INSOL INTERNATIONAL

# GLOBAL INSOLVENCY PRACTICE COURSE

2023 / 2024

Session 5 Materials – Introduction to the UNCITRAL Model Laws Relating to Insolvency

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INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

**INSOL – Global Insolvency Practice Course – Module A**

**UNCITRAL MODEL LAW: AN INTRODUCTION - Exercise**

**Prof. G. Ray Warner**

Dear Colleagues-

I will only have a brief session in which to introduce you to the Model Law on Cross-Border Insolvency (MLCBI) so it is important that you read the assigned materials in advance. The Model Law is fairly short so it will be easy to read the entire document. (You can skim the other two model laws but we will not discuss the details of those.) In addition, I would like you to focus on a few MLCBI issues in advance of our session. This exercise is designed to help you do that so please also complete it in advance of our session.

**Exercise One -** Please (1) read the definition of "Foreign Main Proceeding" in Article 2 of the MLCBI and (2) read the *OAS* opinion interpreting "center of main interest" under the US version (Chapter 15). The EU Insolvency Regulation adopts a fairly rigid view of COMI that focuses on the place where the company's head office functions take place and that is ascertainable (rejecting the "nerve center" view of where decisions are made). Does the EU Regulation adopt the same test for center of main interest as the *OAS* opinion?

**Exercise Two –** How important is COMI? Please read Articles 19, 20 and 21 of the MLCBI. What relief is available for the representative of a Foreign Mani Proceeding that is **not** available for the representative of a Foreign Non-Main Proceeding? Please read Articles 28, 30 and 31of the MLCBI. What is the effect of recognizing the foreign proceeding as a Foreign Main Proceeding?

**Exercise Three –** Please read Articles 21(1 & 2) and 22(1 & 2) of the MLCBI. Is the court required to grant any relief to the Foreign Representative? If relief is not mandatory, then what standard applies to the grant of relief?

**Exercise Four –** Article 21(1) states that the court may "grant any appropriate relief, including [a list of items (a) through (f)] … (g) Granting any additional relief that may be available to [a local insolvency administrator] under the laws of this State." How should this language be read? Can the court grant relief that would not be available to a local insolvency administrator? Must the relief granted be relief that would be available to an insolvency administrator under the laws of the State where the foreign proceeding is pending?

# UNCITRAL Model Law on Cross-Border Insolvency

## PREAMBLE

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

*(a)* Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

*(b)* Greater legal certainty for trade and investment;

*(c)* Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

*(d)* Protection and maximization of the value of the debtor's assets; and

*(e)* Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

## CHAPTER I. GENERAL PROVISIONS

### *Article 1. Scope of application*

1. This Law applies where:

*(a)* Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

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

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

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

2. This Law does not apply to a proceeding concerning [*designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

### *Article 2. Definition*

For the purposes of this Law:

*(a)* "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

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

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

*(d)* "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

*(e)* "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

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

### *Article 3. International obligations of this State*

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

### *Article 4.* [Competent court or authority][a]

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

### *Article 5. Authorization of* [insert the title of the person or body administering reorganization or liquidation under the law of the enacting State] *to act in a foreign State*

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in a foreign State on behalf of a proceeding under [*identify laws of the enacting State relating to insolvency*], as permitted by the applicable foreign law.

### *Article 6. Public policy exception*

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

### *Article 7. Additional assistance under other laws*

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance to a foreign representative under other laws of this State.

### *Article 8. Interpretation*

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

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[a] A state where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials of bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in the State governing the authority of [*insert the title of the government-appointed person or body*].

## CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE

### *Article 9. Right of direct access*

A foreign representative is entitled to apply directly to a court in this State.

### *Article 10. Limited jurisdiction*

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

### *Article 11. Application by a foreign representative to commence a proceeding under* [identify laws of the enacting State relating to insolvency]

A foreign representative is entitled to apply to commence a proceeding under [*identify laws of the enacting State relating to insolvency*] if the conditions for commencing such a proceeding are otherwise met.

### *Article 12. Participation of a foreign representative in a proceeding under* [identify laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under [*identify laws of the enacting State relating to insolvency*].

### *Article 13. Access of foreign creditors to a proceeding under* [identify laws of the enacting State relating to insolvency]

1. Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [*identify laws of the enacting State relating to insolvency*] as creditors in this State.

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [*identify laws of the enacting State relating to*

*insolvency*], except that the claims of foreign creditors shall not be ranked lower than [*identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims*].[b]

### *Article 14. Notification to foreign creditors of a proceeding under* [identify laws of the enacting State relating to insolvency]

1. Whenever under [*identify laws of the enacting State relating to insolvency*] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

2. Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.

3. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

*(a)* Indicate a reasonable time period for filing claims and specify the place for their filing

*(b)* Indicate whether secured creditors need to file their secured claims; and

*(c)* Contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

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[b] The enacting State may wish to consider the following alternative wording to replace paragraph 2 of article 13:

"2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [*identify laws of the enacting State relating to insolvency*] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [*identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims*]."

## CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

### *Article 15. Application for recognition of a foreign proceeding*

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

2. An application for recognition shall be accompanied by:

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

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

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

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

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

### *Article 16. Presumptions concerning recognition*

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

2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

### *Article 17. Decision to recognize a foreign proceeding*

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

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

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

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

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

2. The foreign proceeding shall be recognized:

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

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

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

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

### *Article 18. Subsequent information*

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

*(a)* Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and

*(b)* Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign

representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

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

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

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

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

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

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

*Article 20. Effects of recognition of a foreign main proceeding*

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

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

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

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

2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article*].

3. Paragraph 1 *(a)* of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

4. Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] or the right to file claims in such a proceeding.

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

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

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

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

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

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

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

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

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

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

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

### *Article 22. Protection of creditors and other interested persons*

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

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

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

### *Article 23. Actions to avoid acts detrimental to creditors*

1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [*refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation*].

2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

### *Article 24. Intervention by a foreign representative in proceedings in this State*

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

## CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

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

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

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

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

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

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

### *Article 27. Forms of cooperation*

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

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

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

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

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

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

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

## CHAPTER V. CONCURRENT PROCEEDINGS

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

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

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

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

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

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

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

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

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

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

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

### *Article 30. Coordination of more than one foreign proceeding*

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

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

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

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

### *Article 31. Presumption of insolvency based on recognition of a foreign main proceeding*

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [*identify laws of the enacting State relating to insolvency*], proof that the debtor is insolvent.

### *Article 32. Rule of payment in concurrent proceedings*

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant

to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [*identify laws of the enacting State relating to insolvency*] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

533 B.R. 83
United States Bankruptcy Court,
S.D. New York.

In re: OAS S.A., et al.,[1] Debtors in Foreign Proceedings.

Case No. 15–10937 (SMB) (Jointly Administered)
|
Signed July 13, 2015

STUART M. BERNSTEIN, United States Bankruptcy Judge:

Renato Fermiano Tavares, as proposed foreign representative, requests recognition of three foreign proceedings pending in Brazil as foreign main proceedings pursuant to chapter 15 of the United States Bankruptcy Code. (*See Verified Petition for Recognition of Brazilian Bankruptcy Proceedings and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. §§ 1515, 1517, 1520 and 1521,* dated Apr. 15, 2015 (ECF Doc. # 3) (together with the *Voluntary Petitions for each debtor,* dated Apr. 15, 2015, filed in Adv. Pro. Nos. 15–10937 through 15–10940).) The foreign debtors—OAS S.A. ("OAS"), Construtora OAS S.A. ("Construtora") and OAS Investments GmbH ("OAS Investments," and together with OAS and Construtora, collectively, the "OAS Debtors")[2]—are currently debtors in judicial reorganization proceedings (the "Brazilian Bankruptcy Proceedings") pending in the First Specialized Bankruptcy Court of São Paulo (the "Brazilian Court") pursuant to Federal Law No. 11.101 of February 9, 2005 of the laws of the Federative Republic of Brazil (the "Brazilian Bankruptcy Law"). The Court conducted an evidentiary hearing on May 19, 2015 (the "Recognition Hearing")[3] and concludes based upon the factual findings and legal conclusions that follow that the OAS Debtors' petitions for recognition as foreign main proceedings are granted.

## BACKGROUND

### A. The OAS Debtors

The OAS Debtors are part of the OAS Group. The OAS Group consists of infrastructure companies that focus on heavy engineering and equity investments in infrastructure projects located in and outside Brazil, and provides a range of services that includes public concessions, construction, engineering, planning, execution and works management for the transportation, power, sanitation, infrastructure and real estate industries, providing services in twenty-two countries in Latin America, the Caribbean and Africa. (*Declaration of Re nato Fermiano Tavares Pursuant to 28 U.S.C. § 1746 in Support of Verified Petition for Recognition of Brazilian Bankruptcy Proceedings and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. §§ 1515, 1517, 1520 and 1521,* dated Apr. 15, 2015 ("*Tavares Declaration* ") at ¶ 9 (ECF Doc. # 4).)[4] Its principal operating activities are organized into two major divisions: engineering, which engages in heavy civil engineering and construction projects, and investments, which is focused on private investments in infrastructure and public and private services concessions. (*Id.*)

Most of the OAS Group's foreign construction contracts are with the national governments of countries in Latin America and Africa and relate to the construction of, among other things, highways, hospitals, water and sewage systems and affordable housing. (*Id.* at ¶ 10.) The OAS Group's domestic construction contracts are with private companies holding concessions, other private companies and the federal and local Brazilian governments. (*Id.*) The OAS Group employs, directly or indirectly, approximately 110,000 people. (*Id.*)

OAS, as the holding company, sits at the apex of the OAS Group. (*Id.* at ¶ 12.) It directly or indirectly owns 100% of the share capital of Construtora, the holding company atop the engineering division. (*Id.* at ¶¶ 12–13.) Construtora, through its subsidiaries and branches, conducts business in Brazil, Peru, Trinidad and Tobago, Ghana, Uruguay, Chile, Honduras, Argentina, Bolivia, Colombia, Mozambique, Guinea, Ecuador, Equatorial Guinea, Haiti, Costa Rica, Panama, Angola, and Guatemala. (*Id.* at ¶ 13.) Its operations in Brazil consist of more than eighty construction projects that generate more revenue for Construtora than its operations in any other country. (*Id.*)

OAS Investments maintains its registered office in Vienna, Austria, and is directly and wholly-owned by OAS. (*Id.* at ¶ 15.) Pursuant to its articles of association, its principal corporate purpose is the financing of the operations of the OAS Group. (OASX 27, at 113; OASX 28, at 118.)[5] In or

  

around October 2012, OAS Investments issued $500 million of 8.25% senior notes due 2019 (the "2019–1 Notes"). The 2019–1 Notes were guaranteed by OAS, Construtora, and OAS Investimentos, S.A. ("Investimentos"). (OASX 27, at 122, 123.) Investimentos, a Brazilian company, is not one of the OAS Debtors seeking recognition and should not be confused with OAS Investments, the note issuer. The OAS Group intended to use the proceeds to refinance a substantial portion of its existing debt, fund certain capital expenditures, and use the remainder for general corporate purposes. (OASX 27, at 45.) The 2019–1 Notes were governed by New York law. (*See* OASX 27, at v.)

In or around October 2013, OAS Investments issued an additional $375 million of 8.25% senior notes due 2019 (the "2019–2 Notes" and together with the 2019–1 Notes, the "2019 Notes"; holders of the 2019 Notes are referred to herein as the "2019 Noteholders"). The 2019–2 Notes were guaranteed, again by OAS, Construtora, and Investimentos. (OASX 28, at 128.) The OAS Group intended to use the proceeds to refinance a substantial portion of its existing debt. (OASX 28, at 48.) The 2019–2 Notes were also governed by New York law. (*See* OASX 28, at vi.)

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**3. The Brazilian Bankruptcy Proceedings**

On March 31, 2015, the OAS Debtors together with other OAS affiliates (collectively, the "Brazilian Debtors") commenced the Brazilian Bankruptcy Proceedings under Brazilian Bankruptcy Law. (*See* AAX 27.) On April 1, 2015, the Brazilian Court issued a decision and order approving the continuation of the joint reorganization proceedings. (*See* Decision, Proceeding No. 1030812–77.2015.8.26.0100, 1st District Bankruptcy and Judicial Reorganization Court, São Paulo, Brazil, Apr. 1, 2015 (OASX 1, OASX 2 (English Translation).)) The Brazilian Court observed that although Brazil had not yet adopted the UNCITRAL Model Code, the center of main interests of OAS was Brazil, and the Brazilian Debtors, including those incorporated abroad, were part of the same economic group controlled from Brazil.

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**C. The Chapter 15 Cases**

On April 2, 2015, the Board of Directors of OAS, Construtora, OAS Finance and OAS Investments resolved to grant Tavares a power of attorney for one year to represent the entities with respect to their judicial reorganization proceedings before the Brazilian Court and administer the reorganization of the debtors' assets and affairs in the Brazilian Bankruptcy Proceedings. In addition, the Boards of Directors specifically appointed Tavares as the OAS Debtors' agent and attorney-in-fact for the purpose of seeking relief available to a "foreign representative" under chapter 15 of the United States Bankruptcy Code. The resolutions were accompanied by powers of attorney evidencing his authority. (OASX 3, 4.)

On April 15, 2015, Tavares commenced the chapter 15 cases and sought immediate relief in the form of an injunction against continued litigation and collection efforts. (*Motion for Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code,* dated Apr. 15, 2015 (ECF Doc. # 7).) Aurelius and Alden objected to the provisional relief. (*See Noteholders' Objection to Motion for Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code,* dated Apr. 17, 2015 (ECF Doc. # 17).) At the hearing, the Court granted the relief but only in part.

On May 15, 2015, Aurelius and Alden filed their *Objection to Petition for Recognition,* dated May 15, 2015 (ECF Doc. # 60). The objection and the ensuing Recognition Hearing identified four areas of dispute. *** Third, OAS Investments' center of main interests was in Vienna, and its Brazilian reorganization could not be recognized as a foreign main or non-main proceeding.

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**DISCUSSION**

**A. Introduction**

Congress adopted chapter 15 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Chapter 15 incorporates the Model Law on Cross–Border Insolvency (the "Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"). 11 U.S.C. § 1501(a); *see Morning Mist Holdings Ltd. v. Krys* (*In re Fairfield Sentry Ltd.*), 714 F.3d 127, 132 (2d Cir.2013) ("*Fairfield Sentry* "); *Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V.* (*In re Vitro S.A.B. de C.V.*), 701 F.3d 1031, 1043 (5th Cir.2012) ("*Vitro* "), *cert. dismissed,* —— U.S. ——, 133 S.Ct. 1862, 185 L.Ed.2d 862 (2013). Chapter 15 is intended to promote "cooperation between United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that

protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses." *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.,* 374 B.R. 122, 126 (Bankr.S.D.N.Y.2007), *aff'd,* 389 B.R. 325 (S.D.N.Y.2008); *accord* 11 U.S.C. § 1501(a).

"In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508. "As each section of Chapter 15 is based on a corresponding article in the Model Law, if a textual provision of Chapter 15 is unclear or ambiguous, the Court may then consider the Model Law and foreign interpretations of it as part of its 'interpretive task.' " *O'Sullivan v. Loy* (*In re Loy* ), 432 B.R. 551, 560 (E.D.Va.2010) (footnote omitted) (citing 11 U.S.C. § 1508); *accord Fairfield Sentry,* 714 F.3d at 136; *Fogerty v. Petroquest Res., Inc.* (*In re Condor Ins. Ltd.*), 601 F.3d 319, 321 (5th Cir.2010). When interpreting Chapter 15, the Court should also consult the GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS–BORDER INSOLVENCY (the "GUIDE") promulgated by UNCITRAL. *See* H.R.REP. NO. 109–31, at 105 (2005); LEIF M. CLARK, ANCILLARY & OTHER CROSS–BORDER INSOLVENCY CASES UNDER CHAPTER 15 OF THE BANKRUPTCY CODE § 3[1][a][i], at 17 (2008).

Bankruptcy Code § 1517 states the grounds for granting recognition:

> (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
>
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
>
> (2) the foreign representative applying for recognition is a person or body; and
>
> (3) the petition meets the requirements of section 1515.

Section 1517(b) clarifies the distinction between foreign main and nonmain proceedings referred to in § 1517(a)(1):

> (b) Such foreign proceeding shall be recognized—
>
> (1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or
>
> (2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.

The parties agree that OAS and Construtora maintain their center of main interests ("COMI") in Brazil.[8] They are registered in Brazil where they maintain their main offices, and their registration creates a rebuttable presumption that Brazil is their COMI. 11 U.S.C. § 1516(c). Furthermore, the earlier description of their activities, which are predominantly in Brazil, confirms that their COMI is in Brazil. Aurelius and Alden do, however, dispute that OAS Investments' COMI is in Brazil.

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**C. The COMI of OAS Investments**

Tavares seeks recognition of the OAS Investments' Brazilian Bankruptcy Proceeding as a foreign main proceeding.[15] A " 'foreign main proceeding' means a foreign proceeding pending in the country where the debtor has the center of its main interests," 11 U.S.C. § 1502(4), or COMI. "In the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c). "[A] debtor's COMI is determined as of the time of the filing of the Chapter 15 petition," but, "[t]o offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." *Fairfield Sentry,* 714 F.3d at 133.

The COMI analysis permits consideration of any relevant activities, including liquidation activities and administrative functions. *Id.* at 137. The following non-exclusive group of factors guides the analysis, "but consideration of these specific factors is neither required nor dispositive," *id.:*

> Various factors, singly or combined, could be relevant to such a determination: the location of the

> debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.

*Id.* (quoting *In re SPhinX, Ltd.,* 351 B.R. 103, 117 (Bankr.S.D.N.Y.2006), *aff'd,* 371 B.R. 10 (S.D.N.Y.2007)). In addition, the court may consider the location of the debtor's "nerve center," "including from where the debtor's activities are directed and controlled, in determining a debtor's COMI." *Fairfield Sentry,* 714 F.3d at 138 n. 10. Finally, international sources of law that the court may consider "underscore [ ] the importance of factors that indicate regularity and ascertainability." *Id.* at 138. The party seeking recognition as a foreign main proceeding has the burden of proving that the debtor's COMI is in the jurisdiction where the foreign main proceeding is pending. *SPhinX,* 351 B.R. at 117.

As this case shows, the COMI analysis when applied to a special purpose financing vehicle proves less straightforward than the typical case. OAS Investments is incorporated in Austria, and in the absence of contrary evidence, Austria is its presumed COMI. The evidence, however, indicates that it was not. OAS Investments is a subsidiary of OAS that was formed to serve as a special purpose vehicle. It issued the 2019 Notes, and then loaned the proceeds to OAS Investments (BVI), a direct OAS subsidiary, (*see* AAX 4, at 7518), which apparently loaned the proceeds to the members of the OAS Group in accordance with the uses stated in the offering memoranda. Although OAS Investments' registered office is located in Vienna, Austria, it only maintains a post office box there. (Tr. at 85:12–19.) Furthermore, it does not conduct business, own assets, have a physical location, or employ anyone in Austria. (*Tavares Declaration* at ¶ 18.) It has just a handful of trade creditors located in Austria, (AAX 4, at 7451), who provide services relating to the establishment and maintenance of OAS Investments' registered office in Austria and services required under Austrian law. (*Tavares Declaration* ¶ 18.) The predominant creditors are the beneficial holders of the 2019 Notes located worldwide.[16]

Having issued the 2019 Notes, OAS Investments had no other business except to pay them off. This was the very business it and the other Brazilian Debtors were engaged in through the Brazilian Bankruptcy Proceedings when Tavares filed the chapter 15 case on April 15, 2015. Moreover, the Brazilian Bankruptcy Proceedings provide the only realistic chance to repay the 2019 Notes. OAS Investments principal asset is a receivable owed by OAS Investments (BVI). The latter appears to be a conduit for the distribution of financing proceeds to the ultimate beneficiaries of the financing; it was not mentioned in the offering memoranda and does not appear to have any other purpose. In addition, it is currently the subject of a provisional liquidation proceeding (along with OAS Finance) in the BVI, and lacks the means to repay OAS Investments unless its own OAS Group borrowers repay that debt. In truth, the only source of repayment that will ultimately discharge the obligations to the 2019 Noteholders must come from the OAS Group pursuant to the reorganization of their financial affairs.

Brazil, in this regard, is OAS Investments' nerve center and headquarters. OAS, a Brazilian entity and its sole shareholder, has the power to elect OAS Investments' executive officers and "determine the outcome of any action requiring shareholder approval, including transactions with related parties, acquisitions and dispositions of assets and the timing and payment of any future dividends, according to the Brazilian Corporation Law." (OASX 27, at 42; OASX 28, at 44.) The offering memoranda explained that although OAS Investments was organized under the laws of Austria, "[a]ll of its directors and [OAS Group's] officers and certain advisors named herein reside in Brazil." (OASX 27, at 42; OASX 28, at 44.) There is no evidence that its Board of Directors ever convened a meeting except to pass the resolution appointing Tavares as its foreign representative, and that resolution was executed by its Brazilian directors in Brazil.[17]

The conclusion that Brazil is the nerve center and headquarters of OAS Investments is consistent with the expectation of the creditors, especially the 2019 Noteholders. The first page of each offering memoranda stated that the 2019 Notes were "unconditionally and irrevocably guaranteed by OAS S.A., Construtora OAS Ltda. and OAS Investimentos S.A. (*each organized under the laws of Brazil).*" (Emphasis in original.) The offering memoranda described OAS Investments as "a special purpose finance company and [the OAS Group's] wholly owned subsidiary," (OASX 27, at 15; OASX 28, at 17), and

  

"[p]ursuant to section three of [OAS Investments'] articles of association, [OAS Investments'] principal purpose is the financing of the operations of the OAS group, its affiliates and direct and indirect subsidiaries." (OASX 27, at 113; OASX 28, at 118.) The offering memoranda discussed the businesses of the OAS Group, (OASX 27, at 80–112; OASX 28, at 82–117), supplied the condensed financial statements of OAS, (OASX 27, at F–1 to F–301; OASX 28, at F–1 to F–299), and the three Brazilian guarantors, (OASX 27, at A–1 to A–11; OASX 28, at A–1 to A–10), and identified the management of OAS, Construtora and Investimentos. (OASX 27, at 114–19; OASX 28, at 119–24.) Notably, the offering memoranda did not include any financial information regarding OAS Investments, (*see* OASX 27, at 113; OASX 28, at 118), or identify its management. It is also noteworthy that any notices under the Indentures that needed to be directed to OAS Investments had to be sent to Construtora in Brazil, with copies to Investimentos, also in Brazil. (*See* OASX 31, at § 13.01.)[18] The Indentures did not require any notices to be sent to OAS Investments in Austria or anywhere else in its own name.

Most importantly, the "Risk Factors" that all note purchasers were warned to "carefully consider" before deciding to purchase the notes described the risks associated with the businesses of the OAS Group, not OAS Investments, (OASX 27, at 25–44; OASX 28, at 26–47), and included a separate discussion focusing on the special risks relating to investments that could be affected by the Brazilian economy and Brazilian government actions. (OASX 27, at 39–42; OASX 28, at 41–44.) Potential purchasers were also warned that if OAS and its subsidiaries could not pay their indebtedness, including the obligations under the guarantees, they might become subject to bankruptcy proceedings in Brazil, and Brazilian laws might be less favorable to creditors compared to the laws of the United States or other jurisdictions. (OASX 27, at 43; OASX 28, at 45.) In contrast, the offering memoranda do not discuss the risks of operating in Austria. The only risk factor that mentioned Austria stated that Austria would not enforce U.S. judgments, the U.S. securities laws or awards of punitive damages. (OASX 27, at v; OASX 28, at vi.)

In conclusion, purchasers of the 2019 Notes understood that they were investing in Brazilian-based businesses, and OAS Investments' place of incorporation, or for that matter its very existence, was immaterial to their decision to purchase their notes. While their rights were governed by New York law, (OASX 31, at § 13.08), and OAS Investments consented to the jurisdiction and service of process in New York, (*id.* at § 13.12), the purchasers expected to receive repayment from the cash generated by the operations of the OAS Group, and in the event of a default, might ultimately have to enforce their rights in a Brazilian bankruptcy proceeding. OAS Investments had no separate, ascertainable presence in Austria; it was part of, and inseparable from, the OAS Group located in Brazil. Finally, the 2019 Noteholders had no legitimate expectation that the Austrian courts would play any role in the determination or payment of their claims. For the reasons stated, the Court concludes that OAS Investments' COMI was also located in Brazil when Tavares filed its chapter 15 case.

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INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

# UNCITRAL Model Laws: An Introduction

Prof. G. Ray Warner
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# Three UNCITRAL Model Laws

- MLCBI (1997) – Cross Border Insolvency –widely adopted
  - Our primary focus today
- MLIRJ (2018) – Insolvency Related Judgements
  - Under consideration in UK
- MLEG (2019) – Enterprise Groups
  - Under consideration in UK

# Lots of Variety Around the Globe

- What types of Systems?
  - Historically most were liquidation systems
  - Modern trend
    - Rescue or reorganization systems

# The World is Small

- Assets can be moved easily
  - For legitimate or illegitimate reasons
- Cross-border fraud is common
  - Recovery is difficult
  - Creditors may not want to fund uncertain efforts

# The World is Small II

- Business is global
  - Creditors, suppliers, investors & customers are global
- Businesses are global
  - Example – U.S. Corporation
  - NY headquarters & U.S. patents
  - Korean parts manufacturing plant
  - Mexican & Greek assembly plants
  - German, UK, Canada & U.S. stores

# How do you liquidate a Global Business?

- Seven or more separate bankruptcy cases
- What if each has different rules?

# Value Preservation

- What if assets are worth more if sold together
  - E.g., the Korean parts plant with the Mexican & Greek assembly plants and the U.S. patents

# Worse – How Do You Save It?

- Where should you reorganize a global company?
- Can you do it?
  - What if Korea lacks a reorganization system?
  - What if it has critical differences?
    - E.g., no Debtor in Possession
    - Or different rules for patent licenses

# Problem of Multi-National Companies

- Name one that isn't!
- What are the bankruptcy options
  - Territoriality vs. Universality
- Territoriality –
  - U.S. case deals with U.S. assets, Mexico case deals with Mexico assets, etc.
- Universality –
  - One case deals with all assets and all creditors

# Which One is Better?

- Can you ever get to universality?
  - Loss of sovereignty
  - But – effect of convergence
    - If the law is the same everywhere, how much do you care about choice of law?
    - Still have problems
      - Co-Ordination of proceedings
      - Enforcement of foreign orders

# EU Insolvency Regulation

- EU faced this problem first
  - How do you deal with a common market and multiple different insolvency systems?
  - You need (1) jurisdictional and
    (2) choice of law rules
- UNCITRAL Model Law
  - Much less ambitious

# UNCITRAL Model Law on Cross-Border Insolvency

- Why a Model Law?
- Why not a treaty?
  - Too difficult politically
  - Also easier to make local variations
- Trade off - less uniform but wider adoption
  - Adopted in 59 States and 62 jurisdictions (Oct. '23)
  - But many have variations from uniform text

# EU & UNCITRAL Adopt Modified Universality

- Which nation's insolvency proceeding should be the *main* one?
  - The main proceeding should be the one pending where the company's main interests are centered
- COMI - "center of main interest"

# Main vs. Non-Main Proceedings

- Proceeding pending in the COMI is a “foreign main proceeding”
- Other proceedings are “foreign non-main proceedings”
  - But only if pending where the company has an “establishment”
- What if no establishment but only assets?
  - Model Law does not address it

# Main vs. Non-Main

- This matters a lot in the EU since main proceeding orders may be binding in other EU nations

- Not as critical under Model Law
  - Nothing is “binding”

# What is COMI

- COMI - “center of main interest”
  - Not defined in Model Law
  - But start with registered office presumption
- Interpretation rules
  - International origin & uniformity
    - Can look to EU Regulation
  - EU Test – Head office function
    - Plus – “ascertainable by third parties”
  - US Test – Nerve center

# COMI Reconsidered

- What is the COMI of a corporate group?
- What is the COMI of an Irish subsidiary of Apple?
- How easy is it to change COMI?
  - And get a different bankruptcy outcome
- Timing of determination

- Is ascertainability really meaningful?

# What Does the Model Law Do?

- Not much

  - But that is still an astounding development in international insolvency law

# The Major Features

- Access to local courts
- Recognition
- Relief
- Communication and Co-Ordination

# First - Access

- For insolvency administrators
  - Both inbound and outbound
    - Express authority for *local* administrator to appear in foreign courts
    - Procedures for *foreign* representative to appear in *local* courts

# Access to Local Courts

- Foreign representative can sue and defend in debtor's stead
- Foreign representative can institute a local insolvency proceeding
  - Insolvency is presumed if "Main"
- Foreign representative can participate in a pending local insolvency proceeding

# Access of Foreign Creditors

- Insolvency laws may treat local creditors better
  - May not even permit foreign creditors to participate
- Model Law gives foreign creditors notice and "same rights" as local creditors
- Right to distribution
  - Foreign creditors may be treated worse
    - But not worse than general unsecureds
    - Option to exclude foreign tax and social security claims

# Second - Recognition

- Simply local court recognition (confirmation) that:
  - There is a foreign insolvency proceeding involving this entity,

    and
  - The Foreign Representative is the right person to represent

    that estate's interests
- This is the first issue in the case
  - Model Law says it should be quick and easy
    - But it is where you need to fight hard if you want to block local enforcement of the foreign proceeding

# What is a “Foreign Proceeding”

- Collective
- Judicial or administrative proceeding
- Law relating to insolvency
- Subject to supervision of
  - Foreign judicial or other authority
- Purpose of liquidation or reorganization

# Effects of Recognition

- Portal to appear in local courts
- May participate in a local insolvency proceeding
- May obtain insolvency-related relief from local courts

# What Relief is Available?

- Main gets more than Non-Main
  - Lots of focus in literature

- *Automatic* relief if Main – Art. 20
  - Stay of proceedings and executions
    - Subject to local stay exceptions
      - e.g. secured credit may not be affected
  - Suspension of debtor's power to transfer property

# Discretionary Relief

- But the same stay is available in Non-Main
  - Just not automatic – Art. 21
    - So how great is the difference?

- Also pre-recognition relief allowed
  - All Art. 21 relief
  - Available in Main or Non-Main

# What Else Can You Get?

- Discovery
- Entrustment –
  - Entrust local assets to foreign representative!
  - Entrust *distribution* to foreign representative!!
    - Local court collects assets and sends them to foreign court to distribute under a different set of rules!

# Local Insolvency Powers

- Art. 21 – "any additional relief" available to a local insolvency administrator
- Art. 23 use of local avoiding powers
  - US – Can't use U.S. powers
- Strategy consideration –
  - (1) file a full local proceeding, or
  - (2) seek recognition and exercise local powers
    - US – Choice of avoiding law?

# Model Insolvency Related Judgments Law

- UK (Ruben) – MLCBI is procedural only
  - No new power to enforce foreign plans, schemes, etc.
- US – Art. 21 "appropriate relief" permits enforcement of foreign orders (including plans & schemes)
- MLIRJ – Clarifies this and overrules Ruben
  - Also designed to overrule Gibbs
  - On pause in UK to consider this
- Foreign Insolvency judgments are enforceable
  - Very broad – Shall enforce except for jurisdictional defects, no due process or fraud

# Limitations in Art. 21 & 22

- Court “may” grant relief
- “Appropriate” relief
- Local creditors must be “adequately protected”
- All parties must be “adequately protected”
- May impose “appropriate” conditions

- Lots of discretion!

# Main vs. Non-Main

- Relief granted should reflect the nature of the foreign proceeding
  - Relief may be more restricted in Non-Main
  - E.g. does it relate to assets that “should be administered” in the foreign Non-Main proceeding?

# Enterprise Groups

- Model Law focuses on entity
  - No “Group COMI”
- But might enforce “3rd Party Releases” of Affiliates
  - In COMI of parent
  - Or COMI of finance affiliate
  - Or COMI of any Group Member

# Model Enterprise Group Law (MLEG)

- Recognizes group existence and authorizes cooperation
  - But retains separateness of proceedings
- Possibility of a group planning proceeding
  - Voluntary
  - Extra case and extra costs
- Some important powers
  - Authorizes agreements
  - Authorizes “synthetic secondary” proceedings

# Additional Powers

- Finally Art. 7 - may "provide additional assistance" under other local laws
  - U.S. version includes enforcement of foreign insolvency orders
    - E.g., enforce foreign reorganization plan against local creditors

# Manifestly Contrary to Local Public Policy

- All relief subject to Art. 6 "manifestly contrary" to local public policy
  - Should be very narrow
    - Goal is to facilitate foreign proceeding
  - Often raised but rarely applies

- Real limitation is discretion
  - Threatens to undermine goals of the Model Law

# Using Foreign Law

- Is Model Law merely procedural or can it import substantive results?
- Can I use a more favorable foreign law to reorganize and then use the Model Law to enforce it locally?
- How different can the foreign law be?
- Issue – Must relief be available under forum's law, other law or both?

# Co-Operation

- Let's talk
  - Court to court communication
  - Representative to representative communication

- Authority for court and insolvency representative to communicate with foreign court or foreign insolvency representative

# Let's Work Together

- Courts and representatives are directed to "cooperate to the maximum extent possible"

# Types of Co-Operation

- Can a US and Canadian judge hold a joint televised hearing?

- Can the courts approve agreements?
  - Common - called protocols
  - Usually procedural
    - But use of concentration account?

# The Law of Nowhere?

- What law governs a cross-border case?
  - A little US
  - A little Mexico
  - A little Greek
  - A little protocol that is the law of none?

- Can you predict the outcome for your client

# Recap

- The big issues
  - You can use any nation's law to handle a global case if it purports to grant jurisdiction
    - But enforcement is the problem
  - You can use the Model Law to:
    - Coordinate multiple national cases
    - Collect foreign assets and enforce your nation's bankruptcy orders in some other nations

## Part one

# UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments

### Preamble

1. The purpose of this Law is:

*(a)* To create greater certainty in regard to rights and remedies for recognition and enforcement of insolvency-related judgments;

*(b)* To avoid the duplication of insolvency proceedings;

*(c)* To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;

*(d)* To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;

*(e)* To protect and maximize the value of insolvency estates; and

*(f)* Where legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been enacted, to complement that legislation.

2. This Law is not intended:

*(a)* To restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment;

*(b)* To replace legislation enacting the UNCITRAL Model Law on Cross-Border Insolvency or limit the application of that legislation;

*(c)* To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

*(d)* To apply to the judgment commencing the insolvency proceeding.

## Article 1. Scope of application

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a State that is different to the State in which recognition and enforcement is sought.

2. This Law does not apply to [...].

## Article 2. Definitions

For the purposes of this Law:

*(a)* "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

*(b)* "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the insolvency proceeding;

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

*(d)* "Insolvency-related judgment":

(i) Means a judgment that:

a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and

b. Was issued on or after the commencement of that insolvency proceeding; and

(ii) Does not include a judgment commencing an insolvency proceeding.

## Article 3. International obligations of this State

1. To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

2. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments, and that treaty applies to the judgment.

## Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court before which the issue of recognition is raised as a defence or as an incidental question.

## Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law.

## Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance under other laws of this State.

## Article 7. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.

## Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

## Article 9. Effect and enforceability of an insolvency-related judgment

An insolvency-related judgment shall be recognized only if it has effect in the originating State and shall be enforced only if it is enforceable in the originating State.

## Article 10. Effect of review in the originating State on recognition and enforcement

1. Recognition or enforcement of an insolvency-related judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make recognition or enforcement conditional on the provision of such security as it shall determine.

2. A refusal under paragraph 1 does not prevent a subsequent application for recognition or enforcement of the judgment.

## Article 11. Procedure for seeking recognition and enforcement of an insolvency-related judgment

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. The issue of recognition may also be raised as a defence or as an incidental question.

2. When recognition and enforcement of an insolvency-related judgment is sought under paragraph 1, the following shall be submitted to the court:

*(a)* A certified copy of the insolvency-related judgment; and

*(b)* Any documents necessary to establish that the insolvency-related judgment has effect and, where applicable, is enforceable in the originating State, including information on any pending review of the judgment; or

*(c)* In the absence of evidence referred to in subparagraphs *(a)* and *(b)*, any other evidence on those matters acceptable to the court.

3. The court may require translation of documents submitted pursuant to paragraph 2 into an official language of this State.

4. The court is entitled to presume that documents submitted pursuant to paragraph 2 are authentic, whether or not they have been legalized.

5. Any party against whom recognition and enforcement is sought has the right to be heard.

## Article 12. Provisional relief

1. From the time recognition and enforcement of an insolvency-related judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related judgment, the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 11, paragraph 1, grant relief of a provisional nature, including:

*(a)* Staying the disposition of any assets of any party or parties against whom the insolvency-related judgment has been issued; or

*(b)* Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgment.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice, including whether notice would be required under this article.*]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgment is made.

## Article 13. Decision to recognize and enforce an insolvency-related judgment

Subject to articles 7 and 14, an insolvency-related judgment shall be recognized and enforced provided:

*(a)* The requirements of article 9 with respect to effect and enforceability are met;

*(b)* The person seeking recognition and enforcement of the insolvency-related judgment is an insolvency representative within the meaning of article 2,

subparagraph *(b)*, or another person entitled to seek recognition and enforcement of the judgment under article 11, paragraph 1;

*(c)* The application meets the requirements of article 11, paragraph 2; and

*(d)* Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court.

## Article 14. Grounds to refuse recognition and enforcement of an insolvency-related judgment

In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if:

*(a)* The party against whom the proceeding giving rise to the judgment was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified in this State of the institution of that proceeding in a manner that is incompatible with the rules of this State concerning service of documents;

*(b)* The judgment was obtained by fraud;

*(c)* The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties;

*(d)* The judgment is inconsistent with an earlier judgment issued in another State in a dispute involving the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

*(e)* Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State;

*(f)* The judgment:

(i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed,

a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and

(ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

*(g)* The originating court did not satisfy one of the following conditions:

(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that that party argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State;

[*States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency might wish to enact subparagraph (h).*]

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

(i) The insolvency representative of a proceeding that is or could have been recognized under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*] participated in the proceeding in the originating State to the extent of engaging in the substantive merits of the cause of action to which that proceeding related; and

(ii) The judgment relates solely to assets that were located in the originating State at the time the proceeding in the originating State commenced.

## Article 15. Equivalent effect

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] or [would have had if it had been issued by a court of this State].[1]

2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

## Article 16. Severability

Recognition and enforcement of a severable part of an insolvency-related judgment shall be granted where recognition and enforcement of that part is sought, or where only that part of the judgment is capable of being recognized and enforced under this Law.

[*States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments that may have cast doubt on whether judgments can be recognized and enforced under article 21 of that Model Law. States may therefore wish to consider enacting the following provision*:]

## Article X. Recognition of an insolvency-related judgment under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment.

[1] The enacting State may wish to note that it should choose between the two alternatives provided in square brackets. An explanation of this provision is provided in the Guide to Enactment in the notes to article 15.

# Part one
# UNCITRAL Model Law on Enterprise Group Insolvency

## Part A. Core provisions

### *Chapter 1. General provisions*

**Preamble**

The purpose of this Law is to provide effective mechanisms to address cases of insolvency affecting the members of an enterprise group, in order to promote the objectives of:

*(a)* Cooperation between courts and other competent authorities of this State and foreign States involved in those cases;

*(b)* Cooperation between insolvency representatives appointed in this State and foreign States in those cases;

*(c)* Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;

*(d)* Fair and efficient administration of insolvencies concerning enterprise group members that protects the interests of all creditors of those enterprise group members and other interested persons, including the debtors;

*(e)* Protection and maximization of the overall combined value of the assets and operations of enterprise group members affected by insolvency and of the enterprise group as a whole;

*(f)* Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and

*(g)* Adequate protection of the interests of the creditors of each enterprise group member participating in a group insolvency solution and of other interested persons.

### Article 1. Scope

1. This Law applies to enterprise groups where insolvency proceedings have commenced for one or more of its members, and addresses the conduct and administration of those insolvency proceedings and cooperation between those insolvency proceedings.

2. This Law does not apply to a proceeding concerning [*designate any types of entity, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

### Article 2. Definitions

For the purposes of this Law:

*(a)* "Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;

*(b)* "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;

*(c)* "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

*(d)* "Enterprise group member" means an enterprise that forms part of an enterprise group;

*(e)* "Group representative" means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding;

*(f)* "Group insolvency solution" means a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members;

*(g)* "Planning proceeding" means a main proceeding commenced in respect of an enterprise group member provided:

(i) One or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution;

(ii) The enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution; and

(iii) A group representative has been appointed;

Subject to the requirements of subparagraphs *(g)*(i) to (iii), the court may recognize as a planning proceeding a proceeding that has been approved by a court with jurisdiction over a main proceeding of an enterprise group member for the purpose of developing a group insolvency solution within the meaning of this Law;

*(h)* "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of an enterprise group member debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

*(i)* "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the enterprise group member debtor's assets or affairs or to act as a representative of the insolvency proceeding;

*(j)* "Main proceeding" means an insolvency proceeding taking place in the State where the enterprise group member debtor has the centre of its main interests;

*(k)* "Non-main proceeding" means an insolvency proceeding, other than a main proceeding, taking place in a State where the enterprise group member debtor has an establishment within the meaning of subparagraph *(l)* of this article; and

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

### Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

### Article 4. Jurisdiction of the enacting State

Where an enterprise group member has the centre of its main interests in this State, nothing in this Law is intended to:

*(a)* Limit the jurisdiction of the courts of this State with respect to that enterprise group member;

*(b)* Limit any process or procedure (including any permission, consent or approval) required in this State in respect of that enterprise group member's participation in a group insolvency solution being developed in another State;

*(c)* Limit the commencement of insolvency proceedings in this State, if required or requested; or

*(d)* Create an obligation to commence an insolvency proceeding in this State in respect of that enterprise group member when no such obligation exists.

### Article 5. Competent court or authority

The functions referred to in this Law relating to the recognition of a foreign planning proceeding and cooperation with courts, insolvency representatives and any group representative appointed shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

### Article 6. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

### Article 7. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

### Article 8. Additional assistance under other laws

Nothing in this Law limits the power of a court or an insolvency representative to provide additional assistance to a group representative under other laws of this State.

## *Chapter 2. Cooperation and coordination*

### Article 9. Cooperation and direct communication between a court of this State and other courts, insolvency representatives and any group representative appointed

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with other courts, insolvency representatives and any group

representative appointed, either directly or through an insolvency representative appointed in this State or a person appointed to act at the direction of the court.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, other courts, insolvency representatives or any group representative appointed.

### Article 10. Cooperation to the maximum extent possible under article 9

For the purposes of article 9, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

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

*(b)* Participation in communication with other courts, an insolvency representative or any group representative appointed;

*(c)* Coordination of the administration and supervision of the affairs of enterprise group members;

*(d)* Coordination of concurrent insolvency proceedings commenced with respect to enterprise group members;

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

*(f)* Approval and implementation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;

*(g)* Cooperation among courts as to how to allocate and provide for the costs associated with cooperation and communication;

*(h)* Use of mediation or, with the consent of the parties, arbitration, to resolve disputes between enterprise group members concerning claims;

*(i)* Approval of the treatment and filing of claims between enterprise group members;

*(j)* Recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and

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

### Article 11. Limitation of the effect of communication under article 9

1. With respect to communication under article 9, a court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

2. Participation by a court in communication pursuant to article 9, paragraph 2, does not imply:

*(a)* A waiver or compromise by the court of any powers, responsibilities or authority;

*(b)* A substantive determination of any matter before the court;

*(c)* A waiver by any of the parties of any of their substantive or procedural rights;

*(d)* A diminution of the effect of any of the orders made by the court;

*(e)* Submission to the jurisdiction of other courts participating in the communication; or

*(f)* Any limitation, extension or enlargement of the jurisdiction of the participating courts.

### Article 12. Coordination of hearings

1. A court may conduct a hearing in coordination with another court.

2. The substantive and procedural rights of the parties and the jurisdiction of the court may be safeguarded by the parties reaching agreement on the conditions to govern the coordinated hearing and the court approving that agreement.

3. Notwithstanding the coordination of the hearing, the court remains responsible for reaching its own decision on the matters before it.

### Article 13. Cooperation and direct communication between a group representative, insolvency representatives and courts

1. A group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with other courts and insolvency representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.

2. A group representative is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from other courts and insolvency representatives of other enterprise group members.

### Article 14. Cooperation and direct communication between an insolvency representative appointed in this State, other courts, insolvency representatives of other group members and any group representative appointed

1. An insolvency representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with other courts, insolvency representatives of other enterprise group members and any group representative appointed.

2. An insolvency representative appointed in this State is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from other courts, insolvency representatives of other enterprise group members and any group representative appointed.

### Article 15. Cooperation to the maximum extent possible under articles 13 and 14

For the purposes of article 13 and article 14, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

*(a)* Sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information;

*(b)* Negotiation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;

*(c)* Allocation of responsibilities between an insolvency representative appointed in this State, insolvency representatives of other group members and any group representative appointed;

*(d)* Coordination of the administration and supervision of the affairs of the enterprise group members; and

*(e)* Coordination with respect to the development and implementation of a group insolvency solution, where applicable.