recognition order. The court had not been fully informed about relevant material facts, including regarding the highly political nature of the case. It should have had the opportunity to determine whether recognition should be denied on the grounds that it would be manifestly contrary to public policy, pursuant to article 6 of schedule 1 to the CBIR [article 6 MLCBI]. Thus, the recognition order was set aside *ab initio*.

8. 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 MLCBI in Australia). In particular, the court considered whether the Singapore proceeding was a foreign proceeding within the meaning of article 2 of the MLCBI. 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 Centres*) 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.

9. 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. 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 COMI 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 COMI, 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 COMI and to determine whether the Canadian proceeding was a "foreign main proceeding" for the purposes of chapter 15 of the United States Bankruptcy Code.

10. Creative Finance Ltd

The debtors were organized under British Virgin Islands law and engaged in foreign exchange trading through accounts provided by foreign exchange brokers located outside the British Virgin Islands. No business was conducted in the British Virgin Islands, but rather in the United Kingdom and operations were directed out of Spain and Dubai. Before commencement of insolvency proceedings in the British Virgin Islands, an English company sued the debtors in England under contracts governed by the laws of England and Wales. The English court orally announced that it would enter judgment for the plaintiff and directed the debtors to make arrangements for payment of that judgment. Before the judgment was formally registered, however, over USD 9.5 million was transferred overseas from the debtors' accounts in England. Subsequently, the debtors filed voluntary insolvency proceedings in the British Virgin Islands, and appointed their own liquidator with just enough funding to comply with the minimum requirements of British Virgin Islands law (such as sending out notices to creditors, holding creditor meetings, and making filings with the British Virgin Islands court), but not enough to investigate the transfer of the USD 9.5 million or the substantial claims filed by the debtors' insiders, or to locate and liquidate the debtors' assets. The liquidator did, however, seek recognition of the British Virgin Islands proceedings in the United States under chapter 15 of the United States Bankruptcy Code (enacting the MLCBI in the United States). The United States court declined to recognize the British Virgin Islands proceedings on the grounds that the debtors had neither an establishment nor their COMI in the British Virgin Islands [article 17 MLCBI]. The debtors argued that their COMI had shifted to the British Virgin Islands after the passage of time following commencement of the proceedings. Although the court agreed that precedential law governing the question directed it to consider the question of the debtors' COMI as of the time of the filing of a recognition application, it nonetheless thought that the debtors' business had continued to be conducted outside the British Virgin Islands, given the liquidator's "minimal activities" in those proceedings. The judgment creditor in the English litigation alternatively asked the United States court to dismiss the recognition application on the grounds that the British Virgin Islands proceedings had been commenced in bad faith. Although noting that nothing in the MLCBI expressly authorized such a dismissal, the court thought that there may have been sufficient grounds for dismissal under generally applicable United States bankruptcy laws. It nonetheless declined to reach the issue of bad faith given its failure to recognize the British Virgin Islands proceeding as either a main or non-main foreign proceeding.

11. Condor Ins. Ltd (Fogarty v Petroquest Resources Inc)

Following recognition in the United States 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.

12. 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, under chapter 15 of the United States Bankruptcy Code. Multi-district 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 GE and to United States case law on the enforcement of foreign judgments, both of which stressed that a finding that recognition would be "manifestly contrary" to national public policy considerations must be justified by exceptional circumstances.

13. 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 COMI 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 ECJ for a preliminary ruling. With respect to the question concerning the determination of the COMI of a debtor, the ECJ 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 the EIR that the COMI 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 EIR.

14. 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. Second, 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.

15. 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 and subsequently ceased all business by May 2011. In

October 2011, three creditors applied to commence insolvency proceedings in Bermuda. The proceedings were 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-appealable; 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.

16. 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 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 as a result of that 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 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. Nevertheless, the court held that issues relating to the debtor's property in Israel should be decided by the court there.

17. 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, 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 occurred prior to enactment of the MLCBI in both Australia and 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. 187-189 above).

18. 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 COMI 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 ECJ for a preliminary ruling. With respect to the question concerning rebuttal of the registered office presumption, the ECJ ruled that a debtor's COMI 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 COMI is presumed to be the place of the new registered office.

19. Jaffé v Samsung Electronics Co. Ltd

The foreign representative of the debtor company successfully applied under chapter 15 of the United States Bankruptcy Code for recognition in the United States of insolvency proceedings held in Germany. Upon such recognition, certain provisions of the United States Bankruptcy Code applied automatically, but not section 365, which circumscribes the traditional power of the insolvency representative to reject certain contracts by giving the licensee of intellectual property a choice – either to treat the licensing contract as terminated by a rejection by the insolvency representative or to retain its rights under the licence so long as it continued to pay required royalty payments. However, a supplementary order by the Bankruptcy Court made section 365 applicable in the chapter 15 proceeding. Under German insolvency law, contracts not fully performed are automatically unenforceable. The foreign representative advised the debtor's patent licensees that he would not perform the contracts and the licensees responded by asserting their rights under section 365. The foreign representative asked for modification of the supplementary order and the removal of section 365 from the list of applicable Bankruptcy Code provisions. The court restricted the application of section 365, so that where the foreign representative was exercising the debtor's rights under German law, the licensees would not be protected. The licensees appealed against the modified order. The District Court remanded the case to the Bankruptcy Court for more detailed examination of sections 1506 and 1522 of chapter 15 [articles 6 and 22 MLCBI].

On remand, the Bankruptcy Court refused to grant relief to the foreign representative because the requested discretionary relief would have impinged upon statutory protections accorded to licensees under United States bankruptcy law, thereby undermining a fundamental United States public policy of promoting technological innovation. The court also held that, even absent those public policy considerations, the relief requested by the foreign representative should be denied because allowing the representative to cancel the debtor's licences unilaterally would be "manifestly contrary to the public policy of the United States" under section 1506 of the United States Bankruptcy Code [article 6 MLCBI].

On direct appeal, the Fourth Circuit concluded that the Bankruptcy Court properly *(a)* recognized that the request for discretionary relief under section 1521(a)

[article 21, paragraph 1 MLCBI] required it to consider "the interests of the creditors and other interested entities, including the debtor" under section 1522(a) [article 22, paragraph 1 MLCBI], and *(b)* construed section 1522(a) to require a balancing of the affected interests. Because section 1522 requires the court to consider a range of interests that are "often antagonistic," the court of appeals agreed that this analysis is best accomplished "by balancing the respective interests based on the relative harms and benefits in light of the circumstances presented." In reaching this conclusion, the Fourth Circuit joined the Fifth Circuit in rejecting the notion that the public policy exception in section 1506 [article 6 MLCBI], foreclosed reliance on a balancing test in section 1522. It also upheld the lower court's balancing of the interests of the debtor and its licensees, finding that application of section 365(n) of the United States Bankruptcy Code was necessary to assure protection of the licensees' interests in the debtor's United States patents given the numerous cross-licence agreements at issue. Because the court of appeals affirmed the Bankruptcy Court's decision based on section 1522(a)'s balancing of interests standard, it did not expressly address the lower court's alternative holding under section 1506 that depriving United States patent licensees of the protections afforded by section 365(n) would be "manifestly contrary to the public policy of the United States".

20. Kapila

The foreign representative of the debtor sought recognition in Australia under the Cross-Border Insolvency Act 2008 (enacting the MLCBI in Australia) of proceedings commenced in the United States. The debtor was an Australian citizen with significant business and property interests elsewhere, including the Dominican Republic, Indonesia and the United States. There was little direct evidence of the debtor's current residence. The court considered the factors relevant to determining the location of the debtor's COMI (article 16, paragraph 3 MLCBI) and the time at which that determination should be made (articles 2, subparagraph *(b)* and 17 MLCBI). With respect to the timing issue, the court considered the various sources of information available with respect to interpretation of the MLCBI and various possible dates: *(a)* the date of the application for recognition, *(b)* the date of commencement of the foreign proceeding, and *(c)* the date the court considers the application for recognition. Noting that there were advantages in using the date of commencement of the foreign proceeding, the court went on to observe that if the other possible dates were used, the outcome could be influenced by the activities and movements of the debtor post the commencement of the foreign proceeding and lead to a diversity of outcomes in different States. That approach, it said, would not meet the goals of cooperation and promotion of greater legal certainty as set out in the preamble and article 8 MLCBI. The court expressed its preference for the date

of commencement of the foreign proceeding.[315] Considering the location of the debtor's habitual residence in the context of article 16, paragraph 3 MLCBI, the court observed that a wide variety of circumstances may bear upon where the debtor resides, whether that residence can be considered habitual and the impact of the debtor's past and present intentions on such questions. It was noted that those intentions should not be given controlling weight and may be ambiguous and that a transnational debtor might lead such a nomadic life as to not have a habitual residence. Various factors pointed to the residence being in Australia, including that that was the residential address the debtor gave and that the debtor owned real property in Australia (no freehold or leasehold in the United States was disclosed) and the evidence of his estranged wife supported residence in Australia. The court considered the factors listed in paragraph 147 of the GEI and found that the presumption under article 16, paragraph 3 MLCBI had not been rebutted. Even though the debtor had many creditors and business ventures in the United States, many of the more tangible assets and definitive creditors, secured, unsecured and regulatory in nature appeared to be in Australia. The debtor's recent business dealings in the United States were sufficient, however, to constitute an establishment in the United States and the proceedings were recognized as foreign non-main proceedings. As to relief, the court appointed an Australian practitioner to act as a designated person pursuant to article 21, subparagraph 1 *(e)* MLCBI. It was satisfied, pursuant to article 21, paragraph 3 MLCBI, that the assets in Australia should be administered in the non-main proceeding in the United States and that the interests of creditors were sufficiently protected under article 21, paragraph 2 MLCBI, particularly since the United States' court had made orders *(a)* allowing foreign creditors, including the Australian Deputy Commissioner of Taxation, to file and prove claims and participate in the United States' proceeding, and *(b)* providing that such claims would be treated and rank *pari passu* with other general unsecured creditors.[316] The court went on to say that the relief orders to be made would impose no greater restraint upon the Deputy Commissioner than if the debtor had been made bankrupt under the Australian legislation and administration of his estate was taking place under that legislation.

21. Lightsquared LP

The debtor included Lightsquared and some 20 of its affiliates – 16 were incorporated and had their headquarters in the United States, 3 were incorporated in

[315] The court observed that previous decisions adopting different dates were not plainly wrong: *Moore* (CLOUT 1477) and *Gainsford* (CLOUT 1214; see case no. 14 above).

[316] See *Ackers* [Akers] *v Saad Investments Company Limited* (CLOUT 1219, 1332 and 1474) in which the court made orders protecting the Deputy Commissioner of Taxation against the inability to file and prove revenue claims in a foreign main proceeding. In the reports of the earlier cases, the foreign representative's name is cited as "Ackers" rather than "Akers".

various provinces of Canada and 1 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 MLCBI 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 COMI 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 COMI: *(a)* the location is readily ascertainable by creditors; *(b)* the location is the one in which the debtor's principal assets or operations are found; and *(c)* the location is where the management of the debtor takes place. On the basis of those factors, the judge found the COMI 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.

22. Massachusetts Elephant & Castle Group, Inc

The debtors operated and franchised full-service British-style pubs in the United States and Canada. In June 2011, chapter 11 proceedings commenced 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 COMIs 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 COMI 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.

23. 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, after a proposed plan had been approved by 96 per cent (in number and value) of all participating note holders, the Canadian court entered an amended sanction order and a plan implementation order. 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 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, although expanded in the United States version], 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.

24. Millennium Global Emerging Credit Master Fund Ltd

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 the master fund, in exchange for a 97 per cent ownership interest in that 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, but when attempts to negotiate informal production of documents failed, they sought recognition of the Bermudan proceedings in the United States under chapter 15 of the United States Bankruptcy Code. At first instance, the United States court held that a debtor's COMI should be determined by reference to the date of the commencement of the foreign proceeding and that both debtors' COMI at that date was in Bermuda. The finding as to the location of the COMI was challenged on the basis that a number of facts concerning the arrangement of the debtors' affairs pointed to the COMI 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' COMI. The court concluded that although some of those factors might support a COMI in the United Kingdom, the preponderance of evidence supported Bermuda as the COMI of the debtors, irrespective of whether COMI 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.[317]

25. Morning Mist Holdings Ltd v Krys (In re Fairfield Sentry Ltd)

The debtor companies were incorporated and maintained their registered offices in the British Virgin Islands as vehicles for mainly non-United States 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 British Virgin Islands in 2009, for the appointment of liquidators to each of them. In 2010, recognition of the British Virgin Islands 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' COMI was in the British Virgin

[317] The *Morning Mist* decision, set forth below, discussed the *Millennium Global* decision at length and expressly rejected its conclusion that the date as of which COMI should be determined is the date of the opening of insolvency proceedings for which recognition is sought, not the date of the opening of the chapter 15 case.

Islands, 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 COMI assessment should be made, the court noted that even courts that had focused on the time of the application for recognition (*Betcorp, British American Ins. Co. Ltd* and *Ran*) "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 COMI assessment in which there might have been "an opportunistic shift to establish a COMI (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 COMI might become lodged with the insolvency representative and that that fact, together with the location of the registered office, supported the debtors' COMI being located in the British Virgin Islands. The decision was affirmed on appeal to the District Court and then by the Second Circuit. The appeals court expressly rejected the conclusion of the court in *Millennium Global* that the determination of an entity's COMI should be based on the date of the commencement of the foreign proceeding rather than the date of the commencement of the petition for recognition.

26. Pirogova

The foreign representative of Russian liquidation proceedings sought recognition of those proceedings in the United States as foreign main proceedings. The court in the United States had to consider whether the debtor had her COMI or an establishment in Russia. The court found that the evidence proffered was insufficient to provide a basis on which the court could conclude that, as of the petition date, the debtor's domicile or habitual residence was Russia. The evidence put forward included that the debtor had children, grandchildren, and friends in Moscow; maintained a current internal Russian passport; was, and had been, a long-term member of a Yacht Club in Moscow; continued to maintain insurance for a motor vehicle in Russia; had assets in Russia and creditors who expected their claims to be adjudicated in the Russian insolvency proceedings and had been perpetuating a fraud, avoiding debts, and evading authorities in Russia. The court weighed that evidence against the debtor's stated intention to leave Russia permanently in 2008 and never reside there again; the fact that she had obtained permanent residence status in the United States in 2008; and the absence of direct evidence that she had a habitual residence in Russia at the time of the petition date. The court also found that the evidence was insufficient to find that the debtor had an establishment in Russia from which she conducted non-transitory economic activity; even though she may have owned an apartment in Moscow, there was scant evidence as to the conduct of such activity from that address. Moreover, the ability to participate in the insolvency proceedings of a company owned by the debtor (but currently in the late stages of insolvency) did not satisfy the requirement for "minimal management", nor did the

existence of the insolvency proceedings themselves constitute economic activity. The court declined to recognize the Russian proceedings as either main or non-main proceedings.

27. 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. 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 COMI 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.

28. Rubin & Anor v Eurofinance SA and others

The representatives of insolvency proceedings commenced in the United States in 2007 against The Consumers Trust sought recognition of those proceedings in England under the Cross-Border Insolvency Regulations 2006 (enacting the MLCBI in Great Britain), and enforcement of a judgment 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 judgment. 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 judgments *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 judgments 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 judgment. 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 MLCBI were concerned with procedural matters and did not impliedly empower the courts to enforce a foreign insolvency judgment against a third party.

29. Sivec Srl

The debtor obtained recognition in the United States 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 judgment for the Italian debtor on the first claim and a judgment 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 judgment by the creditor, but give it no ability to claim in the Italian case on the second judgment, 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 set-off or recoupment rights under United States law.

30. 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 judgment in favour of St. James, which sought to enforce it against SNP's property in the United States. 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, among 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.

31. Stanford International Bank Ltd

In February 2009, the Securities Exchange Commission of the United States 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 MLCBI 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 COMI of company Y was at the place of its registered office, namely 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 MLCBI. That decision was upheld on appeal.

32. Sturgeon Central Asia Balanced Fund Ltd

The provisional liquidators of a company incorporated under the laws of Bermuda (the "company") sought recognition of the company's liquidation in Bermuda as foreign main proceeding under the Cross-Border Insolvency Regulations 2006 (CBIR) (enacting the MLCBI in Great Britain). The Court of Appeal of Bermuda had ordered the company, which was indisputably solvent at the time of the order, to be wound up on just and equitable grounds under the Bermuda Companies Act 1981. The English court had to decide whether CBIR recognition was available to a solvent company that was subject to just and equitable winding up. The receiving court noted that the intention of the MLCBI was to focus on proceedings commenced pursuant to a law relating to insolvency, rather than on defining insolvency. The court considered that a receiving court should not be required to investigate the insolvency of the entity and that it would be wholly unclear how financial distress might be determined, or what the threshold was. Furthermore, it would run counter to the aim of allowing recognition on an efficient basis because of the factual enquiry that would be required during the recognition process which the MLCBI was intended to avoid. For that reason, the court found that the winding up proceedings in Bermuda could be recognized as a foreign proceeding in Great Britain. As the place where the company had its registered office was the COMI and there was no proof to the contrary, the winding up proceedings in Bermuda were recognized as foreign main proceedings.

On review, the court undertook an extensive analysis of the origin and drafting history of the meaning of "foreign proceeding" in article 2, subparagraph *(a)* of the MLCBI, as well as the international interpretation of the term. It concluded that the words "for the purpose" in article 2, subparagraph *(a)* should be read as meaning the purpose of insolvency (liquidation) or severe financial distress (reorganization). It would be contrary, the court went on to say, to the stated purpose and object of the MLCBI to interpret "foreign proceeding" to include solvent debtors and more particularly include actions that are subject to a law relating to insolvency but have the purpose of producing a return to members not creditors. The court also disagreed with the suggestion that by restricting the application of "foreign proceedings" in that manner every court would have to make an investigation into insolvency, noting that the vast majority of cases "will be obvious". The court terminated the recognition order.

33. Think3 Inc

The debtor (Think3 Inc), which was the successor of various companies originally established in Italy and the United States, 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 MLCBI 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 MLCBI, which is considered to have substantively the same meaning as COMI)[318] was in Italy, not the United States. 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 GE. 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

[318] See footnote 176 above.

concluded that the debtor's principal place of business was the United States. That decision was affirmed on appeal.

34. 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 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 debtor's 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.

35. Videology Ltd

Recognition and relief were sought under the Cross-Border Insolvency Regulations 2006 (enacting the MLCBI in Great Britain) regarding chapter 11 proceedings commenced in the United States in relation to Videology Inc, ("Inc") a company incorporated in the United States and its wholly owned subsidiary, Videology Ltd ("the company"), a company incorporated in the United Kingdom. The High Court held that the COMI of Inc was indeed in the United States. It therefore recognized the chapter 11 proceeding in relation to Inc as a foreign main proceeding and made an order for a modified regime providing for a stay of individual actions, proceedings and execution against Inc. However, the court rejected the argument that the COMI of the company was also in the United States. Instead, the court found that the presumption that the place of incorporation of the company (the United Kingdom) is the COMI was not rebutted. The company's main assets were in the United Kingdom, it conducted the majority of its business in the United Kingdom using local employees and its contracts referred to English law and jurisdiction, factors that were ascertainable to its creditors. Additionally, a loan agreement in relation to the company stated that its COMI was in England. Thus, the court held that the

company's COMI was the United Kingdom and rejected the application to recognize the chapter 11 proceeding regarding that company as foreign main proceedings. However, the court concluded that the connections with the United States justified recognition of the proceeding as foreign non-main proceeding, on the basis of the presence of an establishment. The court also granted discretionary relief in relation to this proceeding pursuant to article 21 MLCBI, protecting the company from creditors' claims and entrusting the realization and distribution of the company's assets to the supervision of the United States court in the chapter 11 process. The court noted that in the circumstances, it would be to the benefit of the creditors if a coordinated sale was pursued in the United States through the chapter 11 process, which provided adequate protection to the interests of the company's creditors.

36. 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, 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 inter-company 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 time they would have been subject to additional scrutiny before a business entered 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 inter-company 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 inter-company 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, under chapter 15, could enforce an order extinguishing the obligations of non-debtor parties, Vitro had failed to demonstrate the existence of exceptional circumstances in this case.

37. 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 COMI was not within a European Union member State, 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 MLCBI in New Zealand) and sought provisional relief. On 17 September 2010, the provisional relief was granted on certain terms, with additional relief being granted over the following days.[319] 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 MLCBI, 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 MLCBI 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

[319] See also footnote 221 above on the interim relief granted.

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 MLCBI 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.

38. Yakushiji; Yakushiji (No. 2)

Recognition was sought in Australia under the Cross-Border Insolvency Act 2008 (enacting the MLCBI in Australia) for civil rehabilitation proceedings commenced in Japan in respect of two shipping companies, the first of which was incorporated in Japan, the other in Panama. *Ex parte* orders for interim relief were made under article 19 MLCBI. Both proceedings were recognized as foreign main proceedings based upon the COMI of both debtors being in Japan. With respect to the COMI of the second debtor, the court was satisfied that it had no assets in Panama; it was a wholly owned subsidiary of the first debtor controlled by persons located in Japan; having no employees of its own, it relied upon the employees of the first debtor, most of whom resided in Japan; it conducted its administrative functions, including accounting, financial reporting, budgeting and cash management in Japan; and most of its creditors were located in Japan. The court made various orders in support of recognition, including that the administration or realization of all of the first debtor's assets in Australia be entrusted to the foreign representative under article 21 MLCBI; that any application for issue of a warrant for the arrest in Australia of any vessel owned or chartered by the first debtor, brought by a person claiming to hold a security interest, be made to a judge of the Federal Court with the reasons for judgment for the orders made in this application and those in *Yu v. STX Pan Ocean Co Ltd* [2013] FCR 189 (CLOUT 1333) being drawn to the attention of the Court at the time any such application was made; and that any person claiming to hold a security interest in any property or vessel owned or chartered by the first debtor, or who claimed to be a creditor of the first debtor, had liberty to apply for the orders to be varied or rescinded. The court said that the protection given by these orders to a shipping company should not be seen as necessarily defeating proper maritime claims that were lien claims, and the question of the status of any claims that were lien claims (as well as the status of any that were "quasi lien claims") would need to be resolved in litigation, unless the matter was agreed. The court went on to say it would be wrong to forestall the vindication of such claims against the foreign proceeding, but it would also be wrong to prevent the foreign proceeding being supported by the legislation enacting the MLCBI on the mere possibility of the existence of such claims. Subsequently (*Yakushiji, No. 2*), the court was given notice of a "substantial change" in the status of the foreign proceeding, namely that it had been terminated by the Japanese court following acceptance of the rehabilitation

plan. A consequence of acceptance of the plan was the retirement of the officers who had previously been designated as representatives of the two companies. As the protection previously ordered under the MLCBI was no longer appropriate, vacation of those orders was sought. The court considered that in the case of a substantial change of that kind, where the foreign representative(s), to whom the obligation under article 18 MLCBI applied, were no longer in place, it was appropriate for the companies to advise the court under article 18. The court also considered the duration of the stays under Articles 20 and 21 MLCBI, concluding that they would not last beyond the end of the foreign proceeding (in accord with *In re Daewoo Logistics Corporation*, 461 B.R. 175, (Bankr. S.D.N.Y. 2011) CLOUT 1315).

39. Zetta Jet

Zetta Jet Pte Ltd ("Zetta Jet Singapore"), incorporated in Singapore, owns Zetta Jet USA, Inc ("Zetta Jet USA"), established in the United States. On 15 September 2017, Zetta Jet Singapore and Zetta Jet USA ("the Zetta Entities") commenced chapter 11 proceedings in the United States Bankruptcy Court. On 18 September 2017, Asia Aviation Holdings Pte Ltd (AAH), one of the shareholders of Zetta Jet Singapore, obtained from the High Court of Singapore an injunction order to enjoin Zetta Jet Singapore and its other shareholders from carrying out further steps in and relating to the United States bankruptcy proceedings. Despite the injunction order, the proceedings in the United States continued and were converted to chapter 7 proceedings. They culminated in authorization being granted by the United States Bankruptcy Court to an appointed chapter 7 Trustee to commence recognition proceedings in Singapore. AAH intervened in the application, opposing recognition on the basis that the United States proceedings had been carried on in violation of a Singaporean court order. In reaching its decision, the High Court considered that Singapore's enactment of the MLCBI under the tenth schedule of the Companies Act ("the Singapore Law") varied some of the language used in the provisions of the MLCBI. In particular, the Singapore Law omits the word "manifestly" from article 6 MLCBI, allowing Singapore courts to deny recognition of a foreign proceeding if recognition is "contrary" to public policy, without it being manifestly so. While the reason for the omission of the word "manifestly" was not documented, the Singapore Court concluded that, as the omission was deliberate, the standard of exclusion on public policy grounds in Singapore is lower than that in jurisdictions where article 6 MLCBI has been enacted unmodified. In the present case, recognizing the chapter 7 Trustee despite his breach of the Singapore injunction undermined the administration of justice. However, completely denying recognition of the chapter 7 Trustee would render it impossible for the Zetta Entities to set aside the Singapore injunction, since the Zetta Entities were in liquidation in the United States. Based on principles of justice and fairness, the court granted limited recognition to the chapter 7 Trustee, but only for the purposes of applying to set aside or appeal the Singapore

injunction. Such limited recognition was made bearing in mind article 8 of the Singapore Law [article 8 MLCBI], which provides for the need to have regard to the international basis of the MLCBI and the promotion of uniformity in its application. The court stated that the limited nature of the recognition conferred may be characterized as either a form of modification of recognition under article 17, paragraph 4 MLCBI or, given that the applicant has included something similar in its submissions, as a manner of relief under article 21, paragraph 1 MLCBI.

The court subsequently granted full recognition to the foreign proceeding, finding the COMI of the Singapore subsidiary to be in the United States and the date for consideration of COMI to be the date of the application for recognition.

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,

"*Convinced* that providing readily accessible information on the interpretation of and current practice with respect to the Model Law for reference and use by

[a] United Nations publication, Sales No. E.99.V.3.

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[1] 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,[2]

"*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;[2]

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

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

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

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.[1]

82nd plenary meeting
9 December 2011"

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