

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



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

The first draft of the judicial perspective was prepared by Justice Paul Heath of the High Court of New Zealand and developed further through consultations with judges. It was presented to Working Group V (Insolvency Law) in December 2010 for discussion and circulated to Governments for comment in early 2011. It was also presented to participants at the Ninth UNCITRAL/INSOL International/World Bank Multinational Judicial Colloquium, held in Singapore in March 2011.

A revised version of the judicial perspective, taking into account the comments provided by the Working Group, Governments and participants at the judicial colloquium, was presented to the Commission for finalization and adoption at its forty-fourth session in 2011. The text was adopted by consensus on 1 July 2011; on 9 December 2011, the General Assembly adopted resolution A/RES/66/96, in which it expressed its appreciation to the Commission for completing and adopting the *Judicial Perspective* (see annex II).

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I. Introduction

A. Purpose and scope

1. The present text discusses the UNCITRAL Model Law on Cross-Border Insolvency from a judge's perspective. Recognizing that some enacting States have amended the Model Law to suit local circumstances, different approaches might be required if a judge concludes that the omission or modification of a particular article from the text as enacted necessitates such a course. The present text is based on the Model Law as endorsed by the General Assembly of the United Nations in December 1997.¹ It neither makes reference to nor expresses views on the various adaptations to the Model Law made in some enacting States.

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

3. The present text does not purport to instruct judges on how to deal with applications for recognition and relief under the legislation enacting the Model Law. As a matter of principle, such an approach would run counter to principles of judicial independence. In addition, in practical terms, no single approach is possible or desirable. Flexibility of approach is all-important in an area where the economic dynamics of a situation may change suddenly. All that can be offered is general guidance on the issues a particular judge might need to consider, based on the intentions of those who crafted the Model Law and the experiences of those who have used it in practice.

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

¹General Assembly resolution 52/158.

B. Glossary

1. *Terms and explanations*

5. The following paragraphs explain the meaning and use of certain expressions that appear frequently in the present document. Many of these terms are common to the UNCITRAL Model Law, the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.² Their use in the present document is consistent with their use in those texts:

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

(b) “Cross-border insolvency agreement”: an oral or written agreement intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest;³

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

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

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

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

2. *Reference material*

(a) *References to cases*

6. References to specific cases are included throughout the present text. In general, since those references are to cases included in the summaries provided in the annex, only a short-form reference is included in the text, e.g. *Bear Stearns* refers to the proceedings concerning *In Re Bear Stearns*

²These UNCITRAL texts are available from www.uncitral.org/uncitral/en/uncitral_texts.html.

³These agreements are discussed in some detail in the UNCITRAL Practice Guide.

High-Grade Structured Credit Strategies Master Fund, Ltd (case no. 2 in annex I). References to page or paragraph numbers in association with those cases are references to the relevant portion of the version of the judgement cited in the annex.

(b) *References to texts*

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

(a) “UNCITRAL Model Law”: *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* (1997);

(b) “Guide to Enactment”: *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*;

(c) “UNCITRAL Legislative Guide”: *UNCITRAL Legislative Guide on Insolvency Law* (2004);

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

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

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

(g) “Virgos Schmit Report”: M. Virgos and E. Schmit, *Report on the Convention on Insolvency Proceedings*, Brussels, 3 May 1996, available from <http://aei.pitt.edu/952>.

II. Background

A. Scope and application of the UNCITRAL Model Law

8. In December 1997, the General Assembly endorsed the Model Law on Cross-Border Insolvency, developed and adopted by the United Nations Commission on International Trade Law (UNCITRAL).

9. The Model Law does not purport to address substantive domestic insolvency law. Rather, it provides procedural mechanisms to facilitate more

efficient disposition of cases in which an insolvent debtor has assets or debts in more than one State. As at the end of March 2011, 19 States and territories had enacted legislation based on the Model Law.⁴

10. The Model Law is designed to apply where:⁵

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

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

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

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

The Model Law anticipates that a representative (the foreign representative) will have been appointed to administer the insolvent debtor's assets in one or more States or to act as a representative of the foreign proceedings at the time an application under the Model Law is made.⁶

11. The Model Law requires an enacting State to specify the court or other competent authority that has the power to deal with issues arising under the Model Law.⁷ Acknowledging that some States will nominate administrative bodies rather than courts, the definition of "foreign court" includes both judicial and other authorities competent to control or supervise a foreign proceeding.⁸

12. The Model Law envisages that particular entities, such as banks or insurance companies, the failure of which might create systemic risks within the enacting State, may be excluded from the operation of the Model Law.⁹

⁴Australia (2008), British Virgin Islands (overseas territory of the United Kingdom of Great Britain and Northern Ireland; 2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000) and United States of America (2005).

⁵UNCITRAL Model Law, art. 1, para. 1.

⁶See also UNCITRAL Model Law, art. 5, as to the ability of an enacting State to specify those representatives who may seek recognition and relief in a foreign court.

⁷Ibid., art. 4.

⁸Ibid., art. 2, para. (e); definition of "foreign court".

⁹Ibid., art. 1, para. 2.

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

(a) *The “access” principle*: This principle establishes the circumstances in which a “foreign representative”¹⁰ has rights of access to the court (the receiving court) in the enacting State from which recognition and relief is sought;¹¹

(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;¹²

(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.¹³ If a proceeding is recognized as a “main” proceeding, automatic relief follows.¹⁴ Additional discretionary relief is 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”;¹⁵

(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.¹⁶

14. Those principles are designed to meet the following public policy objectives:¹⁷

(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.

¹⁰As defined by art. 2, para. (d), of the UNCITRAL Model Law.

¹¹*Ibid.*, art. 9.

¹²*Ibid.*, art. 17.

¹³*Ibid.*, art. 19.

¹⁴*Ibid.*, art. 20.

¹⁵*Ibid.*, art. 21.

¹⁶*Ibid.*, arts. 25, 26, 27, 29 and 30.

¹⁷Preamble to the UNCITRAL Model Law; see also Guide to Enactment, para 3.

15. In December 2009, the General Assembly endorsed the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.¹⁸ 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.¹⁹

B. A judge's perspective

16. While the UNCITRAL Model Law emphasizes the desirability of a uniform approach to its interpretation based on its international origins,²⁰ 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.²¹ Even so, any court considering legislation based on the Model Law is likely to find the international jurisprudence of assistance to its interpretation.

17. In approaching his or her tasks, a judge²² has a perspective that is necessarily different from that of an insolvency representative. A judicial officer's obligation is to impartially determine questions submitted by a party based on information (evidence) placed before him or her. His or her obligation is to act judicially, meaning that all interested parties should, in the absence of exceptional circumstances, be given an opportunity to be heard on all issues that might materially affect the ultimate decision, in order to ensure due process is followed. In some States, persons presiding over competent administrative authorities²³ may not be affected by such constraints.

¹⁸General Assembly resolution 64/112; the text is available from www.uncitral.org/uncitral/en/uncitral_texts.html.

¹⁹See, generally, UNCITRAL Practice Guide, chap. III, and the case summaries included in annex I to the Practice Guide.

²⁰In States that enact the Model Law as drafted, its terms must be interpreted having regard “to its international origin and to the need to promote uniformity in its application and the observance of good faith” (UNCITRAL Model Law, art. 8).

²¹Indeed, the UNCITRAL Model Law itself makes it clear that the terms of any relevant treaty or agreement to which an enacting State is a party will take precedence over the terms of the Model Law (art. 3).

²²See the extended definition of the term “judge” in the glossary.

²³That is, authorities that come within the definition of “foreign court” (UNCITRAL Model Law, art. 2, para. (e)).

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.

18. Some differences in approach to the interpretation of the terms of the Model Law (or any adaptation of its language) may arise from the way in which judges from different legal traditions approach their respective tasks. Although general propositions are fraught with difficulty, the greater codification of law in some jurisdictions may tend to focus more attention on the text of the Model Law than would be the case in other jurisdictions without the same degree of codification or in which many superior courts have an inherent jurisdiction to determine legal questions in a manner that is not contrary to any statute or regulation²⁴ or have the authority to develop particular aspects of the law for which there is no codified rule.²⁵

19. These different approaches could affect a receiving court's inclination to act on the Model Law's principle of cooperation between courts and coordination of multiple proceedings.²⁶ If the domestic law of the enacting State incorporates the cooperation and coordination provisions of the Model Law, there will be a codified recognition of steps that can be taken in that regard.

20. Without the explicit adoption of such provisions,²⁷ there may be doubt as to whether, as a matter of domestic law, a court is entitled to engage in dialogue with a foreign court or to approve a cross-border insolvency agreement entered into by insolvency representatives in different States and other interested parties. The court's ability to do so will depend on other provisions of relevant domestic law. On the other hand, those courts which possess an inherent jurisdiction are likely to have greater flexibility in determining what steps can be taken between courts, in order to give effect to the Model Law's emphasis on cooperation and coordination.

21. Due process is a concept which 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

²⁴For a discussion of the inherent jurisdiction see I. H. Jacob, "The Inherent Jurisdiction of the Court" 23 *Current Legal Problems* 23 (1970).

²⁵Examples include the development of the law of equity and negligence in common law systems.

²⁶UNCITRAL Model Law, arts. 25-27, 29 and 30; see also paras. 154-187 below.

²⁷For example, in cases involving member States of the European Union (except Denmark), the European Regulation on Insolvency Proceedings, while requiring cross-border cooperation among insolvency representatives, makes no reference to cooperation between courts.

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.²⁸ Those principles assume even greater importance in cases where court-to-court communications take place.

22. Unlike an insolvency representative directly involved in the administration of an insolvent estate, a particular judge is unlikely to have specific knowledge of the issues raised on an initial application to the court, even though urgency often exists in insolvency cases involving complex issues and large sums of money.²⁹ Judges who have not experienced proceedings of this type before might require assistance from the foreign representative,³⁰ generally through his or her legal counsel. That assistance could include succinct, yet informative, briefs and evidence.

23. 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.

24. Over 80 judges from some 40 States, attending a judicial colloquium in Vancouver, Canada, in June 2009,³¹ expressed the view that consideration should be given to the provision of assistance to judges (subject to the overriding need to maintain judicial independence and the integrity of a particular State's judicial system) on ways to approach questions arising under the Model Law. The present text is intended to provide such assistance. Its final form has evolved as a result of a series of informal consultations, principally with judges but also with insolvency practitioners and other experts, with Working Group V (Insolvency Law) and with participants at the Ninth Multinational Judicial Colloquium,³² held in Singapore in March 2011. It was also circulated to Governments for comment, prior to its consideration by the Commission in July 2011.³³

²⁸See also paras. 154-187 below.

²⁹UNCITRAL Model Law, art. 17, para. 3, emphasizes the need for speedy resolution of applications for recognition of a foreign proceeding.

³⁰As defined in the UNCITRAL Model Law, art. 2, para. (d).

³¹The Eighth UNCITRAL/INSOL International/World Bank Multinational Judicial Colloquium was held on 20 and 21 June 2009. A report of the colloquium is available from: www.uncitral.org/pdf/english/news/EighthJC.pdf.

³²The Ninth UNCITRAL/INSOL International/World Bank Multinational Judicial Colloquium was held in Singapore on 12 and 13 March 2011. A report of the colloquium is available from www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html.

³³See annex II for the decision taken by the Commission on 1 July 2011, in which it adopted the Judicial Perspective.

C. Purpose of the UNCITRAL Model Law

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

26. As mentioned above, the Model Law respects differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers 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 in favour of two or more insolvency proceedings involving the same debtor that may take place in multiple States.

27. The *Guide to Enactment of the UNCITRAL Model Law* emphasizes the centrality of cooperation in cross-border insolvency cases in order to achieve the efficient conduct of those proceedings and optimal results. A key element is cooperation both between the courts involved in the various proceedings and between those courts and the insolvency representatives appointed in the different proceedings.³⁴ 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.³⁵

³⁴UNCITRAL Model Law, arts. 25 and 26. See also the UNCITRAL Practice Guide.

³⁵For example, see the discussion of the use of cross-border agreements in chapter III of the UNCITRAL Practice Guide.

While the Model Law provides authorization for cross-border cooperation and communication between courts, it does not specify how that cooperation and communication might be achieved, but rather leaves that up to each jurisdiction to determine by application of its own domestic laws or practices. The Model Law does, however, suggest various ways in which cooperation might be implemented.³⁶

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

III. Interpretation and application of the UNCITRAL Model Law

A. The “access” principle

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

(a) To commence an insolvency proceeding under the laws of the enacting State;³⁷

(b) Recognition of the foreign proceeding in the enacting State,³⁸ so that the foreign representative may:

- (i) Participate in an existing insolvency proceeding in that State;³⁹
- (ii) Apply for relief under the Model Law;⁴⁰ or

³⁶UNCITRAL Model Law, art. 27; see also the UNCITRAL Practice Guide, chap. II.

³⁷*Ibid.*, art. 11, and Guide to Enactment, paras. 97-99.

³⁸*Ibid.*, art. 15, and paras. 112-121.

³⁹*Ibid.*, art. 12, and paras. 100-102, which make it clear that the purpose of article 12 is to give the foreign representative procedural standing to “participate” in the proceedings by making petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding. Where the law of the enacting State uses a word other than “participation” to express that concept, that other term may be used in enacting the provision. It is noted that article 24 uses the term “intervene” to refer to the foreign representative taking part in an individual action by or against the debtor (as opposed to a collective insolvency proceeding).

⁴⁰*Ibid.*, arts. 19 and 21, and paras. 135-140 and 154-160.

- (iii) To the extent that domestic law permits, intervene in any proceeding to which the debtor is a party.⁴¹

30. Article 2 of the UNCITRAL Model Law defines both “foreign proceeding” and “foreign representative”.

31. 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.⁴² A “foreign representative”, is entitled, as of right, to apply directly to the receiving court.⁴³

32. 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.⁴⁴ A question of that type arose in *Rubin v Eurofinance*.⁴⁵ In that case, receivers and managers had been appointed by a United States court for a debtor referred to as “The Consumers Trust”. A trust of that description is recognized as a legal entity—a “business trust”—under United States law, but is not recognized as a legal entity under English law. On a recognition application to the English court, it was argued that the trust was not a “debtor” as a matter of English law. The judge rejected that submission, holding that, having regard to the international origins of the UNCITRAL Model Law, a “parochial interpretation” of the term “debtor” would be “perverse”.⁴⁶ The judge raised a separate question as to whether the relief provisions of the Model Law could work in respect of a debtor not recognized as a matter of English law, but, on the facts of the case, it was not necessary to determine that point.⁴⁷

33. 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.⁴⁸ In some cases, expert evidence of applicable law may be desirable, to determine whether the particular proceeding falls within the scope of the definitions.

⁴¹Ibid., art. 24, and paras. 168-172; see footnote 39 on the use of the term “intervene”.

⁴²UNCITRAL Model Law, art. 2, para. (a). The definition of the term “foreign court” is discussed in para. 11 above.

⁴³Ibid., art. 9.

⁴⁴The term “debtor” is not defined in the Model Law.

⁴⁵Full citations for the cases mentioned in the text are set forth in annex I.

⁴⁶*Rubin v Eurofinance*, paras. 39 and 40.

⁴⁷Ibid., para. 41.

⁴⁸UNCITRAL Model Law, art. 5.

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, paragraph (d), the court may rely on the presumption established by article 16, paragraph (1) of the Model Law.

34. In *Stanford International Bank*, 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.⁴⁹ That observation was made in the context of a receivership found ultimately not to be a collective proceeding under a law relating to insolvency.

35. The UNCITRAL Model Law envisages a “foreign representative” as including one appointed on an “interim basis” but not one whose appointment has not yet commenced—for example, by virtue of a stay of an order appointing the insolvency representative pending an appeal.⁵⁰ 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 authorized⁵¹ to administer a qualifying reorganization or liquidation of the debtor’s assets or affairs, or to act as a representative of the foreign proceeding.

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

(a) The “foreign proceeding” in respect of which recognition is sought is a(n) (interim or final) judicial or administrative proceeding in a foreign State;

(b) The proceeding is “collective” in nature;⁵²

(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”;⁵³ and

⁴⁹*Stanford International Bank*, para. 85.

⁵⁰See the definition of “foreign representative” in the UNCITRAL Model Law, art. 2, para. (d).

⁵¹For the purposes of the UNCITRAL Model Law, art 2, para. (d).

⁵²See paras. 66-70 below.

⁵³UNCITRAL Model Law, art. 2, para. (e), and para. 11 above.

(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”.⁵⁴

37. The foreign representative’s ability to seek early recognition (and the consequential ability to seek relief)⁵⁵ 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”.⁵⁶ The phrase “at the earliest possible time” has a degree of elasticity. Some cases may be so straightforward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, “the earliest possible time” might be measured in months. Interim relief will be available in the event that some order is necessary while the recognition application is pending.⁵⁷

B. The “recognition” principle

1. *Introductory comment*

38. The object of the “recognition” principle is to avoid lengthy and time-consuming processes by providing prompt resolution of applications for recognition. This brings certainty to the process and enables the receiving court, once recognition has been given, to determine questions of relief in a timely fashion.

39. What follows is a general outline of the recognition principle. A more detailed discussion of its component parts is contained in paragraphs 56 to 116 below.

2. *Evidential requirements*

40. A foreign representative will make an application under the UNCITRAL Model Law in order to seek recognition of the foreign proceeding. Article 15 of the Model Law establishes the requirements to be met by that application. In deciding whether a foreign proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the

⁵⁴UNCITRAL Model Law, art. 2, para. (d).

⁵⁵Ibid.; see, in particular, arts. 20, 21, 23 and 24. As to interim relief while the recognition application is pending, see art. 19.

⁵⁶Ibid., art. 17, para. 3.

⁵⁷See paras. 122-129 below.

definition.⁵⁸ The Model Law makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the proceeding satisfies the requirements of article 15, recognition should follow in accordance with article 17.

3. *Power to recognize a foreign proceeding*

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

42. 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.

43. The foreign representative has a continuing duty of disclosure. He or she must inform the receiving court promptly of any substantial change in the status of the recognized foreign proceeding or of his or her appointment and any other foreign proceeding regarding the same debtor of which the foreign representative becomes aware.⁵⁹

44. 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”.⁶⁰ The former is a foreign proceeding that is taking place in the State where “the debtor has the centre of its main interests”,⁶¹ 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”.⁶² Implicitly, the UNCITRAL Model Law does not provide for recognition of other types of insolvency proceedings, for example those commenced in a State where there is only a presence of assets.⁶³ It might be noted, however, that some States that have enacted the Model Law do provide additional powers to the courts under other law⁶⁴ to assist foreign proceedings that might include types of proceedings not subject to recognition under the Model Law.

⁵⁸UNCITRAL Model Law, art. 2, para. (a).

⁵⁹Ibid., art. 18.

⁶⁰See definition of these terms in art. 2, paras. (b) and (c).

⁶¹This term is not defined in the UNCITRAL Model Law; see discussion below, in paras. 75-110.

⁶²UNCITRAL Model Law, art. 2, para. (f).

⁶³See Guide to Enactment, paras. 73 and 128.

⁶⁴E.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.

45. *Bear Stearns* is an illustration of a case in which a “foreign proceeding” was held to be neither a “foreign main proceeding” nor a “foreign non-main proceeding”. Both the court of first instance and the appellate court held that a provisional liquidation commenced in the Cayman Islands did not qualify under either category because the evidence established neither that the debtor’s principal place of business was situated in the Cayman Islands nor that some non-transitory activity occurred there. Accordingly, those proceedings were not recognized.

4. *Reciprocity*

46. There is no requirement of reciprocity in the UNCITRAL Model Law. It is not envisaged that a foreign proceeding will be denied recognition solely on the grounds that a court in the State in which the foreign proceeding was commenced would not provide equivalent relief to an insolvency representative from the enacting State. Nevertheless, judges should be aware that some States, when enacting legislation based on the Model Law, have included reciprocity provisions in relation to recognition.⁶⁵

5. *The “public policy” exception*

47. The receiving court retains the ability to deny recognition if granting recognition would be “manifestly contrary” to the public policy of the State in which the receiving court is situated. The notion of “public policy” is grounded in domestic law and may differ from State to State. For that reason, there is no uniform definition of “public policy” in the Model Law.

48. In some States, the expression “public policy” may be given a broad meaning, in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees. In those States, public policy would only be used to refuse the application of foreign law or the recognition of a foreign judicial decision or arbitral award when to do otherwise would contravene those fundamental principles.

49. For the applicability of the public policy exception in the context of the UNCITRAL Model Law, it is important to distinguish between the notion of public policy as it applies to domestic affairs and the notion of public policy as it is used with respect to matters of international cooperation and

⁶⁵E.g. Mexico, Romania and South Africa.

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.

50. 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.⁶⁶

51. Other than in the context of the public policy exception, the Model Law makes no provision for a receiving court to evaluate the merits of the foreign court’s decision by which the proceeding was commenced or the foreign representative appointed.⁶⁷

6. “Main” and “non-main” foreign proceedings

52. A “foreign proceeding” can be recognized only as either “main” or “non-main”. The basic distinction between foreign proceedings categorized as “main” and “non-main” concerns the availability of relief flowing from recognition. Recognition of a “main” proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor⁶⁸ and an automatic “freeze” of those assets,⁶⁹ subject to certain exceptions.⁷⁰

7. Review or rescission of recognition order

53. It is possible, in limited circumstances, for the receiving court to review its decision to recognize a foreign proceeding as either “main” or “non-main”. If it is demonstrated that the grounds for making a recognition order were “fully or partially lacking or have ceased to exist”, the receiving court may revisit its earlier order.⁷¹

⁶⁶For example, see para. 110 below.

⁶⁷See para. 40 above.

⁶⁸UNCITRAL Model Law, art. 20, paras. 1 (a) and (b).

⁶⁹*Ibid.*, art. 20, para. 1 (c).

⁷⁰*Ibid.*, art. 20, para. 2. Recognition of “main” and “non-main” foreign proceedings is discussed in more detail in paragraphs 75-116 below.

⁷¹*Ibid.*, art. 17, para. 4.

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

- (a) If the recognized foreign proceeding has been terminated;
- (b) If the order commencing the foreign insolvency proceeding has been reversed by an appellate court in that State;
- (c) If the nature of the recognized foreign proceeding has changed, for example, a reorganization proceeding has been converted into a liquidation proceeding;
- (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.⁷²

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

C. The process of recognition

1. Introductory comments

56. For a relevant proceeding to qualify as a “foreign proceeding”, the foreign representative must persuade the receiving court that the proceeding:⁷³

- (a) Is a(n) (interim or final) collective judicial or administrative proceeding in a foreign State;
- (b) Has been brought pursuant to a law relating to insolvency, and is one in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and
- (c) Is for the purpose of reorganization or liquidation.

57. 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.⁷⁴

⁷²See Guide to Enactment, paras. 129-131.

⁷³*Ibid.*, art. 2, para. (a), definition of “foreign proceeding”.

⁷⁴*Ibid.*, art. 17, para. 2, which identifies the need to determine the status of the foreign proceeding that the receiving court is recognizing.

58. 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.

59. The critical question, in determining whether a foreign proceeding (in respect of a corporate debtor) should be characterized as “main” is whether it is taking place “in the State where the debtor has the centre of its main interests”.⁷⁵ In the case of a natural person, the “centre of main interests” is presumed to be the person’s “habitual residence”.⁷⁶

60. Demonstration of the existence of a “non-main proceeding” requires proof of a lesser connection, namely that the debtor has “an establishment” within the State where the foreign proceeding is taking place. The term “establishment” is defined as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”.⁷⁷ 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.

61. As noted above,⁷⁸ 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.⁷⁹ In contrast, only discretionary relief is available to a foreign representative in respect of a “non-main” proceeding.⁸⁰

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

⁷⁵See the discussion in paras. 75-110 below.

⁷⁶See UNCITRAL Model Law, art. 16, para. 3, in the context of a presumption of “centre of the debtor’s main interests” for both corporate and natural persons; see also paras. 58 above and 81-104 below. For a discussion of the term “habitual residence” in this context, see *Re Stojevic* ([2007] BPIR 141, para. 58 and following). In that case, the court found that, essentially, a man’s habitual residence was his settled, permanent home, the place where he lived with his wife and family until the younger members of the family grew up and left home and the place to which he returned from business trips elsewhere or abroad. It also noted that a man might have another residence, called an ordinary residence, which was a place where he lived and which was not his settled, permanent home and the place where he lived when away from home on business or on holiday with his wife and family. Depending on the nature of his work, a man might well live away from his settled, permanent home for a greater number of days in any given year than he spent there with his wife and family. See also *Williams v Simpson* (No. 5), paras. 41-49.

⁷⁷UNCITRAL Model Law, art. 2, para. (f); see also the discussion in paras. 111-116 below.

⁷⁸See para. 52 above.

⁷⁹UNCITRAL Model Law, art. 20; see also paras. 130-137 below.

⁸⁰*Ibid.*, art. 21; see also paras. 138-153 below.

(a) Any decision or certificate of the type to which article 15, paragraph 2, refers is authentic;⁸¹

(b) All documents submitted in support of the application for recognition are authentic, whether or not they have been “legalized”;⁸²

(c) “In the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual,” is the centre of the debtor’s main interests.⁸³

63. Ordinarily, whether a “foreign proceeding” is of a character that meets the criteria of a “main” proceeding will be a matter of expert evidence on the relevant domestic law of the State in which the proceeding was initiated. Determination of whether an “establishment” exists (to demonstrate a non-main proceeding) involves a question of fact. Depending upon applicable national law, the receiving court might be able to rely, in the absence of expert evidence, on reproduction of statutes and other aids to interpretation to determine the status of the particular form of insolvency proceeding at issue.⁸⁴

64. 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. The UNCITRAL Model Law is, however, directed at individual entities, not at enterprise groups as a single entity.⁸⁵ For the purposes of the Model Law, the focus is on each and every member of an enterprise group as a distinct legal entity. It may be that the centre of main interests of each individual group member is found to lie in the same jurisdiction, in which case the insolvency of those group members can be addressed together, but there is no scope for addressing the centre of main interests of the enterprise group as such under the Model Law.

65. In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under the laws of the recognizing State, proof that the debtor is insolvent.⁸⁶

⁸¹Ibid., art. 16, para. 1.

⁸²Ibid., art. 16, para. 2.

⁸³Ibid., art. 16, para. 3.

⁸⁴An illustration of that approach can be found in *Betcorp*, 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.

⁸⁵See also *Eurofood*, para. 37 (decided under the EC Regulation).

⁸⁶UNCITRAL Model Law, art. 31.

2. Collective judicial or administrative proceeding

66. The UNCITRAL Model Law was intended to apply only to particular types of insolvency regimes. The notion of a “collective” insolvency proceeding is based on the ability of a single insolvency representative to control the realization of assets for the purpose of pro rata distribution among all creditors (subject to domestic statutory priorities), as opposed to assisting a particular creditor in obtaining payment or achieving some purpose other than addressing the insolvency of the debtor.

67. Within the parameters of the definition of “foreign proceedings”, a variety of collective proceedings might be eligible for recognition. It was anticipated that some of those proceedings would be compulsory, while others might be voluntary. Some might relate to the liquidation of assets of a debtor; others might focus on the reorganization of the debtor’s affairs. The Model Law was also intended to cover circumstances in which a debtor (corporate or individual) retained some measure of control over its assets, albeit subject to supervision by a court or other competent authority.⁸⁷

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

69. In *Betcorp*, 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 Model Law. Because the voluntary liquidation realized assets for the benefit of all creditors, the requisite aspect of a “collective” proceeding was held to be present.⁸⁸ In *Gold & Honey*, 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.⁸⁹ In *British American Insurance*, the court concurred with the courts in both *Betcorp*

⁸⁷Guide to Enactment, para. 24, e.g. for a so-called debtor in possession.

⁸⁸*Betcorp*, p. 281. A different view of that type of voluntary proceeding was referred to by the Australian court in *Tucker (no. 2)*, pp.1485-86, in the context of considering the meaning of “insolvency proceedings” in article 2. The court quoted the explanatory memorandum to the Cross-Border Insolvency Bill 2008, which noted that “The expression ‘insolvency proceedings’ may have a technical meaning, but it is intended in subparagraph (a) [referring to art. 2 of the Model Law] to refer broadly to proceedings involving companies in severe financial distress”. The court also referred to a consultation paper prepared by the Australian Treasury, which stated that, in the context of the Australian Corporations Act, the scope of the Model Law would extend to liquidations arising from insolvency, reconstructions and reorganizations under Part 5.1 and voluntary administrations under Part 5.3A. ... It would ... not extend to a member’s voluntary winding up or winding up by a court.” [Corporate Law Economic Reform Program’s Proposals for Reform: Paper no. 8, Cross-Border Insolvency—Promoting international cooperation and coordination, p.23].

⁸⁹*Gold & Honey*, p. 370.

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.⁹⁰

70. In another case, *Stanford International Bank*, 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.⁹¹ That view was upheld on appeal, largely for the reasons given by the English lower court.⁹²

3. *Subject to control or supervision by a “foreign court”*

71. No distinction is drawn, in the definition of “foreign court”,⁹³ between a reorganization or liquidation proceeding 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”.⁹⁴

72. The concept of “control or supervision” has received little judicial attention to date. There are two possible approaches, the first of which was discussed in *Betcorp*. Notwithstanding that the type of proceeding for which recognition was sought was commenced, without any court involvement, by a vote of the company concerned, the court held that the “control or supervision” criterion⁹⁵ was met, based on administrative or judicial oversight of the liquidators responsible for administering the collective proceeding on behalf of all creditors, as opposed to control or supervision of the assets and affairs of the debtor. The judge held that the Australian Securities and Investment Commission had a responsibility to supervise liquidators in the performance of their duties, could require liquidators to obtain permission before undertaking certain actions (e.g. destruction of books and records) and had the ability to remove or revoke the authority of any person to be

⁹⁰*British American Insurance*, p. 902.

⁹¹*Stanford International Bank*, paras. 73 and 84.

⁹²*Stanford International Bank* (on appeal), paras. 26-27.

⁹³UNCITRAL Model Law, art. 2, para. (e).

⁹⁴Guide to Enactment, para 74.

⁹⁵UNCITRAL Model Law, art. 2, para. (a).

a liquidator. On that basis, the judge considered that the Australian Securities and Investment Commission was “an authority competent to control and supervise a foreign proceeding” for the purposes of the definition of “foreign proceeding” under the UNCITRAL Model Law.⁹⁶

73. A different view is that the existence of some regulatory regime does not, in and of itself, constitute control or supervision of the assets and affairs of the debtor, particularly in cases in which the regulator’s powers are restricted to ensuring that insolvency representatives perform their functions properly, as opposed to supervising particular insolvency proceedings.

74. The court in *Betcorp* held, in addition to the conclusion with respect to the regulator, that the voluntary liquidation proceeding 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”.⁹⁷

4. *The main proceeding: centre of main interests*

75. In the case of a corporate debtor, to recognize a foreign proceeding as a “main” proceeding, the receiving court must determine that the “centre of [the debtor’s] main interests” was situated within the State in which the foreign proceeding originated.⁹⁸ A review of the origin of the concept of “centre of main interests” and the way in which it has been applied in decided cases may be of assistance to judges grappling with this issue.

76. For the purposes of the UNCITRAL Model Law, a deliberate decision was taken not to define “centre of main interests”. The notion was taken from the Convention on Insolvency Proceedings of the European Union (the European Convention), for reasons of consistency.⁹⁹ At the time the Model

⁹⁶*Betcorp*, p. 284. In support of that proposition, the judge relied on *Tradex Swiss AG* (384 BR 34 at 42 (2008)) [CLOUT case no. 791], in which case the Swiss Federal Banking Commission was held to be a “foreign court” because it controlled and supervised liquidation of entities in the brokerage trade.

⁹⁷*Betcorp*, pp. 283-284.

⁹⁸UNCITRAL Model Law, art. 2, para. (b).

⁹⁹See Guide to Enactment, para. 31; cf. art. 3 of the European Convention.

Law was finalized, the European Convention had not come into force, and it subsequently lapsed for lack of ratification by all Member States.¹⁰⁰

77. Subsequently, European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation) applied to Member States (except Denmark) of the European Union as a means of dealing with cross-border insolvency issues within the European Union. The concepts of “main proceedings” and “centre of main interests” were carried forward into the text of the EC Regulation.¹⁰¹ In contrast to the UNCITRAL Model Law provision, the EC Regulation stresses the need for the centre of main interests to be “ascertainable by third parties”.¹⁰² The Guide to Enactment of the Model Law notes that the notion of “centre of main interests” corresponds to the formulation in article 3 of the European Convention and acknowledges the desirability of “building on the emerging harmonization as regards the notion of a ‘main’ proceeding”.¹⁰³ Although the concepts in the two texts are similar, they serve different purposes. The determination of “centre of main interests” under the EC Regulation relates to the jurisdiction in which main proceedings should be commenced. The determination of “centre of main interests” under the Model Law relates to the effects of recognition, principal among those being the relief available to assist the foreign proceeding.

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

“(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor’s assets. To protect the diversity of interests, this Regulation permits secondary proceedings¹⁰⁴ 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.

¹⁰⁰For 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.

¹⁰¹European Council Regulation, Recitals (12) and (13) set out below.

¹⁰²*Ibid.*, Recital (13).

¹⁰³Guide to Enactment, para. 31; see also A/52/17, para. 153, in which it was stated that “... the interpretation of the term in the context of [the] Convention would be useful also in the context of the Model [Law]”. It should be noted that the EC Regulation does not define centre of main interests (see recital 13 below). During discussion in the UNCITRAL working group negotiating the Model Law, it was noted that the selection of the concept of centre of main interests to determine main proceedings offered several advantages, including that it would be in harmony with the approach and terminology utilized in the European Convention. That would enable use of the Model Law to contribute to the development of a standardized and widely understood terminology, rather than inadvertently contributing to an undesirable diversification of terminology (A/CN.9/422, para. 90).

¹⁰⁴The EC Regulation refers to “secondary proceedings”, while the Model Law uses “non-main proceedings”. Secondary proceedings under the EC Regulation are winding-up proceedings (art. 3, para. 3).

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.”

79. In anticipation of ratification of the European Convention by all Member States, an explanatory report on the Convention was prepared (the Virgos-Schmit Report).¹⁰⁵ That report provided guidance on the concept of “main insolvency proceedings” and, notwithstanding the subsequent demise of the Convention, has been accepted generally as an aid to interpretation of the term “centre of main interests” in the EC Regulation.

80. 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 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

¹⁰⁵See para. 7 (g) above. The report was published in July 1996.

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.”

81. There have now been a number of court decisions which consider the meaning of the phrase “centre of main interests”, either in the context of the EC Regulation or domestic laws based on the UNCITRAL Model Law. A number of subtle differences in approach have emerged, but the differences may be more apparent than real.

82. The leading European decision is *Eurofood*, which arose out of a dispute between Irish and Italian courts about whether an insolvent subsidiary company with a registered office in a different State from the parent company had its “centre of main interests” in the State of its registered office or that of the parent company.

83. To answer that question, the European Court of Justice (ECJ) had to determine the strength of the presumption that the registered office would be regarded as the centre of a particular company’s main interests. For the purpose of the EC Regulation, the presumption is found in article 3, paragraph 1:¹⁰⁶

“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.”

84. 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

¹⁰⁶Compare with UNCITRAL Model Law, art. 16, para. 3. See also Virgos-Schmit Report, para. 76.

be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect”.¹⁰⁷

85. 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.¹⁰⁸ In contrast, it took the view that “the mere fact” that a parent company made economic choices (for example, for tax reasons) as to where the registered office of the subsidiary might be situated would not be enough to rebut the presumption.¹⁰⁹

86. *Eurofood* places significant weight on the need for predictability in determining the centre of main interests of a debtor. In contrast to *Eurofood*, in the first appellate court decision in the United States, *SPhinX*, the court took a more expansive view of the power to determine the centre of main interests.

87. Under chapter 15 of the United States Bankruptcy Code (the chapter adopting the UNCITRAL Model Law), the wording of the presumption was changed from “proof” to the contrary to “evidence” to the contrary.¹¹⁰ 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.¹¹¹ *SPhinX* and subsequent decisions of United States courts must be read in that context.

88. *SPhinX* involved a petition by the provisional insolvency representatives of a company registered in the Cayman Islands for recognition of that regime as a “main proceeding”. The court declined to do so, recognizing it as a non-main proceeding. *SPhinX* suggests that a finding of improper forum shopping might be a factor that could be taken into account in determining the centre of the debtor company’s interests. The appellate Court said:¹¹²

“Collectively, these improper purpose and rebuttal analyses, combined with pragmatic considerations, led the Bankruptcy Court to conclude, where so many objective factors point to the Cayman Islands not being the debtor’s COMI, and no negative consequences would appear to

¹⁰⁷*Eurofood*, para. 34.

¹⁰⁸*Ibid.*, para. 35.

¹⁰⁹*Ibid.*, para 36. See also the full summary of the court’s conclusions on this topic in para. 37 of the judgement.

¹¹⁰Section 1516 (c) of the US Bankruptcy Code: “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.”

¹¹¹The United States Congressional Report sets out the legislative history: HR Rep No 31, 109th Congress, 1st Session 1516 (2005).

¹¹²*SPhinX*, p. 21.

result from recognising the Cayman Islands proceedings as non-main proceedings, that is the better choice.

“Overall, it was appropriate for the Bankruptcy Court to consider the factors it considered, to retain its flexibility, and to reach a pragmatic resolution supported by the facts found. No authority has been cited to the contrary.”

89. In *Bear Stearns*, the United States court gave further consideration to the question of determination of the centre of main interests of a debtor. Again, the application for recognition involved a company registered in the Cayman Islands which had been placed into provisional liquidation in that jurisdiction.

90. The court identified the rationale for the change made to the presumption by the United States legislation, i.e. replacing “proof” with “evidence”. 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.”¹¹⁰

91. 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”.¹¹³

92. The court, in *Bear Stearns*, referred to the burden of displacing the presumption. The court regarded the onus as being on the foreign representative seeking recognition to demonstrate that the centre of main interests was in some place other than the registered office.¹¹⁴ 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.

93. After discussing the *Eurofood* judgement, the United States court expressed the view that the place where the debtor conducted the administration of his interests on a regular basis, and that was therefore ascertainable by third parties generally, equated with the concept of “principal place of business” in United States law.¹¹⁵ More recently, the term “principal place

¹¹³*Bear Stearns*, p.128.

¹¹⁴*Ibid.*

¹¹⁵*Ibid.*, p. 129.

of business” was defined as the “nerve centre” for the purposes of certain laws by the United States Supreme Court in *Hertz Corp v Friend*.¹¹⁶ That approach appears to have been followed in *Fairfield Sentry*, for Model Law purposes.¹¹⁷

94. The decision in *Bear Stearns* was appealed, on the ground that the judgement did not “accede” to principles of comity and cooperation and on the ground of an asserted erroneous interpretation of the presumption by the judge. On appeal, the appellate judge had no difficulty in holding that principles of comity had been overtaken by the concept of recognition. The appellate judge held that “recognition” ought to be distinguished from “relief”. The *Bear Stearns* decision was followed in *Atlas Shipping*, in which the court held that, once a court had recognized a foreign main proceeding, chapter 15 specifically contemplated that the court would exercise its discretion to fashion appropriate post-recognition relief consistent with the principles of comity.¹¹⁸ It was also followed in *Metcalfe & Mansfield*, in which a United States court was asked to enforce certain orders for relief issued by a Canadian court, orders that were broader than would have been permitted under United States law. The court noted that principles of comity did not require that the relief granted in the foreign proceedings and the relief available in the United States 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.¹¹⁹

95. In *SPhinX*, the appellate court considered that it might be appropriate to regard the presumption as rebutted if there was no opposition by a party to such a finding. In *Bear Stearns*, the appellate court affirmed the lower court’s decision that the burden lay on a foreign representative to rebut the presumption and that the court had a duty to determine independently whether that had been done, irrespective of whether party opposition was or was not present.¹²⁰

96. In common with the lower court, the appellate court in *Bear Stearns* accepted that the concept of centre of main interests and the presumption

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

¹¹⁷*Fairfield Sentry*, p. 6. The court found that the facts before it suggested the debtor’s most feasible administrative nerve centre as having existed for some time in the British Virgin Islands (BVI). Those facts included the composition and site of decision-making of an independent litigation committee that governed the debtor’s affairs, the conduct of board meetings telephonically with the debtor’s counsel in the BVI; and, since the commencement of the BVI liquidation in 2009, the direction and coordination of the debtor’s affairs by BVI liquidators with resident employees and offices.

¹¹⁸*Atlas Shipping*, p. 78.

¹¹⁹*Metcalfe & Mansfield*, pp. 697-698.

¹²⁰*Bear Stearns* (on appeal), p. 335.

were derived from the European Convention—that the “centre of main interests” equated to the “principal place of business”. The appellate court also affirmed a list of factors set out in the first-instance decision, to be taken into account in assessing whether a centre of main interests has been established in accordance with the application for recognition. The factors identified were:¹²¹

- (a) The location of the debtor’s headquarters;
- (b) The location of those who direct the debtor company;
- (c) The location of the debtor’s primary assets;
- (d) The location of the majority of creditors, or at least those affected by the case;
- (e) Applicable law in relation to disputes that might arise between debtor and creditor.

97. In *Betcorp*, although the centre of main interests of the Australian company did not appear to be seriously in dispute, the judge offered some thoughts on the subject. He concluded that “a commonality of cases analysing debtors’ [centre of main interests] demonstrates that courts do not apply any rigid formula or consistently find one factor dispositive; instead courts analyse a variety of factors to discern, objectively, where a particular debtor has its principal place of business. That inquiry examines the debtors’ administration, management and operations along with whether reasonable and ordinary third parties can discern or perceive where the debtor is conducting these various functions.”¹²² The judge held that the time at which the centre of main interests should be determined was the time at which the application for recognition was made.¹²³ That interpretation seems to arise from the tense in which the definition of “foreign main proceeding” is expressed: “means a foreign proceeding taking place in the State where the debtor has the centre of its main interests”. A similar problem arises in relation to the place of an “establishment” under the definition of “foreign non-main proceeding”: “means a foreign proceeding ... taking place in a State where the debtor has an establishment”. The approach in *Betcorp* was followed in *Lavie v Ran* and *British American Insurance*.

98. The remaining decisions are those at first instance and on appeal in *Stanford International Bank*. That case involved an application for recognition in England of a proceeding commenced in Antigua and Barbuda. It considered whether a “head office functions” test, articulated in earlier decisions by English courts, was still good law, having regard to *Eurofood*.

¹²¹*Bear Stearns*, p. 128; *Bear Stearns* (on appeal), p. 336.

¹²²*Betcorp*, p. 292.

¹²³*Ibid.*

99. At first instance, the judge accepted a submission that ascertainment by third parties was an overarching consideration, following the approach set out in *Eurofood*.¹²⁴ The judge made that decision in the context of the Cross-Border Insolvency Regulations 2006 (enacting the UNCITRAL Model Law in Great Britain), rather than under the EC Regulation. In determining what was meant by the term “ascertainable”, the judge referred to information in the public domain and what a typical third party would learn from dealings with the debtor. In doing so, the judge declined to follow an earlier decision of his own in which he had applied the “head office functions” test.¹²⁵

100. The judge observed that the difference in approach, in relation to rebuttal of the presumption, between 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.¹²⁶

101. The judge expressed some doubt about whether the factors listed in *Bear Stearns*¹²⁷ had been qualified by a requirement of “ascertainability”, indicating that it had been a requirement of *Eurofood*. Nevertheless, even though the specific list of criteria was not qualified in that way by the United States court, it would seem plausible that an informed creditor could at least be aware of the location of those who directed the debtor company, its headquarters and the place where primary assets could be found, as well as whether the debtor was trading domestically or internationally.¹²⁸ 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.

102. The decision in *Stanford International Bank* was upheld on appeal. In the principal judgement, the presiding judge held that there was a clear correlation between the words used in the UNCITRAL Model Law and the EC Regulation, both in relation to “centre of main interests” and the presumption.¹²⁹ 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 Report¹³⁰ (concerning ascertainability) was equally apposite for Model Law proceedings. The presiding judge did

¹²⁴*Stanford International Bank*, para. 61.

¹²⁵*Ibid.*, paras. 61-62.

¹²⁶*Ibid.*, paras. 63 and 65.

¹²⁷See para. 96 above.

¹²⁸*Stanford International Bank*, para. 67; compare with the list of factors set out at para. 96 above.

¹²⁹*Ibid.*, (on appeal), para. 39.

¹³⁰Virgos-Schmit Report, para. 75; see para. 80 above.

not necessarily see the United States as applying a different onus on rebutting the presumption, but left that question open.¹³¹

103. The presiding judge was joined by one other member of the court, who agreed with his reasons.¹³² The third member of the court, while agreeing generally with the views expressed by the presiding judge, expressed the following view on the “head office functions” test:¹³³

“I respectfully differ [from the presiding judge] to a small extent on the test to be applied to review the first instance decision on where the [centre of main interests] is situated. What the judge has to do is to make findings as to what activities were conducted in each potential [centre of main interests] and then ask whether they amounted to the carrying on of head office functions and then quantitatively and qualitatively whether they were more significant than those conducted at the registered office.”

Those observations might be seen as suggesting that a court is required to judge objectively, based on evidence before it, where the centre of main interests of the debtor lies, as opposed to making that finding based on evidence of what was actually ascertainable by creditors and other interested parties who dealt with the debtor during the course of its trading life. The remaining appellate judgements in *Stanford International Bank* and the decision in *Eurofood* tend to support the latter proposition.

104. A review of cases dealing with the vexed question of the “centre of main interests” indicates the following areas of conflict:

(a) On whom does the onus of proof lie to rebut the “registered office” presumption?

(b) Should “centre of main interests” be interpreted differently under the Model Law and the EC Regulation, given the different purposes for which that test is used?

(c) What objectively ascertainable circumstances can be taken into account in determining where the “centre of main interests” is located? In particular:

- (i) Should the issue be addressed by reference to the principal place of business (or “nerve centre”), or by reference to what those dealing with the company would regard as the actual place where coordination, direction and control of the debtor occurred?

¹³¹*Stanford International Bank* (on appeal), para 55.

¹³²*Ibid.*, para. 159.

¹³³*Ibid.*, para. 153.

- (ii) What factors are ascertainable objectively by third parties in the sense contemplated by *Eurofood*? In particular, at what time does the inquiry into the centre of main interests occur? Is it at the time the debtor is trading with third parties, at the time it is placed into a collective insolvency proceeding or at the time of the recognition hearing?
- (iii) Can the court take into account attempts by the debtor to seek a better forum, from its perspective, in determining whether recognition should be granted?

105. The issues identified are ones which, in interpreting domestic legislation based on the UNCITRAL Model Law, a judge will need to consider, having regard to the international jurisprudence and relevant public policy factors.

106. As noted previously,¹³⁴ the party on whom the onus of displacing the presumption lies is unlikely to be determinative in the vast majority of cases. Ordinarily, from the evidence adduced by relevant parties, it will be clear whether the place in which the registered office is situated constitutes the centre of main interests. Only in a case in which the evidence is in a state of equipoise is it likely that the burden of displacing the presumption will be determinative of the application for recognition.

107. While there are differences in approach to the determination of the centre of main interests of a debtor, the general trend of the decided cases seems to support objective ascertainment by third parties dealing with the debtor at relevant times.¹³⁵ The issue lies more in the focus in some jurisdictions on specific factors, such as the “nerve centre” or “head office” of the particular entity that is the subject of the recognition application.

108. On a recognition application, ought the court to be able to take account of abuse of its processes as a ground to decline recognition? There is nothing in the UNCITRAL Model Law itself which suggests that extraneous circumstances, such as abuse of process, should be taken into account on a recognition application. The Model Law envisages the application being determined by reference to the specific criteria set out in the definitions of “foreign proceeding”, “foreign main proceeding” and “foreign non-main proceeding”. Yet, there is plainly a problem if illegitimate forum shopping has resulted in a debtor being placed in a more advantageous position, with consequential prejudice to creditors. The Model Law does not prevent receiving courts from applying domestic law, particularly procedural rules, to respond to any abuse of process.

¹³⁴See para. 92 above.

¹³⁵*Eurofood and Bear Stearns*.

109. An alternative way of dealing with the illegitimate forum shopping concern may be to consider whether recognition could be refused on the grounds of public policy.¹³⁶ Viewed in that way, the issue of illegitimate forum shopping falls within the wider ambit of abuse of the processes of a court. A case could be made to support the proposition that an application for recognition as a main proceeding is an abuse of process if those responsible for pursuing the application know that the centre of main interests was elsewhere and yet deliberately decide to move the registered office to a different location to argue otherwise and/or to suppress information of that type when applying for recognition. An approach based on the “public policy” exception has the advantage of separating the recognition inquiry from any abuse-of-process issues in a manner reflecting the terms and spirit of the UNCITRAL Model Law.

110. In *Gold & Honey*, a United States court refused recognition of Israeli proceedings on public policy grounds. In that case, after liquidation proceedings had been commenced in the United States and after the automatic stay had come into force, a receivership order was made in Israel in respect of the debtor company. The United States judge declined to recognize that receivership proceeding on the basis that to do so “would reward and legitimize [the] violation of both the automatic stay and [subsequent orders of the court] regarding the stay”.¹³⁷ 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”,¹³⁸ the United States judge considered that the high threshold required to establish the public policy exception had been met.

5. *Non-main proceedings: “establishment”*

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

¹³⁶See the discussion of the public policy exception at paras. 47-51 above.

¹³⁷*Gold & Honey*, p. 371.

¹³⁸*Ibid.*, p. 372.

“Article 3

International jurisdiction

...

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

112. The Guide to Enactment notes¹³⁹ that the definition of “establishment” was inspired by article 2, paragraph (*h*), of the European Union Convention on Insolvency Proceedings. The Virgos-Schmit Report on that Convention provides some further explanation of “establishment”:

“Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.

“The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an ‘establishment’. A certain stability is required. The negative formula (‘non-transitory’) aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor.”¹⁴⁰

113. Whether an “establishment” exists is largely a question of fact; no presumption is provided in the Model Law. Necessarily, that factual question will turn on specific evidence adduced. It must be established that the debtor “carries out a non-transitory economic activity with human means and goods or services” within the relevant State.¹⁴¹ 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.

114. The term “establishment” has been discussed by some of the authorities. In *Bear Stearns*,¹⁴² “establishment” was equated with “a local place of

¹³⁹Guide to Enactment, para. 75.

¹⁴⁰Virgos-Schmit Report, para. 71.

¹⁴¹UNCITRAL Model Law, art. 2, para. (*f*).

¹⁴²*Bear Stearns*, p. 131; see also *Lavie re Ran* (2009), pp. 286-287 and *British American Insurance*, pp. 914-915.

business”. In that case, the court held that there was no evidence to establish that non-transitory economic activity was taking place in the Cayman Islands. On appeal, the appellate court made it clear that auditing activities carried out in the preparation of incorporation documents did not constitute “operations” or “economic activity” for the purposes of an “establishment”; neither did investigations carried out by the provisional liquidators into whether antecedent transactions could be avoided.¹⁴³

115. 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”.

116. In *In re Ran*, the appellate court considered the issue of establishment from the point of view of the individual debtor and what might be sufficient to constitute an establishment. The court noted the source of the definition of establishment in the Model Law, and the requirement, in the context of corporate debtors, for there to be a place of business.¹⁴⁴ 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”.¹⁴⁵ 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.¹⁴⁶

D. Relief

1. Introductory comments

117. There are three types of relief available under the UNCITRAL Model Law:

(a) Interim (urgent) relief that can be sought at any time after the application to recognize a foreign proceeding has been made;¹⁴⁷

¹⁴³*Bear Stearns* (on appeal), p.339.

¹⁴⁴Referring to the test in *Bear Stearns*, p. 131.

¹⁴⁵607 F. 3d 1017 (5th Cir. 2010), p. 16.

¹⁴⁶*Ibid.*, pp. 17-18.

¹⁴⁷UNCITRAL Model Law, art. 19.

(b) Automatic relief consequent upon recognition of a foreign proceeding as a “foreign main proceeding”;¹⁴⁸ and

(c) Discretionary relief consequent upon recognition as either a main or non-main proceeding.¹⁴⁹

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

118. By virtue of the definition of “foreign proceeding”,¹⁵⁰ the effects of recognition extend to foreign “interim proceedings”.¹⁵¹ That solution is necessary because interim proceedings are not distinguished from other insolvency proceedings merely because they are of an interim nature.

119. 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).

120. Nothing in the Model Law limits the power of a court or other competent authority to provide additional assistance to a foreign representative under other laws of the enacting State.¹⁵²

121. Consideration of a particular statute enacting the Model Law is required in order to determine whether any type of relief (automatic or discretionary) envisaged by the Model Law has been removed or modified in the enacting State.¹⁵³ Once available relief has been identified, it is up to the receiving court, in addition to automatic relief flowing from a recognized “main” proceeding, to craft any appropriate relief required.

¹⁴⁸*Ibid.*, art. 20.

¹⁴⁹*Ibid.*, art. 21.

¹⁵⁰*Ibid.*, see art. 2, para. (a).

¹⁵¹An 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.

¹⁵²UNCITRAL Model Law, art. 7. This article is designed to encompass relief based on comity, exequatur or the use of letters rogatory or under any other law of a particular State.

¹⁵³States that have enacted legislation based on the Model Law have taken different approaches. For example, in the United States, the scope of the automatic stay is wider (to conform with chapter 11 of its Bankruptcy Code). In Mexico the stay does not operate to prevent the pursuit of individual actions, as opposed to enforcement. Japan and the Republic of Korea provide that the relief available upon recognition is subject to the discretion of the court on a case-by-case basis, rather than applying automatically as provided by the Model Law.

2. Interim relief¹⁵⁴

122. 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.¹⁵⁵ 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.

123. Article 19 authorizes the court to grant the type of relief that is usually available only in collective insolvency proceedings,¹⁵⁶ as opposed to the “individual” type of relief that may be granted before the commencement of insolvency proceedings under domestic rules of civil procedure.¹⁵⁷ Nevertheless, discretionary “collective” relief under article 19 is somewhat narrower than the relief available under article 21.

124. The restriction of interim relief to a “collective” basis is consistent with the need to establish, for recognition purposes, that a “collective” foreign proceeding exists. Collective measures, albeit in a restricted form, may be urgently needed, before the decision on recognition, in order to protect the assets of the debtor and the interests of the creditors.¹⁵⁸ Extension of available interim relief beyond collective relief would frustrate those objectives. On

¹⁵⁴The summary that follows is based substantially on the Guide to Enactment, paras. 135-140.

¹⁵⁵The 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 *Ephedra* and *Tri-Continental Exchange* and paras. 47-51 above. In *Ephedra*, which involved the recognition of Canadian proceedings in the United States, 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 court indicated that the procedure at issue plainly afforded claimants a fair and impartial proceeding and that nothing more was required by the United States equivalent of article 6 of the Model Law. The court granted the relief sought, recognizing and enforcing the claims resolution procedure adopted in the Canadian proceedings. In *Tri-Continental Exchange*, which involved the recognition of proceedings commenced in Saint Vincent and the Grenadines, the United States court considered whether to impose additional conditions, in accordance with articles 6 and 22, on the relief sought by the foreign representatives, i.e. that they be entrusted under article 21 with the administration or realization of the debtors’ assets within the territorial jurisdiction of the United States but not with the distribution of those assets. The court concluded that such conditions were unnecessary in the circumstances. The record did not warrant the court placing itself in a position in which it could impede the progress of the main proceeding in Saint Vincent and the Grenadines and, if it later transpired that there was reason for it to have discomfort about that conclusion, article 22, paragraph (3), enabled it to revise its position and exercise its authority under article 22, paragraph (2), to impose conditions on the entrustment under article 21, paragraph (1) (*e*), to the foreign representatives. Those conditions could include the giving of a security or the filing of a bond.

¹⁵⁶I.e. the same type of relief available under article 21.

¹⁵⁷I.e. measures covering specific assets identified by a creditor.

¹⁵⁸See also the discussion of *Rubin v Eurofinance* in para. 145 below.

the other hand, because recognition has not yet been granted, interim relief should, in principle, be restricted to urgent and provisional measures.

125. The urgency of the measures is alluded to in the opening words of article 19, paragraph (1). Subparagraph (a) restricts a stay to execution proceedings, and subparagraph (b) refers to perishable assets and assets susceptible to devaluation or otherwise in jeopardy.¹⁵⁹ Otherwise, the measures available under article 19 are essentially the same as those available under article 21.

126. Article 19 relief is provisional in nature. The relief terminates when the application for recognition is decided upon;¹⁶⁰ however, the court is given the opportunity to extend the measure.¹⁶¹ 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.

127. 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.¹⁶² 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.¹⁶³

128. 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.

¹⁵⁹E.g. *Tucker* (20 November 2009), in which the Australian court made orders for interim protection of aircraft parts inventory stored at locations in Australia and controlled by Qantas, on the basis that they might be at risk because of a dispute as to entitlement to the parts. The interim relief was granted to preserve the position and assets of the defendant in Australia for a limited period pending the hearing of the application seeking recognition of the English proceeding. On the evidence, the court was satisfied that it was likely that recognition would be granted, at which time relief under the Australian provision that was equivalent to article 20 would commence. A further example is the case of *Williams v Simpson* (17 September 2010). Following an application by the trustee of the English bankruptcy proceedings, the New Zealand court made orders for interim measures, including the issue of a search warrant for a specific property, suspension of the debtor's ability to deal with his property in New Zealand and his examination by a court official. The court observed that "it would be odd if the ability to grant such relief [under article 19] extended only to property known to exist and readily locatable". It went on to say that "the flexibility inherent in article 19 could justify the issue of a search warrant to ascertain whether there are assets that are being concealed that might be in jeopardy if some form of interim relief did not attach to them".

¹⁶⁰UNCITRAL Model Law, art. 19, para. (3).

¹⁶¹*Ibid.*, art. 21, para. (1) (f).

¹⁶²*Ibid.*, see also articles 29 and 30.

¹⁶³*Ibid.*, article 15, paragraph (3).

129. The idea underlying article 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief.¹⁶⁴ This balance is essential to achieve the objectives of cross-border insolvency legislation.

3. Automatic relief upon recognition of a main proceeding¹⁶⁵

130. 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.

131. 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.

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

133. 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.¹⁶⁶

134. 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

¹⁶⁴See generally Guide to Enactment, paras. 161-164.

¹⁶⁵The summary that follows is based substantially on the Guide to Enactment, paras. 141-153.

¹⁶⁶See UNCITRAL Model Law, art. 20, para. (2).

measures initiated by creditors outside the court system, which measures creditors are allowed to take under certain conditions in some States. Article 20, subparagraph (1) (b), was added to make it abundantly clear that executions against the assets of the debtor are covered by the stay.

135. 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.¹⁶⁷ 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.

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

137. 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.¹⁶⁸ If a local proceeding is initiated, article 29 deals with the coordination of the foreign and the local proceedings.¹⁶⁹

4. *Post-recognition relief*¹⁷⁰

(a) *The provisions of the Model Law*

138. 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.

¹⁶⁷Ibid.

¹⁶⁸The right to apply to commence a local insolvency proceeding and to participate in it is, in a general way, dealt with in articles 11 to 13 of the Model Law.

¹⁶⁹See paras. 175-177 below.

¹⁷⁰The present summary is taken substantially from the Guide to Enactment, paras. 154-160.

139. Post-recognition relief under article 21 is discretionary. The types of relief listed in article 21, paragraph (1), are those most frequently used in insolvency proceedings; however, the list is not exhaustive. It is not intended to restrict the receiving court unnecessarily in its ability to grant any type of relief that is available and necessary under the law of the enacting State to meet the circumstances of a particular case.¹⁷¹

140. It is in the nature of discretionary relief that the court may tailor such relief to the case at hand. This idea is reinforced by article 22, paragraph (2), according to which the court may subject the relief granted to conditions it considers appropriate. In each case it will be necessary for a judge to determine the relief most appropriate to the circumstances of the particular case and any conditions on which the relief should be granted. Article 22 also addresses the need for the adequate protection of the interests of creditors and other interested persons when the court is granting or denying relief upon recognition of foreign proceedings and modifying or terminating that relief.¹⁷²

141. The “turnover” of assets to the foreign representative (or another person), as envisaged in article 21, paragraph (2), remains discretionary. The UNCITRAL Model Law contains several safeguards designed to ensure the protection of local interests before assets are turned over to the foreign representative.¹⁷³ In *Atlas Shipping*, 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.¹⁷⁴ 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.

¹⁷¹As 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 *Ephreda* and *Tri-Continental* (footnote 155 above) and paras. 47-51 above.

¹⁷²See paras. 128-129 above.

¹⁷³Those safeguards include: the general statement of the principle of protection of local interests in article 22, paragraph (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; and article 22, paragraph (2), according to which the court may subject the relief it grants to conditions it considers appropriate.

¹⁷⁴*Atlas Shipping*, p. 742.

142. 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.

143. 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.

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.

144. 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. That is one of the reasons why the court may grant relief on such conditions as it considers appropriate.¹⁷⁵ 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.¹⁷⁶

145. An example of a case in which relief was initially refused is *Rubin v Eurofinance*. The receiving court was asked to grant relief to enforce an order to pay money to a particular creditor, given as a result of a judgement entered in the United States. An issue arose about whether relief of that type was contemplated by the Model Law. The judge accepted that the proceeding in which judgement was entered was "part and parcel" of chapter 11 insolvency proceedings¹⁷⁷ in the United States. 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 established¹⁷⁸ (which would justify relief) and a judgement for

¹⁷⁵See para. 140 above.

¹⁷⁶UNCITRAL Model Law, art. 22.

¹⁷⁷*Rubin v Eurofinance*, para. 47.

¹⁷⁸*Ibid.*, para. 58, citing *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 (PC), para. 13.

money entered in favour of a single creditor (which would not). The judge considered that the order made in the chapter 11 proceedings fell into the second category, meaning that the judgement could not be enforced under the terms of the UNCITRAL Model Law. For enforcement purposes, the usual rules of English private international law continued to apply.

146. On appeal, the appellate court agreed that the proceedings were part of the chapter 11 proceedings, but disagreed with the conclusion of the lower court, finding that the judgements in question were for the purposes of the collective enforcement regime of the insolvency proceedings. As such, the court held, they were governed by the private international law rules relating to insolvency and not by the ordinary private international law rules preventing enforcement of judgements because the defendants were not subject to the jurisdiction of the foreign court.¹⁷⁹

(b) *Approaches to questions of discretionary relief*

147. 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 UNCITRAL Model Law did not apply) is a case concerning Australian liquidation proceedings, in which relief was sought in England. Although both England and Australia have enacted statutes based on the Model Law, neither statute was in force at the time that proceeding was commenced in England.¹⁸⁰

148. 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

¹⁷⁹*Rubin v Eurofinance* (on appeal), para. 61.

¹⁸⁰The 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.

would have entailed a distribution to creditors inconsistent with the priorities required under English law. At first instance, the request was denied;¹⁸¹ that decision was upheld on appeal.¹⁸² On a second appeal, the earlier decisions were overturned and relief was granted in favour of the Australian liquidators.¹⁸³

149. 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.¹⁸⁴ On that basis, the main proceeding in Australia should be allowed to have universal effect,¹⁸⁵

(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,¹⁸⁶

(c) The third approach relied on four specific factors to grant relief:¹⁸⁷

- (i) The companies in liquidation were Australian insurance companies;
- (ii) Australian law made specific provision for the distribution of assets in the case of the insolvency of such companies;
- (iii) The Australian priority rules did not conflict with any provisions of English law in force at the material time that were designed to protect the holders of policies written in England;
- (iv) The policy underlying the Australian priority rules accorded (by the time of the decision of the final court) with changes made to the law in England.

¹⁸¹*Re HIH Casualty and General Insurance Ltd (2005)*.

¹⁸²*Re HIH* (first appeal).

¹⁸³*McGrath v Riddell*.

¹⁸⁴Compare the discussion of public policy in *Gold & Honey* in para. 110 above.

¹⁸⁵*McGrath v Riddell*, paras. 30, 36 and 63.

¹⁸⁶*Ibid.*, paras. 59, 62, 76 and 77.

¹⁸⁷*Ibid.*, para. 42.

(c) *Relief in cases involving suspect antecedent transactions*

150. Article 23¹⁸⁸ provides standing for a foreign representative, upon recognition, to initiate certain proceedings aimed at illegitimate antecedent transactions. The specific types of proceedings to which article 23 refer are likely to be identified in the adopting legislation of the enacting State.

151. 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”.¹⁸⁹ 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.

152. 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.¹⁹⁰ 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.

153. In *Fogarty v Petroquest (Condor Insurance)*, the United States appellate court was asked to consider the jurisdiction of the bankruptcy court to offer avoidance relief under foreign law in a chapter 15 proceeding in the United States. Reversing the decisions of the first- and second-instance courts, the appellate court held that the bankruptcy court did have that power. The case involved the recognition in the United States of foreign main proceedings commenced in Nevis, following which the foreign representatives commenced a proceeding alleging Nevis law claims against the debtor to recover certain assets fraudulently transferred to the United States. Chapter 15 excepts avoidance powers from the relief that may be granted under the equivalent of article 21, subparagraph (1) (g), providing instead under article 23 that such powers may be exercised in a full bankruptcy proceeding. Chapter 15 does not, however, the appellate court found, deny the foreign representative powers of avoidance provided by applicable foreign law, and the language used in the legislation suggests the need for a broad reading of the powers granted to the court in order to advance the goals of comity

¹⁸⁸See also Guide to Enactment, paras. 165-167.

¹⁸⁹UNCITRAL Model Law, art. 23, para. (2).

¹⁹⁰*Ibid.*, art. 23, para. (1).

to foreign jurisdictions.¹⁹¹ Prior to this appellate decision, a similar interpretation had been approved in *Atlas Shipping*, in which the 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 15.¹⁹²

E. Cooperation and coordination

1. Introductory comments

154. Articles 25 to 27 of the UNCITRAL Model Law are designed to promote cooperation between insolvency representatives and the courts of different States to ensure insolvency proceedings affecting a single debtor are dealt with in a manner best designed to meet the needs of all of its creditors. The objective is to maximize returns to creditors (in liquidation and reorganization proceedings) and (in reorganization proceedings) to facilitate protection of investment and the preservation of employment¹⁹³ through fair and efficient administration of the insolvency estate.

155. Court cooperation and coordination are core elements of the Model Law. Cooperation is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets¹⁹⁴ 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.¹⁹⁵ Cooperation leads to better coordination of the various insolvency proceedings, streamlining them with the object of achieving greater benefits for creditors.

156. 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

¹⁹¹*Condor Insurance* (on appeal), section III, pp. 3-17.

¹⁹²*Atlas Shipping*, p. 744.

¹⁹³UNCITRAL Model Law, preamble, para. (e).

¹⁹⁴E.g. when items of production equipment located in two States are worth more if sold together than if sold separately.

¹⁹⁵See UNCITRAL Legislative Guide, part three: Treatment of enterprise groups in insolvency, recommendations 239-254 on promoting cross-border cooperation in enterprise group insolvencies.

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

157. The articles leave the decision as to when and how to cooperate to the courts and, subject to the supervision of the courts, to the insolvency representatives. For a court (or a person or body referred to in articles 25 and 26) to cooperate with a foreign court or a foreign representative regarding a foreign proceeding, the UNCITRAL Model Law does not require a formal decision to recognize that foreign proceeding.

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

2. Cooperation

159. 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,¹⁹⁶ which was held prior to completion of the UNCITRAL Model Law. At that colloquium, reports on a number of cases in which judicial cooperation had in fact occurred were given by the judges involved in the cases.

160. From those reports, a number of points emerged:¹⁹⁷

(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;¹⁹⁸

(b) Communication should be done openly, with advance notice to the parties involved¹⁹⁹ and in the presence of those parties, except in extreme circumstances;²⁰⁰

¹⁹⁶A report of the meeting is available from www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html and from www.insol.org. The colloquium was held in New Orleans (United States) on 22 and 23 March 1997. See also document A/52/17, paras. 17-22; available from www.uncitral.org/uncitral/en/commission/sessions/30th.html. Nine judicial colloquiums have been held to date; for reports on those meetings, see www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html.

¹⁹⁷Several of these points are now addressed in the UNCITRAL Legislative Guide: part three specifically in paras. 14-40 of chap. III, and recommendations 240-245 on cooperation between courts in cross-border enterprise group insolvencies.

¹⁹⁸*Ibid.*, paras. 21-34 of chap. III and recommendations 241-243.

¹⁹⁹This 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.

²⁰⁰UNCITRAL Legislative Guide: part three, chap. III, paras. 24-27, and recommendations 243 (b) and (c).

(c) Communications that might be exchanged are various and include formal court orders or judgements, informal writings of general information, questions and observations, and transcripts of court proceedings;²⁰¹

(d) Means of communication include telephone, video link, facsimile and e-mail;²⁰²

(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.

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

162. In *Maxwell Communication*,²⁰³ judges in New York and England raised independently with the parties' legal representative in each country the possibility that a cross-border insolvency agreement²⁰⁴ 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.²⁰⁵

163. 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. In a procedural sense, the hearing was conducted simultaneously.²⁰⁶ Each judge heard argument on substantive issues with which his court was concerned prior to deciding on an appropriate outcome. While the parties and the judge in the other jurisdiction saw and heard what occurred during substantive argument in the other, they did not actively participate in that part of the hearing.

²⁰¹Ibid., para. 20 and recommendation 241.

²⁰²Ibid., para. 20.

²⁰³In *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).

²⁰⁴See UNCITRAL Practice Guide, chap. III.

²⁰⁵See 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).

²⁰⁶*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).

164. 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.²⁰⁷

165. 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.

166. 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 *Perpetual Trustee Company Ltd v Lehman Bros. Special Financing Inc.*,²⁰⁸ 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. The intention was to encourage further communication, if conflicting decisions emerged.²⁰⁹

167. 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.²¹⁰

168. 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

²⁰⁷Transcript of conference in *In re PS-Net Inc.* between United States Bankruptcy Court, Southern District of New York and Superior Court of Justice of Ontario, 26 September 2001, on file with the UNCITRAL secretariat.

²⁰⁸[2009] EWHC 2953 paras. 12-23.

²⁰⁹*Ibid.*, paras. 41-50.

²¹⁰For examples of the use of this technique, see the UNCITRAL Practice Guide, chap. II, paras. 2-3. As indicated in the Practice Guide, cases using this technique have included *Maxwell Communication*, (see para. 162 above); *In re Matlack Sys. Inc.*, Superior Court of Justice of Ontario, No. 01-CL-4109 and the United States Bankruptcy Court for the District of Delaware, No. 01-01114 (Bankr. D. Del. May 24, 2001); and *In re Nakash*, United States Bankruptcy Court for the Southern District of New York, No. 94B 44840 (Bankr. S.D.N.Y. May 23, 1996) (cross-border insolvency protocol and order approving protocol) and the District Court of Jerusalem, No. 1595/87 (23 May 1996). Notes on the agreements used in these cases are included in the case summaries in annex I to the UNCITRAL Practice Guide.

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.²¹¹

169. In 2000, the American Law Institute developed the Court-to-Court Communication Guidelines²¹² as part of its work on transnational insolvency in the countries of the North American Free Trade Agreement (NAFTA). A team of judges, lawyers and academics from the three NAFTA countries—Canada, Mexico and the United States—worked jointly on that project. The Court-to-Court Communication Guidelines are intended to encourage and facilitate cooperation in international cases. They are not intended to alter or change the domestic rules or procedures that are applicable in any country, nor are they intended to affect or curtail the substantive rights of any party in proceedings before the courts. The Guidelines have been endorsed by a number of courts in different countries and used in a number of cross-border cases.²¹³

170. In relation to cooperation, there is an important difference between the terms of the UNCITRAL Model Law and those of the EC Regulation. The EC Regulation does not contain any provision for court-to-court communication. Rather, duties are placed on insolvency representatives in both main and secondary proceedings commenced in a Member State: "to communicate information to each other", "to cooperate with each other" and for the liquidator in the secondary proceedings to give the insolvency representative in the main proceeding "an early opportunity of submitting proposals" on that proceeding or the use of assets in the secondary proceeding.²¹⁴

3. Coordination

171. 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.

172. Article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of a local

²¹¹UNCITRAL Model Law, art. 26, paras. (1) and (2), as well as any other national law having an impact on the practicalities of cooperation.

²¹²Available in 14 languages from www.iiiglobal.org/component/jdownloads/?task=viewcategory&catid=394 [visited 25 July 2011].

²¹³A cross-border insolvency agreement endorsed by courts in Ontario and Delaware in *In re Matlack Inc* (see footnote 210 above) demonstrates how the Court-to-Court Guidelines were adapted for use in an actual case. The Guidelines have also been adopted in a number of other cross-border insolvency agreements (see the case summaries in annex I to the UNCITRAL Practice Guide).

²¹⁴EC Regulation, art. 31.

insolvency proceeding concerning the same debtor as long as the debtor has assets in the State.

173. 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.²¹⁵ 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.

174. 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]”.

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.

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

176. 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;²¹⁶

²¹⁵For 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.

²¹⁶UNCITRAL Model Law, art. 29, para. (a) (i).

(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;²¹⁷

(c) If the foreign proceeding is a main proceeding, the automatic effects pursuant to article 20 are to be modified and terminated if inconsistent with the local proceeding;²¹⁸

(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 20.²¹⁹

177. 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.

178. Article 29, paragraph (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.

179. 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.

180. 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.

181. 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,

²¹⁷Ibid., art. 29, para. (b) (i).

²¹⁸Ibid., art. 29, para. (b) (ii). Those automatic effects do not terminate automatically, since they may be beneficial and the court may wish to maintain them.

²¹⁹Ibid., art. 29, para. (a) (ii).

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.²²⁰

182. 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”.²²¹

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

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

185. 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.

186. 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.

187. The expression “secured claims”²²² is used to refer generally to claims guaranteed by particular assets, while the words “rights in rem” are intended

²²⁰Ibid., art. 30, paras. (a) and (b).

²²¹Ibid., art. 30, para. (c).

²²²The UNCITRAL Legislative Guide, in paragraph 12 (nn) of the glossary, defines “secured claim” as “a claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor’s default”.

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.

Annex I

Case summaries

1. *In re Atlas Shipping A/S*^a

Insolvency proceedings commenced against the debtor in Denmark in 2008. The Danish insolvency representatives applied to a United States court for vacation of certain maritime attachments that foreign creditors had obtained, both before and after commencement of the insolvency proceedings, on funds of 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 the United States provision that was equivalent to article 20 of the Model Law [11 USC § 1520], 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.^b More specifically, the court found that the type of relief sought fell within the terms of United States provisions that were equivalent to article 21, paragraphs (1) (*e*) and (2) [11 USC § 1521 (*a*) (5) and 1521 (*b*)], 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.

^a404 B.R. 726 (Bankr. S.D.N.Y. April 2009).

^bChapter 15 of the United States Bankruptcy Code enacts the Model Law in the United States.

2. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd*^c

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 and sought relief under the United States equivalent of article 21 of the Model Law [11 USC § 1521]. In its reasoning, the court first noted that it had to make an independent determination as to whether the foreign proceeding met the definitional requirements of the provisions that were equivalent to articles 2 and 17 of the Model Law [11 U.S.C. §§ 1502, 1517]. The court discussed the requirements of a foreign main proceeding and examined the presumption of article 16, paragraph (3), of the Model Law [11 U.S.C. § 1516 (c)] that the debtor's registered office is the centre of its main interests. The court clarified that the presumption should be applied only in cases without any serious controversy, permitting and encouraging fast action in clear cases, and that the burden of proof was on the foreign representative. Examining the type of evidence that was needed to rebut the presumption, the court referred to article 8 of the Model Law, which directed that interpretation of the Model Law be made in accordance with its international origin and the need to promote uniformity in its application. The court looked to the interpretation of the concept of "centre of main interests" in the European Union context, noting the decision of the European Court of Justice in the *Eurofood* case that the "centre of main interests" presumption might be rebutted "particular[ly] in the case of a 'letterbox' company not carrying out any business in the territory of the member State in which its registered office is situated". The United States court held that, in the instant case, the foreign representatives themselves provided the evidence to the contrary: there were no employees or managers in the Cayman Islands; the investment manager for the funds was located in New York; the administrator running the back-office operations of the funds was in the United States, along with the funds' books and records; and, prior to the commencement of the foreign proceedings, all of the funds' liquid assets were located outside the Cayman Islands. The court also noted that the investor registries and accounts receivable were located outside the Cayman Islands and that no counterparties to master repurchase and swap agreements were based in the Cayman Islands.

Examining whether the Cayman proceedings might constitute foreign non-main proceedings according to article 2, paragraph (c), of the Model Law [11 U.S.C. § 1502 (5)] on the basis of an establishment, the court noted that the debtors did not conduct any (pertinent) non-transitory economic

^c374 B.R. 122 (Bankr. S.D.N.Y. Sep 2007) [CLOUT case no. 760]. Affirmed by 389 B.R. 325 (S.D.N.Y. 2008) [CLOUT case no. 794].

activity in the Cayman Islands, nor did they have any funds on deposit there before the Cayman Islands insolvency proceedings commenced. The court denied recognition on the basis that the foreign proceedings were not pending in a country where the debtors had either their “centre of main interests” or an establishment. The court noted that the applicants were, nevertheless, not left without a remedy upon non-recognition. It referred to the equivalent of article 29 of the Model Law [11 U.S.C. § 1529], which mandated cooperation among and coordination of foreign and domestic proceedings taking place concurrently concerning the same debtor pursuant to articles 25 to 27 of the Model Law [11 U.S.C. §§ 1525-1527].

3. *In re Betcorp Ltd (in liquidation)*^d

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, 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 the United States provision that was equivalent to article 2, paragraph (a), of the Model Law [11 USC § 101 (23)] and recognized it as a foreign main proceeding.

4. *In re British American Ins. Co. Ltd*^e

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 for recognition of their respective proceedings as a foreign main proceeding or,

^d400 B.R. 266, 284 (Bankr. D. Nev. 2009) [CLOUT case no. 927].

^e425 B.R. 884 (Bankr. S.D.Fla. 2010) [CLOUT case no. 1005].

in the alternative, as a foreign non-main proceeding, relief under the provisions that were equivalent to articles 20 and 21 of the Model Law [11 USC § 1520 and 1521] and coordination of multiple foreign proceedings under the equivalent of article 30 [11 USC § 1530]. The difficult issue of the case concerned whether the Bahamian proceeding constituted a main or non-main proceeding pursuant to the equivalent of article 2, paragraphs (b) and (c), of the Model Law [11 USC § 1502 (4)-(5)]. The court looked at management of the debtor's affairs (conducted from a wholly owned subsidiary in Trinidad and Tobago), the location of the debtor's primary assets and of the majority of its creditors (neither of which was in the Bahamas), and the perception of third parties. On the evidence, the court found that the debtor's centre of main interests was not in the Bahamas.

The court also found that the debtor had no establishment in the Bahamas pursuant to the equivalent of article 2, paragraph (c) or (f), of the Model Law [11 USC § 1502 (2), (5)] and declined to recognize the Bahamian proceeding as a foreign 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, 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 the debtor had an establishment in Saint Vincent and the Grenadines and that the proceeding there was thus a foreign non-main proceeding. The court denied relief under the equivalent of article 30, on the basis that it had only recognized a single foreign non-main proceeding.

5. *In re Ephedra Products Liability Litigation*^f

The Canadian insolvency representative of a Canadian debtor applied to the United States court, in which multidistrict product liability litigation was pending against the same debtor, for recognition of the Canadian insolvency proceeding as a foreign main proceeding. After recognition of that proceeding as a foreign main proceeding by the United States court, the Canadian court entered an order approving 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

^f349 B.R. 333 (S.D.N.Y. 2006) [CLOUT case no. 765].

contrary to the public policy of the United States pursuant to the United States provision that was equivalent to article 6 of the Model Law [11 USC § 1506], in that it would deprive the creditors of due process and trial by jury. The United States court agreed that the claims resolution procedure, which provided for mandatory mediation and, if the mediation resulted in a plan approved by specified majorities of creditors, for the estimation and liquidation of the remaining claims, 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. The claims resolution procedure was amended to require such an opportunity to be provided and, based on that amendment, the court concluded that due process would be satisfied with that claims resolution 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 the United States provision that was equivalent to article 6 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 UNCITRAL Guide to Enactment of the Model Law on Cross-Border Insolvency and to United States case law on the enforcement of foreign judgements, both of which stressed that a finding that recognition would be “manifestly contrary” to national public policy considerations must be justified by exceptional circumstances.

6. *Re Eurofood IFSC Ltd*⁸

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

⁸[2006] Ch 508 (ECJ).

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

7. *In re Fairfield Sentry Ltd*^h

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 for each of them. In 2010, recognition of the proceedings was sought in the United States as either main or non-main proceedings. The United States court found that the debtors' centre of main interests was in the British Virgin 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 centre of main interests assessment should be made, the court noted that even courts that had focused on the time of the application for recognition (*In re Ran, Betcorp* and *British American Insurance*) “would likely support a totality of circumstances approach where appropriate.” The court went on to say that the emerging jurisprudence did not preclude looking into a broader temporal centre of main interests assessment in which there might have been “an opportunistic shift to establish a centre of main interests (i.e. insider exploitation, untoward manipulation, overt thwarting of third party expectations)”. The court noted that, where a debtor had ceased trading, the

^h440 B.R. 60 (Bankr. S.D.N.Y. 2010)

debtor's centre of main interests might become lodged with the insolvency representative and that that fact, together with the location of the registered office, supported the debtors' centre of main interests being located in the British Virgin Islands.

8. *Fogarty v Petroquest Resources, Inc. (In re Condor Ins. Ltd)*ⁱ

Following recognition in the United States of insolvency proceedings commenced under Nevis law against a Nevis insurance company, the Nevis representatives of the debtor brought an action under Nevis law to avoid allegedly fraudulent transfers made to another company. The defendant sought to dismiss the action on the grounds that the United States equivalent of articles 21 and 23 of the Model Law [11 USC § 1521, 1523] did not authorize the foreign representatives of a foreign main or foreign non-main proceeding to commence avoidance actions, despite 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 dismissed the complaint, a decision that was affirmed on the first appeal. The foreign representatives further appealed, arguing that articles 21 and 23 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 appeal court found that the United States equivalents of articles 21 and 23 only expressly precluded, in a chapter 15 case, specified avoidance actions under United States law, in the absence of 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 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. In the absence of a decision in the case, the Nevis representatives in the Nevis proceeding would have been unable to avoid the transactions at issue. Foreign insurance companies, like the debtor in the case, were ineligible for relief in a chapter 7 or 11 proceeding under United States insolvency law. As a result, the ordinary course of action—a chapter 7 or 11 proceeding commenced by a foreign representative following recognition of the foreign proceeding—was not available. The court thought it unlikely that Congress had unwittingly facilitated tactics permitting debtors

ⁱ601 F.3d 319, (5th Cir. 2010) [CLOUT case no. 1006], reversing 411 B.R. 314 (S.D. Miss. 2009) [CLOUT case no. 928].

to hide assets in the United States out of the reach of the foreign jurisdiction, given that some defendants might defy the jurisdictional reaches of the court in which the foreign proceeding was pending. As a result, 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 pended, and thus that nothing in chapter 15 precluded such a result.

9. *In re Gold & Honey, Ltd*^d

In July 2008, a receivership proceeding was commenced in Israel, but the appointment of a receiver was denied by the Israeli court. In September 2008, reorganization proceedings were commenced in the United States in which the court ordered that all assets of the debtor were subject to its jurisdiction. Notwithstanding the order of the United States court, the application for appointment of a receiver was continued in the Israeli court, which determined that it had jurisdiction and could proceed to appoint receivers to liquidate the assets in Israel despite the proceedings in the United States and the application of the worldwide stay. In January 2009, the Israeli receivers applied for recognition of the Israeli proceedings in New York 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 the equivalent of article 2, paragraph (a), of the Model Law [11 U.S.C. § 101 (23)]; (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 in the equivalent of article 6 of the Model Law [11 U.S.C. § 1506] had been met.

10. *Re HIH Casualty and General Insurance Ltd*;^k *McGrath v Riddell*^l

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

^d410 B.R. 357 (Bankr. E.D.N.Y. 2009) [CLOUT case no. 1008].

^k[2005] EWHC 2125; First appeal [2006] EWCA Civ 732.

^lSecond appeal [2008] UKHL 21.

extent in the insurance and reinsurance business in the United Kingdom, conducted in various ways, including through branches or locally incorporated companies. Although the majority of the assets of the companies were located in Australia, there were also significant assets in England. Insolvency proceedings commenced in Australia and in England. The English insolvency representatives sought direction from the English courts as to how the English assets of the debtors were to be dealt with given the differences between the Australian and English insolvency laws and priority schemes. Australian insolvency law gave priority to insurance creditors with respect to reinsurance recoveries, while English law did not recognize such a priority and required *pari passu* distribution to all creditors. The Australian insolvency representatives obtained a letter of request from the Australian court seeking assistance from the English court (the case did not involve the legislation enacting the Model Law in either Australia or Great Britain). The Australian insolvency representatives requested that any assets collected in England be remitted to the Australian court for distribution in accordance with Australian insolvency law and priority schemes. At first instance, the English court ruled that it could not remit the English assets to Australia because the priority and distribution order was different from that applicable in England. On appeal, the court ruled that, while it had the power to remit the assets, it declined to do so because that would prejudice the interests of the non-reinsurance creditors. On a second appeal, the court ruled that the power to remit the assets existed and that it should be exercised in that case. Different views were expressed by the court as to the source of the power, but the judges were unanimous on the question of remitting the funds (see paras. 147-149 above).

11. *Lavie v Ran*^m

The debtor had been the chief executive officer of an Israeli company. After that company encountered financial difficulties, the debtor left Israel in 1997 and moved to Texas. Involuntary insolvency proceedings were commenced against the debtor in Israel in 1997. 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. 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 court again

^m406 B.R. 277 (S.D. Tex. 2009) [CLOUT case no. 929], affirming *In re Ran*, 390 B.R. 257 (Bankr. S.D. Tex. 2008), on remand from *Lavie v Ran*, 384 B.R. 469 (S.D. Tex. 2008). Affirmed by *In re Ran*, 607 F. 3d 1017 (5th Cir. 2010).

declined to recognize the foreign proceeding as either a foreign main or foreign non-main proceeding. Following a further appeal, the refusal of recognition was affirmed. The decision not to recognize the debtor's centre of main interests as located in Israel was based on the facts that the debtor: (a) had left Israel nearly a decade before the application for recognition was made; (b) had established employment and residence in the United States; (c) maintained his finances exclusively in the United States; and (d) indicated no intention of returning to Israel. With respect to the denial of recognition as a non-main proceeding, the decision was based on the debtor not having an establishment in Israel within the definition in article 2, paragraph (c), of the Model Law [11 USC § 1502 (5)]. The foreign representative's argument that the foreign proceeding itself constituted an activity that would satisfy that definition was rejected.

12. *In re Metcalfe & Mansfield Alternative Investment*⁴²¹

In March 2008, insolvency proceedings commenced against the debtors in Canada to restructure all outstanding third-party (non-bank-sponsored) asset-backed commercial paper obligations of the debtors. In June 2008, the Canadian court entered an amended sanction order and a plan implementation order, after the plan had been approved by 96 per cent (in number and value) of all participating note holders. The orders were upheld on appeal in August 2008 and became effective in January 2009. Interim cash distributions were made to note holders in January and May 2009, with final cash distributions authorized by the Canadian court. In November 2009, the Canadian insolvency representative applied under chapter 15 for recognition of the Canadian proceedings in the United States as foreign main proceedings and for enforcement of the Canadian orders as post-recognition relief in the United States. The Canadian proceedings were recognized as foreign main proceedings. 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 the United States provision that was equivalent to article 7 of the Model Law [11 USC § 1507], 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 the provision that was equivalent to article 6 of the Model Law [11 USC § 1506] placed a limitation on recognition if granting recognition would be manifestly contrary to the policy of the United States. The court noted that principles of comity did not require that the relief available in the United

⁴²¹421 B.R. 685 (Bankr. S.D.N.Y. 2010) [CLOUT case no. 1007].

States and the foreign proceedings 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 Canadian representatives' request for their enforcement.

13. *Rubin v Eurofinance SA*^o

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, which give effect to the Model Law in Great Britain, and enforcement of a judgement of the United States court holding Eurofinance liable for the debts of The Consumers Trust. The Consumers Trust was a business trust, recognized as a legal entity under United States law. In 2009, the English court recognized the foreign insolvency proceedings as main proceedings but dismissed the application for enforcement of the judgement. In recognizing the insolvency proceedings, the court found that, notwithstanding that English law did not recognize a business trust as a legal entity, the provisions of the Model Law, such as the stay under article 20, could in practice apply to the debtor and that it would be perverse, having regard to the international origins of the Model Law, to adopt a parochial interpretation of the term "debtor". The court also found that the foreign representatives were representatives of the proceedings that had led to the judgement against Eurofinance and that those proceedings were an integral part of the insolvency proceedings against The Consumers Trust. With respect to the enforcement of the judgement, the court held that the judgement was in personam not in rem and that all the court could do was to authorize the foreign representative to bring an action on the judgement or to bring a fresh claim in England. Permitting the foreign representative to enforce the judgement of the United States court would not constitute "cooperation" within the meaning of article 27 of the Model Law.

On appeal against the dismissal of the application for enforcement, the court allowed the appeal, concluding that ordinary rules for enforcing or not enforcing foreign judgements in personam did not apply to insolvency proceedings and that the mechanisms available in insolvency proceedings to bring actions against third parties for the collective benefit of all creditors were integral to the collective nature of insolvency and not merely incidental procedural matters. The orders against Eurofinance were therefore part of the insolvency proceedings and for the purpose of the collective enforcement

^o[2009] EWHC 2129; on appeal [2010] EWCA CIV 895.

regime of the insolvency proceedings. As such, the orders were not subject to the ordinary rules of private international law preventing the enforcement of judgements because the defendants were not subject to the jurisdiction of the foreign court. The court recognized the proceedings that had led to the judgement against Eurofinance as foreign main proceedings. The court found that assistance to foreign proceedings extended, under common law, to enforcing the orders made by the United States court; with respect to article 27 of the Model Law, the court noted that no mention was made of enforcement and that, while “assistance to the maximum extent possible” would surely include enforcement, no conclusion on that point was required in that case.

14. In re SPhinX Ltd^p

The debtors were hedge funds registered and incorporated under the laws of the Cayman Islands. They had an investment relationship with a broker of commodities and futures contracts that had commenced an insolvency proceeding in the United States, which involved the debtors in an avoidance action. Agreement was reached to settle that action, but before the settlement agreement could be approved, an insolvency proceeding was commenced in the Cayman Islands against the debtors. The debtors’ Cayman Island insolvency representatives sought recognition of the Cayman Island proceedings as “foreign main proceedings” in the same United States court in which approval of the settlement agreement was pending. The United States court recognized those proceedings as foreign non-main proceedings rather than as foreign main proceedings. It based that finding, in part, on the fact that the debtors did not conduct a trade or business in the Cayman Islands and had no employees, no physical offices and no assets in the country other than the corporate books and records required by Cayman Islands law to be present there. The court also found pragmatic considerations to support its conclusion that the debtors’ centre of main interests lay outside the Cayman Islands, i.e., that the lack of assets in the Cayman Islands meant that the insolvency representatives would have to rely on the assistance of other courts to make distributions to creditors. Finally, the court emphasized that improper purposes had motivated the commencement of the Cayman Island proceedings and the application for recognition, namely the seeking, through delay, to overturn the [SPhinX] settlement of the avoidance action without addressing the merits. The foreign representatives appealed the recognition decision. On appeal, the court affirmed the lower court’s decision.

^p371 B.R. 10 (S.D.N.Y. 2007) [CLOUT case no. 768].

15. *Stanford International Bank Ltd*^a

In February 2009, the United States Securities Exchange Commission filed a complaint against the owner of a group of companies (“Mr. X”) and companies belonging to Mr. X, including company “Y”, alleging, among other things, securities fraud. On the same day, a United States court appointed a receiver over the assets of the group of companies belonging to Mr. X, including company Y, and of Mr. X himself. Mr. X was a national of both the United States and Antigua and Barbuda, and company Y was incorporated and had its registered office in Antigua and Barbuda. In April 2009, the court of Antigua and Barbuda made a winding-up order and appointed two liquidators for company Y. Both the United States receiver and the liquidators of Antigua and Barbuda applied for recognition in England under the Cross-Border Insolvency Regulations 2006, which give effect to the Model Law in Great Britain. Each of them claimed that the proceedings in which they had been respectively appointed were “foreign main proceedings” pursuant to the Cross-Border Insolvency Regulations 2006. The English court recognized the Antigua and Barbuda proceeding as a foreign main proceeding, finding that it satisfied all aspects of the definition of “foreign proceeding” and that, following the test in *Eurofood*, the presumption that the centre of main interests of company Y was at the place of its registered office, i.e. Antigua, had not been rebutted. With respect to the United States proceeding, the 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), 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 the United States equivalent of article 2, paragraph (a), of the Model Law[11 U.S.C. § 101 (23)]. That decision was upheld on appeal.

16. *In re Tri-Continental Exchange Ltd*^b

The debtors were insurance companies registered under the laws of Saint Vincent and the Grenadines and subject to insolvency proceedings in the Eastern Caribbean Supreme Court, High Court of Justice, under the Companies Act of Saint Vincent and the Grenadines. The debtors’ only offices were located in Saint Vincent and the Grenadines, with approximately 20 employees. Although the debtors sold approximately 5,800 insurance

^a[2009] EWHC 1441 (Ch) [CLOUT case no. 923], on appeal [2010] EWCA Civ 137 [CLOUT case no. 1003].

^b349 B.R. 627 (Bankr. E.D. Cal. 2006) [CLOUT case no. 766].

policies to holders in the United States and Canada, all business was conducted through the debtors' registered offices in Kingstown. Premium payments were mailed to addresses in the United States, but bundles of mail from these "drop boxes" were forwarded to the debtors' offices in Saint Vincent and the Grenadines, where they were endorsed for deposit and sent to bank accounts maintained by the debtors in the United States. The insolvency representatives sought recognition of the proceeding of Saint Vincent and the Grenadines as a foreign main proceeding in the United States under chapter 15. The United States court recognized the proceeding as a foreign main proceeding, on the basis that the debtors' centre of main interests was located in Saint Vincent and the Grenadines, where they had their registered offices. The court further held that the debtors, as foreign insurance companies, would have been ineligible to apply for the commencement of insolvency proceedings under United States law but nevertheless would have been eligible for relief under for chapter 15.

**17. *Re Tucker, Aero Inventory (UK) Ltd
v Aero Inventory (UK) Limited*^s
*Re Tucker, Aero Inventory (UK) v
Aero Inventory (UK) Limited (No. 2)*^t**

In November 2009, insolvency proceedings commenced in the High Court of England and Wales against Aero Inventory and joint insolvency representatives were appointed. Aero Inventory owned and controlled movable aeronautical assets in Australia. The day after their appointment, the insolvency representatives applied, under the legislation enacting the UNCITRAL Model Law in Australia (Cross-Border Insolvency Act 2008) for recognition of the English proceedings as foreign main proceedings and for interim relief. The interim relief concerned protection of aircraft parts inventory stored at locations in Australia and controlled by Qantas, on the basis that it might be at risk because of a dispute as to entitlement to the parts. The court granted interim relief under the Australian equivalent of articles 19 and 21 of the Model Law, preventing any dealing with the property of the debtor adverse to the interests of the joint insolvency representatives and its creditors. At the final hearing (concerning Aero Inventory (No. 2)), the Australian court recognized the English proceedings, finding that the proceedings were foreign main proceedings, (the centre of main interests of the debtor being based upon its registered office in England and there being no evidence sufficient to displace the presumption in article 16, paragraph (3)) and that the representatives were foreign representatives as required by the Model

^s(2009) 76 ACSR 19; (2009) FCA 1354.

^t(2010) 77 ACSR 510; (2009) FCA 1481 [CLOUT case no. 922].

Law. Pursuant to the provision that was equivalent to article 21, subparagraph (1) (e), of the Model Law, the court entrusted the administration and realization of all of the debtor's assets in Australia to the foreign representatives, and ordered that no person could enforce a charge on the property of the debtor and that a pledge or lienholder in possession of the property of the debtor could continue in possession, but could not sell or otherwise enforce, the lien or pledge.

18. *Williams v Simpson*;⁴⁴ *Williams v Simpson (No. 5)*⁴⁵

On 9 September 2009, insolvency proceedings commenced against Mr. Simpson (the debtor) in England. The English proceedings commenced on the basis of a debt owed by the debtor to the applying creditor, which stated in its petition that the debtor's centre of main interests was not within a member State of the European Union and on the basis that a creditor could apply for commencement of insolvency proceedings in respect of a debtor who had "carried on business in England and Wales". On 10 September 2010, the insolvency representative (Mr. Williams) applied for recognition of the English proceeding in New Zealand under the legislation enacting the Model Law in New Zealand (Insolvency (Cross-border) Act 2006) and sought provisional relief.⁴⁶ On 17 September, the provisional relief was granted on certain terms, with additional relief being granted over the following days. The recognition application was heard on 1 October 2010. The court found that, while the English proceeding was a foreign proceeding as required by the Model Law, it was neither a foreign main proceeding—since the debtor's habitual residence was in New Zealand—nor a foreign non-main proceeding, as the test for an establishment under the Model Law was not met. The court found that, while under English law the debtor was subject to the insolvency laws of that country on the basis that he was still in the process of winding up business activities there, that was not a reason for holding that, in fact, he had a place of operations there from which he presently carried out the activity required under the definition of an establishment. Accordingly, the court declined to recognize the foreign proceedings. The court was, however, able to grant assistance in aid of the English proceedings under section 8 of the New Zealand law, a provision that could be applied in the rare circumstances in which the provisions enacting the Model Law were not available. That assistance was to enable the insolvency representative to collect and realize assets owned by the debtor in New Zealand, subject to any further directions that might be required in relation to the distribution of any proceeds of sale.

⁴⁴[2011] B.P.I.R. 938 (High Court of New Zealand, Hamilton, 17 September 2010).

⁴⁵High Court of New Zealand, Hamilton, 12 October 2010.

⁴⁶See also footnote 159 on the interim relief granted.

Annex II

Decision of the United Nations Commission on International Trade Law and General Assembly resolution 66/96 adopted 9 December

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 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,

^aUnited Nations publication, Sales No. E.99.V.3.

“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.”

