INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 2A Guidance Text

UNCITRAL Model Laws Relating to Insolvency

2021 / 2022

INSOL INTERNATIONAL
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1. INTRODUCTION TO THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Welcome to **Module 2A**, dealing with the **UNCITRAL Model Laws Relating to Insolvency**. This Module is one of the compulsory module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of the UNCITRAL Model Law on Cross-Border Insolvency;
- a relatively detailed overview of the different parts of the Model Law on Cross-Border Insolvency, including the purpose and function of each part;
- a relatively detailed overview of the practicalities in applying the Model Law on Cross-Border Insolvency as illustrated by appropriate case law;
- a general overview of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments;
- a general overview of the Model Law on Enterprise Group Insolvency.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

It is to be noted that candidates will only be examined on Part A of this guidance text, dealing with the Model Law on Cross-Border Insolvency. Candidates will not be examined on Part B (Model Law on Recognition and Enforcement of Insolvency-Related Judgments) and Part C (Model Law on Enterprise Group Insolvency).

Please Note

If you have selected this module as one of your **compulsory modules**, the formal assessment for this module must be submitted by **11 pm (23:00) GMT on 1 March 2022**.

If you have selected this module as one of your **elective modules**, you have a choice as to when you must submit the assessment. You may either submit the assessment by **11 pm (23:00) GMT on 1 March 2022**, or by **11 pm (23:00) BST (GMT +1) on 31 July 2022**. However, if you elect to submit your assessment on 1 March 2022, you may not submit the assessment again on 31 July 2022 (for example, to obtain a higher mark).

Please consult the Foundation Certificate in International Insolvency Law web pages for both the assessment and the instructions for submitting the assessment via the course web pages. Please note that **no extensions** for the submission of assessments beyond 1 March 2022 (or 31 July 2022, depending on whether you have taken this module as a compulsory or elective module) will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the Course Handbook which you will find on your student portal for the Foundation Certificate in International Insolvency Law.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law or MLCBI):

- the background and historical development of the Model Law;
- the purpose of the Model Law;
- the general provisions of the Model Law;
- access for foreign representatives and creditors under the Model Law;
- recognition of foreign proceedings and relief under the Model Law;
- co-operation with foreign courts and foreign representatives under the Model Law;
- concurrent proceedings under the Model Law;
- the UNCITRAL practice guide on cross-border insolvency co-operation;
- a judicial perspective on the Model Law;
- the treatment of enterprise groups under the Model Law;
- an overview of the provisions of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments; and
- an overview of the Model Law on Enterprise Group Insolvency.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of Part A of this module;
- be able to write an essay on any aspect of the Model Law on Cross-Border Insolvency; and
- be able to answer questions based on a set of facts relating to the Model Law on Cross-Border Insolvency.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress

through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. RECOMMENDED READING (NOT COMPULSORY)

- **Working Group V Documents**: Working Group V Documents on Cross-Border Insolvency, which can be accessed via: http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html

- **UNCITRAL Guide to Enactment**: UNCITRAL Guide to Enactment and Interpretation (1997, updated 2014), which can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf

- **Legislative Guide– Parts One and Two**: The UNCITRAL Legislative Guide on Insolvency Law (2004), contains part one (Designing the Key Objectives and Structure of an Effective and Efficient Insolvency Law) and part two (Core Provisions for an Effective and Efficient Insolvency Law), can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.

- **Practice Guide**: The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009), which can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf.

- **The Judicial Perspective**: The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective (2011, updated 2013), which can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/Judicial-Perspective-2013-e.pdf.

- **Legislative Guide – Part Three**: The UNCITRAL Legislative Guide on Insolvency Law – part three deals with treatment of enterprise groups in insolvency (2010) and can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-.pdf.

- **Insolvency Related Judgments**: The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments can be accessed via: http://www.uncitral.org/pdf/english/texts/insolven/Interim_MLIJ.pdf.

PART A – THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

4. THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY LAW: BACKGROUND AND HISTORICAL DEVELOPMENT[1]

4.1 Introduction

This part of the Module explores why the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law or MLCBI) came about when it did, as well as who was involved in its development. When studying this part of the Module, please also ask yourself why the format of a model law (as opposed to, for example, a treaty or convention) was chosen and what this attempts to achieve.

The United Nations Committee on International Trade Law (UNCITRAL) was established by the United Nations (UN) General Assembly in 1966 to reduce or remove the obstacles to trade created by the disparities between the national laws governing international trade. With a focus on harmonisation and modernisation of international trade, the Commission[2] was regarded as the vehicle through which the UN could play a more active role in the field. UNCITRAL conducts its business through working groups and the Commission. Working groups are the fori that do the day-to-day work on developing legislative texts and at present UNCITRAL has six working groups.[3]

On 23 June 1993, in its twenty-sixth session, following a proposal made at the 1992 UNCITRAL Congress titled "Uniform Commercial Law in the 21st Century", UNCITRAL decided to pursue the issue of cross-border insolvency.[4] Since 1995, Working Group V (Insolvency Law) (WG V) has been working on cross-border insolvency.[5] On 30 May 1997, UNCITRAL adopted the Model Law on Cross-Border Insolvency which was subsequently adopted by the General Assembly in a resolution of 15 December 1997.[6]

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1 See generally Neil Hannan, *Cross-Border Insolvency - The Enactment and Interpretation of the UNCITRAL Model Law*, Chapter 2 "Development of the Model Law", Springer, 2017.

2 The Commission is an intergovernmental body that comprises 60 Member States elected by the General Assembly and which represent the world's various geographic regions and the principal economic and social systems.

3 Jenny Clift and Neil Cooper, *Celebrating 20 years of Collaboration*, INSOL International / UNCITRAL publication (May 2014), Chapter 2 "UNCITRAL – its history and mission", pp 1-2.

4 United Nations Commission on International Trade Law, *Possible Future Work, Note by Secretariat addendum, Cross Border Insolvency*, UN Doc A/CN.9/378/Add.4, 23 June 1993 ("Possible Future Work").

5 It should be noted that WGV does not exclusively deal with cross-border insolvency but also works on other aspects of insolvency law. See in this respect the "Working Group V Documents" mentioned in Section 3 "Recommended Reading" and also the UNCITRAL Legislative Guide, on Insolvency Law, with its various parts. UNCITRAL together with the World Bank are considered international standard-setting bodies for insolvency. The World Bank has its so-called "World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes" (http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf) and a Taskforce meets annually to align the insolvency related work both organisations undertake.

6 UNCITRAL Guide to Enactment, p 23 at para 16.

But what is cross-border insolvency? In its most simple form, a "cross-border insolvency" arises when insolvency proceedings are commenced in one sovereign jurisdiction (or State) against an insolvent debtor that also has assets and / or liabilities in at least one other State.[7] In the most complex cases, a multinational enterprise (set up as a group of companies) may have business operations in dozens of States carried out by subsidiaries, branches and other affiliated entities, with a wide variety of different types of assets and liabilities in different locations and numerous different creditors.

4.2 Historical development

Why did UNCITRAL, more particularly WG V, decide to also focus on cross-border insolvency? This requires us to take a step back and look back at the historical development of its work. While trade was historically conducted primarily by individuals locally within their own home country, the 19th century saw the fast growing use of corporations (that is, separate legal entities) and in today's world, business and trade are increasingly international, crossing more jurisdictions than just the home country of the traders. This internationalisation and globalisation has been facilitated by more affordable international travel and the explosion of cross-border communications via the Internet and the use of devices such as iPhones, smart phones, tablets and the like.

In the area of insolvency law and the substantive rules dealing with financial difficulties or financial distress, most of the relevant substantive laws and rules of insolvency are jurisdiction-specific. Legal systems have over a long period of time developed rules to deal with the consequences of business failures, including an orderly and equitable distribution of the assets which are left to divide amongst the creditors of a failed business. However, when the assets of a business are spread across more than one State, it is difficult to conduct an orderly and equitable distribution of the assets due to the differences in laws, legal systems, political interests and self-interest that characterise each State. In other words, without anything else agreed between State A and State B, insolvency laws and rules of State A (even those declared by State A to have "universal effect") stop having any effect at the border of State B.

For some debtors with international activities, this territorial effect of a domestic insolvency is an incentive to conceal assets abroad outside of the insolvent estate and thereby make them unavailable for collective distribution to the creditors of that debtor. To combat such international fraud,[8] but also to incentivise international trade by making the consequences of an insolvency more predictable and transparent and at the same time combat the existing disharmony on cross-border insolvency issues amongst States, something was clearly needed to facilitate assistance between States in a cross-border insolvency.

Amongst the British Commonwealth countries a common law principle of "comity" was developed. This principle allows the courts in one common law State to recognise the courts in another common law State and to assist each other in the enforcement of their respective

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7 United Nations Commission on International Trade Law, *Possible Future Work*, *supra* note 4, at 10 where it is stated that: "Cross-border insolvency is the term frequently used for insolvency cases in which the assets of the debtor are located in two or more States, or where foreign creditors are involved. (…)"

8 UNCITRAL Guide to Enactment, p 21 at para 6.

judgments to the extent permitted by each court's domestic laws and it further allows nominated persons in one State to obtain the assistance of the court in another State. A similar principle of "comity" was adopted in the United States of America (the "USA") where the US Supreme Court described the principle as follows:

> "'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[9]

In civil law jurisdictions an attempt is made to achieve the same result as comity by issuing enabling orders (also known as *exequaturs*), or the conclusion of *ad hoc* protocols, to establish co-operation and facilitate the administration in cross-border insolvency proceedings.[10]

Treaties (bilateral ones between two States, or multilateral ones amongst more than two States) are another way of dealing with assistance and recognition issues in a cross-border insolvency. However, treaties dealing with insolvency law have proven to be quite difficult to agree.[11] In Europe, for example, it took until 29 May 2000 for the European Council to adopt the Regulation on Insolvency Proceedings (the European Insolvency Regulation or EIR).[12] The EIR (which is not a treaty, but an EU Regulation which, following adoption, directly becomes part of the domestic law of each EU Member State) was the outcome of almost forty years of efforts[13] to establish a framework within which insolvency proceedings taking place in any EU Member State could be recognised and enforced throughout the rest of the European Union.[14]

The Model Law was established as a result of work done and pressure exerted by a number of groups, including INSOL International and the International Bar Association (IBA).[15] During its development, WG V took into account other international regulations and proposals from other non-governmental bodies.[16]

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9 *Hilton v Guyot* (1895) 159 US 113, 163-4.

10 United Nations Commission on International Trade Law, Report on UNCITRAL – INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22 and 23 March 1995) UN Doc A/CN.9/413, 12 April 1995 ("UNCITRAL – INSOL Judicial Colloquium"), p 3 at para 10.

11 In *Possible Future Work*, *supra* note 4, it was acknowledged that "(…) while recognising the desirability of a workable system of cooperation between States in insolvency matters, it has also been pointed out in international discussions that it may be unrealistic to suppose that any principle of universality of insolvency proceedings could be attained at the global, or even at regional, level in the foreseeable future. (…)".

12 Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, as recast in Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May, 2015.

13 In 1995, the European Community for example unsuccessfully proposed the introduction of the European Convention on Insolvency Proceedings.

14 In 2003 in North America, the American Law Institute published *Transnational Insolvency: Cooperation Among the NAFTA Countries, Principles of Cooperation Among NAFTA Countries* in an attempt to develop principles and procedures for managing cross-border insolvency within NAFTA (North Atlantic Free Trade Agreement) countries.

15 UNCITRAL Guide to Enactment, p 22 at para 12.

16 Including, for example, the Model International Insolvency Act (MIICA) and the Cross-Border Insolvency Concordat developed by Committee J of the IBA. See also the initiatives listed in part III of *Possible Future Work*, *supra* note 4, including for Latin American States the Bustamante Code and the Montevideo Treaties, the

In 1994, UNCITRAL and INSOL held a colloquium at which it was recognised that:

> "despite concerns about the feasibility of a project to harmonise rules on international aspects of insolvency, the practical problems caused by the disharmony among national laws governing cross-border insolvencies warranted further study of legal issues in cross-border insolvencies and possible internationally acceptable solutions."[17]

There was a high degree of support expressed at the colloquium for the Commission to commence a project on cross-border insolvency.

A second colloquium was held in March 1995 for judges and government officials.[18] This Judicial Colloquium's consensus view was that:

> "the development by UNCITRAL of a legislative text of limited scope (e.g. in the form of model statutory provisions facilitating judicial cooperation and access and recognition) was both desirable and feasible."[19]

There was a prevailing sense of urgency, as the legal environment then in which solutions to cases of cross-border insolvency were crafted were characterised by "diversity and often inconsistency in legal approaches applied in cross-border insolvency, including the degree of discretion that might be available to judges in the absence of statutory authorisation.[20]

The Model Law does not attempt to substantively unify the insolvency laws of States. It also is not a treaty and does not contain any requirement of reciprocity. The Model Law is only a recommendation, not a convention, and can therefore be considered as an example of "soft law".[21] It is suitable for adoption, in whole or in part, into the domestic legislation of a State and premised on the following four key concepts:[22]

- **Access** - providing access of foreign representatives and creditors to courts;
- **Recognition** – recognition of foreign proceedings;

Bankruptcy Convention (of 1933, as amended in 1977 and 1982) of the Nordic Council covering Denmark, Finland, Iceland, Norway and Sweden, and the Hague Conference on Private International Law. See also UNCITRAL Guide to Enactment p 22 at para 10.

17 United Nations Commission on International Trade Law, *Report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency* (Vienna, 17-19 April 1994), UN Doc. A/CN.9/398, 19 May, 1994, at p 2, para 1. ("UNCITRAL-INSOL Colloquium").

18 See generally UNCITRAL – INSOL Judicial Colloquium, *supra* note 10.

19 *Idem*, p 5 at para 22.

20 *Idem*, p 2 at para 5.

21 According to the UNCITRAL Guide to Enactment, p 24 at para 19 "A model law is a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, a model law does not require a State enacting it to notify the United Nations or other States that may have also enacted it."

22 "Approaches based purely on the doctrine of comity or on exequatur do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as contained in the Model Law, on judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts. (…)", UNCITRAL Guide to Enactment, p 21 at para 8.

- **Relief** – providing appropriate relief; and

- **Co-operation** – facilitating co-operation with foreign courts and foreign representatives.

The Model Law has adopted several concepts, such as COMI (Centre of Main Interest)[23] and "establishment", similar to those contained in the EIR and it was envisaged that a similar interpretation would apply to such concepts and that the Model Law would complement the EIR.[24]

Following the adoption of the Model Law in 1997, a number of subsequent publications emerged that are of great assistance in interpreting and understanding the Model Law, including:

- **UNCITRAL Guide to Enactment** – the Guide to Enactment of The UNCITRAL Model Law on Cross-Border Insolvency which was first published in 1997 and has been amended over time;

- **Legislative Guide on Insolvency Law – Parts One and Two** - In 2005, UNCITRAL adopted its Legislative Guide on Insolvency Law, which was designed to foster and encourage the adoption of effective national insolvency regimes. In the Legislative Guide, UNCITRAL makes several comments about the Model Law and how it should be interpreted and its interrelationship with the EIR;

- **The Practice Guide on Cross-Border Insolvency Cooperation** - On 1 July 2009, UNCITRAL adopted the Practice Guide on Cross-Border Insolvency Cooperation, designed to provide information for practitioners and judges on the practical aspects of co-operation as envisaged in Article 27 of the Model Law;

- **The Legislative Guide – Part Three** – On 1 July 2010, UNCITRAL adopted the Legislative guide on Insolvency Law – Part Three which deals with the treatment of enterprise groups in insolvency;

- **The Judicial Perspective** - In December 2011, the UN General Assembly adopted the UNCITRAL publication "UNCITRAL Model Law on Cross-Border Insolvency - the Judicial Perspective.", which was updated in 2013.

Self-Assessment Exercise 1

How did the Model Law come about and why? Explain also whether the chosen format (that is, a model law) was deliberate and what this format attempts to achieve.

[23] While the Model Law does not have a definition of COMI, Art 16 para 3 of the Model Law does presume, in the absence of proof to the contrary, that the debtor's registered office, or habitual residence in the case of an individual, is the debtor's COMI.

[24] UNCITRAL Guide to Enactment, p 44 at para 82, pp 46-47 at paras 88-90 and p 70 at para 144.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. PURPOSE OF THE MODEL LAW (PREAMBLE)

5.1 Introduction

This part of the Module uses the Preamble of the Model Law as a basis to explore the purpose of the Model Law and this should allow you to better understand what the Model Law does and does not do.

The Preamble of the Model Law is short and describes the purpose of the Model Law as an instrument to provide effective mechanisms for dealing with cases of cross-border insolvency, so as to promote the objectives of:

- co-operation between the courts and other competent authorities of the State (that is, the State that has enacted the Model Law, hereinafter the "enacting State") and foreign States involved in cases of cross-border insolvency;
- 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 persons, including the debtor;
- protection and maximisation of the value of the debtor's assets; and
- facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

The Preamble is not intended to create substantive rights, but rather to provide general orientation for users of the Model Law and to assist in its interpretation.[25]

The purpose of the Model Law is not to attempt a substantive unification of insolvency law. Instead, the Model Law aims to provide a procedural framework for co-operation between jurisdictions (respecting differences among national procedural laws) and promotes a uniform approach to cross-border insolvency. The UNCITRAL Guide to Enactment[26] lists the following 7 solutions that should facilitate such a uniform approach:

(1) **Access / Co-ordination / Relief**: Providing the person administrating a foreign insolvency proceeding (the "foreign representative") with access to the courts of the enacting State, thereby permitting the foreign representative to seek temporary "breathing space" and

[25] UNCITRAL Guide to Enactment, p 32 at para 46.
[26] *Idem*, p 19-20 at para 3.

allowing the courts in the enacting State to determine what co-ordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

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

(3) **Transparency**: Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

(4) **Co-operation**: Permitting courts in the enacting State to co-operate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

(5) **Authorise assistance abroad**: Authorising courts in the enacting State and persons administrating insolvency proceedings in the enacting State to seek assistance abroad;

(6) **Jurisdiction and co-ordination in concurrent insolvency proceedings**: Providing for court jurisdiction and establishing rules for co-ordination where an insolvency proceeding in an enacting State is taking place concurrently with an insolvency proceeding in a foreign State; and

(7) **Co-ordination of relief**: Establishing rules for co-ordination of relief granted in the enacting State to assist two or more insolvency proceedings that may take place in foreign States regarding the same debtor.

5.2 How does the Model Law fit in, in a domestic context?

The Model Law is meant to fit in and operate as an integral part of the existing insolvency law in the enacting State. This is evidenced by the following features of the Model Law:[27]

- **New terminology limited**: New legal terminology added by the Model Law to the existing insolvency law of the enacting State, is limited;[28]

- **Alignment of relief**: The Model Law allows for the alignment of relief resulting from the recognition of a foreign proceeding, with the relief available in a comparable proceeding under national law;[29]

- **Rights local creditors respected**: The recognition of foreign proceedings does not prevent local creditors from initiating or continuing collective insolvency proceedings commenced in the enacting State;[30]

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[27] *Idem*, pp 25-26 at para 21.

[28] For the key terms "foreign proceeding" and "foreign representative", see the guidance below on Chapter I (General Provisions of the Model Law).

[29] Model Law, Art 20.

[30] *Idem*, Art 28.

- **Compliance with local procedural and notice requirements**: The relief available to the foreign representative is subject to compliance with the procedural requirements of the enacting State and applicable notification requirements,[31] as well as to the protection of local creditors and other interested parties (including the debtor) against undue prejudice;[32]

- **Public policy safeguard**: The Model Law preserves the possibility of excluding or limiting any action in favour of the foreign proceeding on the basis of overriding public policy considerations;[33]

- **Flexible form of Model Law**: The Model Law is in the flexible form of model legislation that takes into account differing approaches in national insolvency laws and the varying propensities of States to co-operate and co-ordinate in insolvency matters.[34]

5.3 What the Model Law does and does not do

The Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Enacting the Model Law therefore provides useful additions and improvements to the national insolvency regime so as to resolve more readily problems arising in cross-border insolvency cases.[35]

While the Model Law provides authorisation for cross-border co-operation and communication between courts and suggests various ways in which co-operation might be implemented, it does not specify how that co-operation and communication might be achieved, but rather leaves that up to each jurisdiction to determine by application of its own domestic laws and practices.[36]

The ability of the courts, with the appropriate involvement of parties, to communicate "directly" with, and to request information and assistance "directly" from, foreign courts or foreign representatives, is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. As insolvency proceedings are inherently chaotic and value evaporates quickly with the passage of time, this ability is critical when there is a need for a court to act with urgency.[37]

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31 *Idem*, Art 19(2).
32 *Idem*, Art 22.
33 *Idem*, Art 6. It should be noted, however, that it is expected that the public policy exception should only rarely be used.
34 *Idem*, Arts 25-27.
35 Judicial Perspective, p 9 at para 26.
36 *Idem*, p 10 at para 28.
37 *Idem*, pp 10-11 at para 29.

Self-Assessment Exercise 2

Please answer the following questions by answering TRUE (T) or FALSE (F) only.

1. The Model Law aims to provide enacting States with additional, modern and efficient substantive insolvency law fit for cross-border insolvencies? [T/F]

2. The procedural framework the Model Law provides to enacting States aims to make cross-border insolvencies in the enacting State more transparent and predictable in outcome? [T/F]

3. While fitting and operating as an integral part of the existing insolvency law of the enacting State, the Model law limits the enacting State's sovereignty because it introduces foreign law into the enacting State. [T/F]

4. With the enactment of the Model Law, a statutory basis is created in the enacting State for various forms of appropriate co-operation and direct communication between (foreign) courts and foreign representatives in cross-border insolvencies. [T/F]

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. GENERAL PROVISIONS OF THE MODEL LAW (CHAPTER I)

6.1 Introduction

Chapter 1 of the Model Law consists of articles 1- 8 and each will be briefly addressed in this part of the Module. Some key defined terms will be explored such as "foreign proceeding", "foreign representative", "main proceeding", and "non-main proceeding" as well as the so-called "public policy exception", which is an important safeguard for any enacting State. Chapter 1 further contains an important rule on interpretation of the Model Law and how the Model Law should be viewed vis-à-vis other international obligations of the enacting State, as well as the scope of the Model Law.

6.2 Scope of the Model Law (Article 1)

Article 1 deals with the scope of the Model Law and in paragraph 1 it outlines the types of issue that may arise in cases of cross-border insolvency for which the Model Law aims to provide solutions, such as:[38]

- Inward-bound requests for recognition of a foreign proceeding;

[38] UNCITRAL Guide to Enactment, p 35 at para 53.

- Outward-bound requests from a court or insolvency representative in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State;

- Co-ordination of proceedings taking place concurrently in two or more States; and

- Participation of foreign creditors in insolvency proceedings taking place in the enacting State.

6.3 Exclusions

Paragraph 2 of Article 1 allows the enacting State to exclude certain proceedings from the application of the implemented Model Law.[39] In principle, the Model Law should apply to any proceeding that qualifies as a "foreign proceeding" within the meaning of Article 2(a) of the Model Law. However, banks and insurance companies are mentioned as examples of entities that the enacting State might decide to exclude from the Model Law, as they may require to be administered under a special regulatory regime.[40] Public utility companies or consumers/non-traders could – for policy reasons – also require special solutions in cross-border situations, but an enacting State should be careful not to inadvertently and undesirably limit the right of the insolvency representative or court to seek assistance or recognition abroad of an insolvency proceeding conducted in the territory of the enacting State, merely because that insolvency is subject to a special regulatory regime.[41] It is advisable to exclusions from the scope of the Model Law be expressly mentioned by the enacting State to make the national insolvency law more transparent (especially for the benefit of foreign users).

6.4 Key definitions (Article 2)

Article 2 contains a number of definitions, some of which are addressed in more detail below.

6.4.1 Foreign proceeding

A key definition is that of **"**foreign proceeding". This definition has the following elements:[42]

- a proceeding (including an interim proceeding);[43]

- that is either judicial or administrative;

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[39] In the United Kingdom, for example, the Cross-Border Insolvency Regulations 2006 ("CBIR"), which implements the Model Law, excludes certain water and sewage undertakers or qualified licensed water suppliers, Scottish Water, a protected railway company, a company licensed to provide air traffic services, a public private partnership company, a protected energy company, a building society, an English credit institution or EEA credit institution or any of their branches, a third party credit institution, certain insurers, EEA insurers and certain reinsurers authorised by competent authorities in an EEA State and Channel Tunnel Concessionaires.

[40] UNCITRAL Guide to Enactment, pp 35-36 at paras 55 and 56.

[41] *Idem*, pp 36-37 at paras 57- 61.

[42] For a discussion of each of the elements of the definition of "foreign proceedings", see The Judicial Perspective, pp 25-31 at paras 70-92.

[43] The interim proceeding is addressed in the UNCITRAL Guide to Enactment, pp 42-43 at paras 79-80.

- that is collective in nature;[44]
- that is in a foreign State;
- that is authorised or conducted under a law relating to insolvency;[45]
- in which the assets and affairs of the debtor are subject to control or supervision by a foreign court;[46] and
- which proceeding is for the purpose of reorganisation or liquidation.[47]

In a recent judgment by the English court in the *Agrokor*[48]case, a number of these elements where tested. As a systemically important company in Croatia, Agrokor (together with 50 of its affiliates) was subjected to the Extraordinary Administration Proceeding (EAP) under the newly adopted "Law on Extraordinary Administration Proceeding in Companies of Systemic Importance in Croatia" (*Lex Agrokor*). Agrokor itself (without the 50 affiliates) made an application before the English court, under the UK Cross-Border Insolvency Regulations 2006 (or CBIR), for the Croatian Extraordinary Proceeding to be recognised. The application was opposed by Sberbank, a creditor with a claim in excess of EUR 1 billion. In the context of assessing whether the Croatian EAP qualified as a "foreign proceeding" the following questions were raised:

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[44] The collective proceeding element is addressed in the UNCITRAL Guide to Enactment, pp 39-40 at paras 69-70. A key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. However, a proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors' rights is unaffected by it – see The Judicial Perspective, p 25 at para 72).

[45] This element is addressed in the UNCITRAL Guide to Enactment, p 41 at para 73. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules, irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency - The Judicial Perspective, p 28 at para 79). *In the matter of Sturgeon Central Asia Balanced Fund Ltd* [2019] EWHC 1215 (Ch) the English court had to decide whether the solvent winding up proceeding on just and equitable grounds of Sturgeon under the Bermudian Companies Act qualified as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI. In that decision of 17 May 2019, the English court held it did. However, following a review application the English court *In the matter of Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 123 (Ch) at 5 decided on 27 January 2020 to overturn that earlier decision and held that "it would be contrary to the stated purpose and object of the MLCBI to interpret "foreign proceedings" to include solvent debtors and more particularly include actions that are subject to a law relating to insolvency which have the purpose of producing a return to members not creditors".

[46] This element is addressed in the UNCITRAL Guide to Enactment, p 41-42 at paras 74-76. The Model Law specifies neither the level of control or supervision required to satisfy this element of the definition, nor the time at which that control or supervision should arise and the control or supervision required may be potential rather than actual - The Judicial Perspective, p 30 at para 85).

[47] This element is addressed in the UNCITRAL Guide to Enactment, p 42 at paras 77-78. This element was specifically addressed by the English court in its decision of 27 January 2020 *In the matter of Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 123 (Ch) at 6, where it held that "read in context and employing a purposive approach, the words 'for the purpose' in [article 2(a) MLCBI] should be read as meaning the purpose of insolvency (liquidation) or severe financial distress (reorganisation)".

[48] *In the matter of Agrokor DD* [2017] EWHC 2791 (Ch). It should be noted that an appeal has been lodged against this judgment, which at the time of finalising the guidance text for this Module had not yet resulted in decision.

- "manifestly is the *Lex Agrokor* a "law relating to insolvency"?;
- does it matter that the *Lex Agrokor* was not passed "for the purpose of reorganization"?;
- does the EAP qualify as "collective proceedings"?;
- is the EAP "subject to control or supervision by a foreign court"?;
- does it matter that the EAP is a single *group* proceeding in respect of Agrokor and its 50 affiliates, while the CBIR (and the Model Law) only provide for recognition of a single *company* proceeding?;
- would recognition of the EAP in respect of Agrokor as "foreign proceedings" be contrary to English public policy"?

The English court granted the requested recognition and all the objections were dismissed for the following reasons:[49]

- *Foreign law*: Characteristics of the *Lex Agrokor* are a matter of Croatian law and questions of foreign law are questions of fact to be decided by the English Court on the basis of expert evidence;
- *Single Group Proceedings*: None of the Model Law materials state that it is impossible to recognise a single group proceeding, such as the Agrokor EAP pursuant to the *Lex Agrokor*, as a foreign proceeding in respect of a single debtor (in this case Agrokor);
- *Law relating to insolvency*: The Model Law does not require "insolvency law" as a label; it is sufficient if the law deals with or addresses insolvency or severe financial distress, which the *Lex Agrokor* does. The "law relating to insolvency" requirement is satisfied if insolvency is one of the grounds on which the proceeding could be commenced, even if insolvency could not actually be demonstrated and there was another basis for commencing the proceeding. At the commencement of the proceedings, it was unchallenged evidence that Agrokor and the wider group was in a state of serious financial distress;
- *Court supervision*: The level of court supervision required by the Model Law is relatively low. Under the CBIR it can be potential, rather than actual and indirect rather than direct. The fact that the *Lex Agrokor* also gave some control to the Croatian government, did not negate the supervision of the court;

[49] In his memorandum opinion of 24 October 2018 in the Agrokor d.d. *et al* – case (Case No. 18-12104), granting recognition and enforcement of Foreign Debtors' Settlement Agreement within the territorial jurisdiction of the United States (the "US Chapter 15 Agrokor Opinion"), US Bankruptcy Judge Martin Glenn briefly discusses the Model Law recognition applications for the Croatian EAP in the jurisdictions of Slovenia (pp 20 and 21), Serbia (pp 21 and 22), Federation of Bosnia and Hersegovina (p 22) and Montenegro (pp 22 and 23). Unlike the English court, each of these jurisdictions denied recognition. [While it is understood that each of these decisions reached in first instance are presently subject to appeal, the status of these appeals was unknown at the time this guidance text was finalised].

- *Collective nature of the proceedings*: Sberbank asserted that "collective" should mean "relating to the debtor and its own creditors", not "to the debtor and creditors of others". However, the English court considered that the consolidated nature of the EAP made it more collective rather than not collective enough;

- *For the purpose of reorganisation or liquidation*: The English court held that the purpose of the *Lex Agrokor* was to protect the stability of the economic system against systemic shocks by enabling the restructuring of companies of systemic importance that get into financial difficulty and, if a restructuring failed, by transforming it into a bankruptcy proceeding. This could be described as a law for the purposes of reorganisation or liquidation within the meaning the CBIR.

6.4.2 Foreign representative

Another key definition is that of "foreign representative", which has the following elements:

- a person or body, including one appointed on an interim basis;

- authorised in a foreign proceeding;

- to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding.

Please note that the Model Law does not specify that the foreign representative must be authorised by the foreign court.[50]

By specifying the required characteristics of a "foreign proceeding" and a "foreign representative", the definitions limit the scope of application of the Model Law.[51]

[50] The term "foreign court" is defined in Article 2(e) of the Model Law as "a judicial or other authority competent to control or supervise a foreign proceeding". See also the UNCITRAL Guide to Enactment, p 46 at para 86. The English Court of Appeal in *Candey Ltd v Crumpler an another (as joint liquidators of Peak Hotels and Resorts Ltd (in liquidation)* [2020] EWHC Civ 26, held in its judgment of 23 January 2020 that a recognition order under the MLCBI does not have the effect that the foreign representatives are thereafter treated acting as or acting in the capacity of an English liquidator. If, so reasoned the English Court of Appeal, the effect of a recognition order was generally to deem a foreign representative to have the same abilities, capacities and powers as a British insolvency practitioner, article 21 of the MLCBI would be redundant because the foreign representative would automatically have the powers that the MLCBI expressly confers on them. A similar conclusion was reached in the decision of 28 November 2017 in *Brian Glasgow (the Bankruptcy Trustee of Harlequin Property (SVG) Ltd) v ELS Law Ltd and others* [2017] EWCH 3004 (Ch) where at 83 the English court held that, in the UK, the foreign representative is not an officer of the [English] court, having been appointed bankruptcy trustee by the High Court in St Vincent and the Grenadines.

[51] UNCITRAL Guide to Enactment, p 38 at para 63.

6.4.3 Main or non-main proceedings[52]

The definition of "foreign main proceeding" uses the term "centre of main interest" (or COMI) of the debtor, without defining what it means. The definition of "foreign non-main proceeding" requires the debtor to have an "establishment", which term is defined in the Model Law in the same way as that term is defined in the European Insolvency Regulation, namely:

> "any place of operations where the debtor carries out a non-transitory[53] economic activity with human means and goods or services."[54]

For the purposes of the interpretation of the term "COMI" in the Model Law, the jurisprudence relating to this same term in the European Insolvency Regulation[55] and the so-called Virgos-Schmit Report, are relevant.

The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative under articles 20 and 21 of the Model Law, the co-ordination (under Chapter IV of the Model Law) of the foreign proceeding with proceedings that may be commenced in the enacting State, and with concurrent proceedings under Chapter V of the Model Law.[56]

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[52] When dealing with members of enterprise groups in this context, it should be noted that, for the purposes of the Model Law, the focus is on individual entities and therefore on each and every member of an enterprise group as a distinct legal entity. See The Judicial Perspective, p 24 at para 68.

[53] The Judicial Perspective, p 23 at para 64 notes that "(…) There is a legal issue as to whether the term "non-transitory" refers to duration of a relevant economic activity or to a specific location at which the activity is carried out."

[54] The Judicial Perspective, p 47 at para 140 clarifies that: "(…) the presence alone of goods in isolation or bank accounts does not, in principle satisfy the requirements for classification as an "establishment".

[55] The demise in 2009 of the business empire of Sir Allen Stanford due to alleged involvement in a fraudulent "Ponzi" scheme, has in the UK resulted in two interesting decisions in respect of the Antigua incorporated Standard International Bank Limited ("SIB"): in the first instance the 3 July 2009 judgment by Lewison J [2009] EWHC 1441 (Ch) and in appeal the Court of Appeal (CA) decision [2010] EWCA 137 (CA). This involved a contested case under the CBIR (*supra* note 39) between two rival applications for recognition in the UK by separate foreign office-holders appointed over SIB: (i) liquidators appointed in Antigua and (ii) a receiver appointed by the United States Securities and Exchange Commission (SEC). These judgments deal with the determination of COMI (and the different approaches taken in the UK and the US in this respect) as well as whether the US receivership could qualify as a "foreign proceeding" for purposes of the CBIR. The CA agreed with the conclusion of Lewison J that the US receivership was not a foreign proceeding for the purposes of the CBIR, but that the Antiguan liquidation was such a foreign proceeding. The purpose of the US receivership was to prevent detriment to investors, rather than to reorganise the corporation or to realise assets for the benefit of all creditors. It was further decided that the presumption as to SIB's COMI had not been rebutted and that, accordingly, the Antiguan liquidation was the foreign main proceeding. The CA further emphasised that – as set forth in *In re Eurofood IFCS Ltd* ((Case C-341/04) [2006] Ch 508) – COMI had to be identified by reference to factors which are both "objective and ascertainable" by third parties. Thus the so-called "head office function" test applied only to the extent that the relevant factors were so ascertainable. See also The Judicial Perspective, p 27 at para 77, where reference is made to a US court of appeal decision regarding SIB that concluded differently from the English CA and found the US receivership to be a collective proceeding.

[56] *Idem*, p 43, para 81.

Thus, a foreign proceeding that is not opened in the jurisdiction of the debtor's COMI and does not have at least an establishment in the enacting State, cannot be recognised as a foreign proceeding for purposes of the Model Law.

6.5 Supremacy of other international obligations (Article 3)

Article 3 expresses the principle of supremacy of international obligations of the enacting State over internal law. If the enacted Model Law conflicts with a treaty or other form of multi-State agreement of the enacting State, then that treaty or international agreement prevails.[57] In a restructuring of an airline, for example, the treaty obligations under the Convention on International Interest in Mobile Equipment (also known as the Cape Town Convention)[58] may take priority over the Model Law if the enacting State is a party to the Cape Town Convention.

6.6 Competent court or authority (Article 4)

Article 4 allows the enacting State to clarify if any functions relating to recognition and co-operation under the Model Law are performed by an authority other than a court.[59] The value of article 4 would be to increase the transparency and ease of use of the insolvency legislation for the benefit of, in particular, foreign representatives and foreign courts.[60]

6.7 Domestic representative authorised in foreign proceedings (Article 5)

Article 5 intends to equip insolvency representatives (or other authorities) appointed in insolvency proceedings commenced in the enacting State, to act abroad as foreign representatives of those proceedings.[61] Article 5 further makes it clear that the scope and power exercised abroad by the insolvency representative would depend upon the foreign law and courts.[62]

6.8 The public policy exception (Article 6)[63]

Article 6 contains the so-called public policy exception. For the enacting State, the exception should provide comfort as the ultimate safeguard to its sovereignty, which the Model Law respects. However, the use of the expression "manifestly" in this exception emphasises that

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57 *Idem*, pp 48-49, paras 91- 93.

58 The Cape Town Convention can be accessed via the following link: https://www.unidroit.org/instruments/security-interests/cape-town-convention.

59 Including government-appointed officials (typically civil servants) who carry out their functions on a permanent basis. See UNCITRAL Guide to Enactment, p 50, paras 97-98.

60 UNCITRAL Guide to Enactment, pp 49-50, paras 94-98.

61 *Idem*, p 51, para 99.

62 *Idem*, p 51, para 100.

63 See generally The Judicial Perspective, pp 18-20 at paras 48-54 where it is made clear that the notion of "public policy" is grounded in domestic law and may therefore differ from State to State. The *Ephedra* case is mentioned as an example to demonstrate that the public policy exception should only be exercised in very exceptional circumstances. 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 USA, was held **not** to be manifestly contrary to the public policy of the USA.

public policy exceptions should be interpreted restrictively and should only apply in exceptional circumstances concerning matters of fundamental importance for the enacting State.[64]

In the *Agrokor* case,[65] the English court clarified that "manifestly" raises the threshold considerably higher than merely "contrary to English public policy". Sberbank argued (unsuccessfully) that (i) the substantive consolidation aspects of the Croatian EAP and (ii) the lack of a right of creditors to object to the compromise of their claims, was manifestly contrary to English public policy. Differences in the Croatian EAP in comparison to an English proceeding (including in respect of priority rules) is not enough, according to the English court. However, a breach of the full and frank disclosure obligation a foreign representative has towards the court to which a recognition application under the Model Law is made, may amount to an abuse of process and as such justify a denial of the requested recognition based on the public policy exception.[66]

6.9 Additional assistance under domestic laws (Article 7)

Article 7 makes it clear that the Model Law does not aim to displace any existing cross-border assistance provisions in the law of the enacting State.[67] Under the US Chapter 15 (the Chapter of the Bankruptcy Code under which the Model Law was enacted), any "additional appropriate relief" is provided for in section 1507(b) which states that a court, in determining whether to provide additional assistance, shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure:[68]

- just treatment of all holders of claims against or interests in the debtor's property;
- protection of claim holders in the USA against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- prevention of preferential or fraudulent dispositions of property of the debtor;
- distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
- if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

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64 UNCITRAL Guide to Enactment, p 52, para 104.

65 See note 48, *supra*, and the discussion in that part of the guidance text.

66 This was the decision reached by the English judge Snowden J on 12 January 2016 in *Nordic Trustee A.S.A & anr v OGX Petroleo e Gas SA* [2016] EWHC 25 (Ch). See also, the decision of 5 December 2017 by the English judge Vos J in *Cherkasov & Ors v Olegovich* [2017] EWHC 3153 (Ch) which was another case in which the full and frank disclosure obligation towards the court was significantly breached by, in this case, a Russian foreign representative.

67 UNCITRAL Guide to Enactment, p 53, para 105.

68 See p 41 of the US Chapter 15 *Agrokor* Opinion, *supra* note 49, where s 1507(b) was addressed in a reference of the judgment in *In re Atlas Shipping*, 404 B.R. 746 at 740 [Bankr. S.D.N.Y. 2009].

6.10 Interpretation of the Model Law (Article 8)

Article 8 clarifies that in the interpretation of the Model 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.[69]

Self-Assessment Exercise 3

Question 1

Explain how the definitions of "foreign proceeding" and "foreign representative" limit the application of the Model Law.

Question 2

Explain why both the public policy exception and its restrictive application are important.

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

7. ACCESS FOR FOREIGN REPRESENTATIVES AND CREDITORS (CHAPTER II)

7.1 Introduction

Chapter II of the Model Law consists of Articles 9-14, which each will be briefly addressed in this part of the Module. The provisions provide for standing before the courts in the enacting State for both the foreign representative and creditors, as well as non-discrimination principles ensuring that foreign creditors have the same rights as local creditors and benefit from timely notice of events taking place in the enacting State. In short, these access rights and non-discrimination principles aim to save time and expense, which in turn avoid value destruction and, in certain cases may even facilitate value creation. They also provide comfort and transparency, which should make it easier for the foreign debtor (and other companies) to do business in the enacting State without counter-parties of the foreign debtor becoming concerned that the foreign debtor does this.

7.2 Standing (*locus standi*)

The access granted to a foreign representative is primarily standing in the courts of the enacting State, without the need to meet formal requirements such as licenses or consular action.

[69] UNCITRAL Guide to Enactment, p 53, paras 106-107.

Article 9 expresses this principle of direct access by a foreign representative to courts of the enacting State.[70] No recognition of the foreign proceeding opened in the foreign State is required in the enacting State to provide the foreign representative with standing in the courts of the enacting State, but such access does not automatically vest the foreign representative with any other rights or powers.

Article 11, like Article 9, focuses on providing standing to the foreign representative in the courts of the enacting State, but in this case to request the commencement of a domestic insolvency proceeding in the enacting State without otherwise modifying any of the conditions for the opening of such a proceeding.[71] Again, no prior recognition of the foreign proceeding is required for this type of access.[72]

Article 12 is another article that provides the foreign representative with standing, but this time recognition of the foreign proceeding is required for this standing to be available. When a domestic insolvency proceeding in the enacting State is opened in respect of the debtor, and following recognition of the foreign proceeding in the enacting State, the foreign representative will have standing to make petitions, requests or submissions concerning issues such as the protection, realisation or distribution of assets or co-operation with the foreign proceeding. However, article 12 does not vest the foreign representative with any specific powers or rights.[73]

7.3 Safe Conduct Rule

A so-called "safe conduct" rule is provided for in **Article 10** ensuring that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground of the fact that the foreign representative has made an application for the recognition of a foreign proceeding. This article responds to concerns of foreign representatives and creditors about exposure to an all-embracing jurisdiction triggered by an application under the Model Law.

7.4 Anti-discrimination principle

Foreign creditors have the same rights as creditors domiciled in the enacting State regarding the commencement of, and participation in, local proceedings regarding the debtor under the insolvency law of the enacting State. This access right for foreign creditors is expressed in **Article 13**, in which it is further clarified that this access does not affect the ranking of claims in the enacting State, except that the claim of a foreign creditor shall not be given a lower priority than that of general unsecured claims solely because the holder of such claim is a foreign creditor.

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70 *Idem*, p 55, para 108.

71 It should be noted in this context that, according to Art 31 of the Model Law, recognition of a foreign main proceeding (ie, where the COMI of the debtor is located in the jurisdiction where the foreign proceedings have commenced) provides, in the absence of evidence to the contrary, proof that the debtor is insolvent for purposes of opening a domestic insolvency proceeding under the laws of the enacting State.

72 UNCITRAL Guide to Enactment, p 57, paras 112-114.

73 *Idem*, p 58, paras 115-117.

The footnote to Article 13 provides wording for States that refuse to recognise foreign tax and social security claims, allowing them to continue to discriminate against such claims.[74]

7.5 Timely Notice

While the Model Law leaves a discretion to the court to decide otherwise in a particular case, foreign creditors are further entitled to *individual* notification of, amongst other things, the commencement of the local proceedings regarding the debtor under the insolvency law of the enacting State and of the time-limit to file claims in those proceedings. This is expressed in **Article 14** as well as the equal treatment principle requiring that foreign creditors should be notified whenever notification is required for local creditors in the enacting State. To ensure timely notice by expeditious means, Article 14 states "no letters rogatory or other, similar formality required". The traditional "diplomatic channels" are too cumbersome and time-consuming in the context of insolvency proceedings and therefore not adequate. Paragraph 3 of Article 14 specifies what a notification to a foreign creditor of commencement of a proceeding in the enacting State should include. This should address any conflict with treaty obligations of the enacting State and, for secured creditors in particular, provide clarification as to what (if anything) they need to do. For example, in some jurisdictions the filing of a claim by a secured creditor is deemed to be a waiver of their security interest.[75]

Self-Assessment Exercise 4

Explain how access rights and non-discrimination principles in Chapter II of the Model Law may give foreign investors comfort in the jurisdiction of the enacting State.

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

8. RECOGNITION OF FOREIGN PROCEEDINGS AND RELIEF (CHAPTER III)

8.1 Introduction

This part of the Module discusses Chapter III of the Model Law which consists of articles 15-18, dealing with recognition and articles 19-24, dealing with relief. While there are certain requirements for recognition, they are relatively easy to meet and recognition is further facilitated by certain presumptions the court in the enacting State can rely on. Under the Model Law, the COMI of the debtor, which is not a defined term, determines the consequences of the recognition. If the COMI is in the jurisdiction where the foreign proceedings have been opened, the proceedings are main insolvency proceedings with automatic mandatory relief. If the debtor only has an establishment in the jurisdiction where the foreign proceedings are opened, the proceedings are non-main proceedings without automatic relief, but only discretionary post-

[74] *Idem*, p 60, paras 119-120.
[75] *Idem*, pp 61-63, paras 121-126.

recognition relief granted by the court. There is no reciprocity requirement and there is an ongoing duty to keep the court updated on developments. Urgent interim relief can be granted prior to the recognition decision after the recognition application has been filed, provided the interests of the debtor's creditors and other interested parties are adequately protected. Recognition also provides the foreign representative with standing to exercise local avoidance powers and the right to intervene in local insolvency proceedings. There are limits to the relief that is deemed to be appropriate to grant under the Model Law. In that context a number of English cases will be briefly discussed, including the *Rubin v Eurofinance* case, the so-called *Pan Ocean* case and the so-called *IBA* case, in which the so-called *Gibbs* Rule (or the Rule in *Gibbs*) will be addressed, as well as the IBA case appeal.

8.2 Recognition

8.2.1 Benefits

The Model law is intended to expedite and simplify the process required to recognise foreign proceedings and to provide a clear framework for obtaining recognition. This is done by prescribing straightforward and easy-to-meet conditions for obtaining recognition of a foreign proceeding in the enacting State. The clear benefit of recognition in the enacting State of a foreign proceeding opened in another foreign State is that there is no need to open separate insolvency proceedings in the enacting State. In certain respects, the foreign proceedings in the foreign State are treated in the enacting State as if local insolvency proceedings had been opened in the enacting State, without the need in fact to open such proceedings. As will be addressed under "relief" below, recognition allows the foreign representative to access certain of the tools and protections available to a local insolvency office-holder in the enacting State. Significant cost and time can be saved and complications avoided as the foreign representative - through the recognition process – is able to request tailor-made relief without the need to commence local insolvency proceedings. A good example is the ability of a foreign representative to seek powers allowing the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, liabilities and affairs more generally. The use of such powers, if granted, can assist in gathering information to ascertain whether insolvency "claw-back" actions (vulnerable transactions) or claims against the directors, exist.

8.2.2 Requirements and presumptions

Recognition and relief are related concepts. 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.[76]

The evidential requirements for recognition of a foreign proceeding are set forth in Article 15 of the Model Law. If those requirements are met, recognition will be granted pursuant to Article 17 of the Model Law. In deciding whether the foreign proceeding should be recognised, the court in the enacting State is further limited to the jurisdictional pre-conditions set out in the

[76] The Judicial Perspective, pp 14-15, para 39.

definition of "foreign proceeding" as set forth in Article 2(a) of the Model Law. The court of the enacting State is not to embark on a consideration of whether the foreign proceeding for which recognition is requested was correctly commenced under the applicable law of the foreign State.[77]

8.2.3 Recognition requirements (Article 15)

Article 15 provides as follows:

- A foreign representative may apply to the court for recognition of the foreign proceeding to which the foreign representative has been appointed.
- 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 sub-paragraphs a) and b), any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative.

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

8.2.4 Recognition presumptions (Article 16)

Article 16 sets forth the following presumptions concerning recognition:

- If the decision or certificate referred to in article 15 paragraph 2 indicates that the foreign proceeding is a proceeding within article 2(a) (of the Model Law) and that the foreign representative is a person or body within the meaning of article 2(d) (of the Model Law), the court is entitled to presume so.
- The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised.
- 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.

[77] *Idem*, p 15, para 41.

8.2.5 Recognition decision (Article 17)

Article 17 makes it clear that an application for recognition of a foreign proceeding must be decided upon at the earliest possible time (paragraph 3) and recognition can be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist (paragraph 4).[78] In the absence of public policy grounds in the enacting State for denying a request for recognition,[79] such request made before the competent court of the enacting State – pursuant to article 4 of the Model Law – shall be granted as a matter of course if the requirements of Article 15(2) of the Model Law are met,[80] the foreign proceeding qualifies as such in accordance with the definition of Article 2(a) of the Model Law and the foreign representative qualifies as such in accordance with the definition of Article 2(d) of the Model Law (paragraph 1). If the foreign proceeding takes place in the State where the debtor has its COMI, the foreign proceedings will be recognised as foreign main proceedings (paragraph 2(a)) and if the debtor only has an establishment in the foreign State where the foreign proceedings were opened, then the foreign proceedings will be recognised in the enacting State as foreign non-main proceedings (paragraph 2(b)).

8.2.6 Reciprocity

In the context of recognition, there is no reciprocity requirement in the Model Law. In other words, 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.[81] However, some States, when enacting the Model Law, have included reciprocity provisions in relation to recognition.[82] These reciprocity requirements significantly undermine the effectiveness of the Model Law and in certain cases there is no practical effect at all following adoption of the Model

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78 *In Sanko Steamship Co Ltd* [2015] EWHC 1031 (Ch) at 47 and 50, the English court dismissed a recognition application requesting a continuation of recognition after the Japanese proceedings, as foreign proceedings, had terminated. As a matter of language and consistent with commercial common sense, the court held that once the foreign proceeding ends the recognition terminates as well. *In the matter of Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 123 (Ch) at 52-56, the English court addressed the scope of "a person affected by recognition" as meant in article 17(4) of the MLCBI and held that also a person without a direct economic interest in Sturgeon may fall within paragraph 4 of article 17 of the MLCBI.

79 In *Re Dalnyaya Step LLC; Cherkasov & Ors v Olegovich* [2017] EWHC 756 (Ch) at 82 an *ex parte* obtained earlier recognition order for a foreign proceeding in Russia was being challenged on public policy grounds when the foreign representative was also applying for "disclosure of documents2-relief ex article 21(d) MLCBI and at the same time a security of costs order against the foreign representative was requested. While initially concerned that a decision to grant security might be seen as a green light to creditors of insolvent foreign companies to disrupt what should be the straightforward operation of the MLCBI in the UK, the English court was, nevertheless, satisfied that the facts of this case were exceptional and the granting of security would not open undesirable floodgates to many similar applications.

80 Although the court in the enacting State is not bound by the orders and decisions made by the originating court in the foreign State and required to satisfy itself that the foreign proceeding meets the requirements of Arts 2 and 15(2), the court in the enacting State can rely on the presumptions set forth in Art 16(1) and (2). See also UNCITRAL Guide to Enactment, p 74, para 152. The process of granting is meant to be straightforward and something of a "tick-box" exercise. For an example of this, see the judgment of 10 May 2019 of the English court in *Rozhkov v Markus*, [2019] EWHC 1519 (Ch).

81 The Judicial Perspective, p 18, para 47.

82 Examples of such States are Mexico, the British Virgin Islands, Romania, Mauritius, South Africa and Uganda.

Law, as the South African approach to reciprocity demonstrates.[83] In South Africa the 2000 Cross-Border Insolvency Act that introduced the Model Law, continues to be dormant because the reciprocity requirement adopted in South Africa requires certain countries to be designated as meeting the reciprocity requirement and so far no State has been designated as such.

8.2.7 COMI[84]

While the concept of COMI is fundamental to the operation of the Model Law, there is no definition of COMI in the Model Law itself. However, the UNCITRAL Guide to Enactment[85] does provide some guidance. Similar to the COMI concept under the European Insolvency Regulation,[86] the two key factors for determining COMI under the Model Law are:

- the location where the central administration of the debtor takes place; and
- which is readily ascertainable as such by creditors of the debtor.

Depending on the circumstances, the court may need to give greater or less weight to a given factor, but in all cases the determination of the COMI is a holistic endeavour designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's COMI, as readily ascertainable by its creditors. Additional factors that could be considered by a court to determine the debtor's COMI include, but are not limited to, the following:[87]

- the location of the debtor's books and records;
- the location where financing was organised or authorised;
- the location from where the cash management system was run;
- the location in which the debtor's principal assets or operations are found;

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83 See eg S. Chandra Mohan, "Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?" (2012), *International Insolvency Review*, 21, (3), 199-233, available at: https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=3097&context=sol_research.

84 Although the COMI concepts in the EIR and the Model Law are similar, they serve different purposes. In the EIR the determination of COMI relates to the jurisdiction in which main proceedings should be commenced. In the Model Law the determination of COMI relates to the effects of recognition, in particular the relief available to assist the foreign proceeding - The Judicial Perspective, p 33, para 95).

85 See in particular the UNCITRAL Guide to Enactment, pp 70-72, paras 144-149 and pp 75-76 at paras 157-160. The decision of 16 August 2018 in *Re Videology Limited* [2018] EWHC 2186 (Ch) at 29-37 and 40-51 is also recommended reading for a better understanding of the concept of COMI, as it contains a detailed discussion of the COMI guidance provided in recital 13 of the EC Insolvency Regulation (1346/2000) ("EIR") and recitals 28-30 of the Recast EU Insolvency Regulation (EU 2015/848) ("Recast EIR) and the leading cases of the European Court of Justice on COMI: *Re Eurofood IFSC Ltd* (Case C-341/04) [2006] Ch 508 and *Interedil Srl v Fallimento Interedil Srl* (Case C-396/09) [2012] *Bus LR* 1582, as well as guidance on the correct interpretation of relevant concepts such as "administration", "central administration" and "head office functions" related to (the process of determining) COMI.

86 *Idem*, p 44, para 82.

87 Please note that the list of additional factors is not set out in order of priority.

- the location of the debtor's primary bank;
- the location of employees;
- the location in which commercial policy was determined;
- the site of the controlling law or the law governing the main contracts of the debtor;
- the location from which purchasing and sales policy, staff, accounts payable and computer systems are managed;
- the location from which contracts (for supply) were organised;
- the location from which reorganisation of the debtor was being conducted;
- the jurisdiction whose law would apply to most disputes;
- the location in which the debtor was subject to supervision or regulation; and
- the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

The appropriate date for determining the COMI, or whether an establishment exists, is the date of commencement of the foreign proceeding.[88] While the COMI of a debtor can move, if such a move is in close proximity (timing-wise) to the commencement of the foreign proceedings, the appropriate evidence for this will be harder to establish, in particular the requirement that the COMI must be readily ascertainable by third parties, such as creditors of the debtor.

8.2.8 Abuse of process[89]

The Model Law itself does not contain a provision on abuse of process, but leaves it to domestic law and the procedural rules of the enacting State to determine what constitutes an abuse of process. However, the Model Law also does not explicitly prevent a court in the enacting State

[88] Please note that in the US judgment of *Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals Apr. 16, 2013) the Second Circuit of Appeals took a slightly different approach towards the date for determination of the debtor's COMI. The US court held that: "(…) a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition [ie the US implementation of the Model Law] is filed, as the statutory text suggests. But given the EIR and other international interpretations, which focus on the regularity and ascertainability of the debtor's COMI, a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith. (…)" [Slip Op. at 23/34]. As far as COMI factors are concerned, the US court further held that: "(…) any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis. (…)" [Slip Op at 24]. In the UK, this US approach has now been followed in the *Re Toisa Limited* judgment by ICC Judge Catherine Burton of 29 March 2019. This judgment is still unpublished, but has been discussed in the Lexis-Nexis Update "Clarity on cross-border conundrum (*Re Toisa Limited*)" written by Charlotte Moller and Harry Rudkin of Reed Smith LLP and Adam Goodison of South Square (who acted for Toisa Limited).

[89] See generally, UNCITRAL Guide to Enactment, p 76, para 161.

from responding to a perceived abuse of process. In this context it should be noted that a foreign representative has an obligation to full and frank disclosure to the court in the enacting State. If a foreign representative breaches this obligation by, for example, falsely claiming that the COMI of the debtor is in a particular State, or where the foreign representative has inappropriate alternative motives for the recognition application which are not disclosed to the court, then the court could consider this to be abuse of process based on domestic law and procedural rules which could affect the recognition application.[90]

In this context it should further be noted that, as a general rule the public policy exception (of article 6 of the Model Law) should rarely be the basis for refusing an application for recognition, even though it might be a basis for limiting the nature of relief accorded.

8.2.9 Ongoing obligation to update court on developments (Article 18)

Article 18 requires the foreign representative, from the time of filing the recognition application for the foreign proceeding, to promptly inform the court in the enacting State of (i) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.[91]

8.3 Relief

Even prior to a decision on the recognition application, the court in the enacting State is entitled to grant urgently needed interim relief upon application for the recognition of a foreign proceeding based on **Article 19** of the Model Law. While **Article 21** of the Model Law sets out the court's discretionary power to provide post-recognition relief, **Article 20** of the Model Law provides for automatic mandatory relief in case the recognised foreign proceeding qualifies as a foreign main proceeding. **Article 22** of the Model Law clarifies in paragraph 1 that, in granting or denying relief based on either Article 19 (interim pre-recognition relief) or Article 21 (discretionary post-recognition relief), the court in the enacting State must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected. For that purpose, the court is granted the power to subject relief to conditions it considers appropriate (paragraph 2) and at the request of the foreign representative or an affected person the court may further modify or terminate the relief (paragraph 3).

A consequence of a recognition decision is also, according to **Article 23** of the Model Law, that the foreign representative obtains standing to initiate actions under the law of the enacting State to avoid or otherwise render ineffective legal acts detrimental to the creditors of the debtor (that is, claw-back rights and the power to avoid antecedent transactions). Another consequence of recognition according to **Article 24** of the Model Law, is the right of the foreign representative

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[90] See in this context the decision of the English judge Snowden J on 12 January 2016 in *Nordic Trustee A.S.A & anr v OGX Petroleo e Gas SA* [2016] EWHC 25 (Ch) and the decision of 5 December 2017 by the English judge Vos J in *Cherkasov & Ors v Olegovich* [2017] EWHC 3153 (Ch).

[91] The Judicial Perspective, p 17, para 44 also emphasises the continuing duty of disclosure the foreign representative has.

to intervene in any local proceedings in the enacting State in which the debtor is a party, provided the foreign representative meets the local requirements for this.

8.3.1 Appropriate relief (Article 21)[92]

Upon recognition of a foreign proceeding (whether main or non-main), Article 21(1) of the Model Law provides the court in the enacting State with the discretionary power[93] – where necessary to protect the assets of the debtor or the interest of creditors and at the request of the foreign representative – to grant appropriate relief, including:[94]

- 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 (automatically) stayed under Article 20(1)(a) of the Model Law;

- staying execution against the debtor's assets to the extent it has not been stayed (automatically) under Article 20(1)(b) of the Model Law;

- suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been (automatically) suspended under Article 20(1)(c) of the Model Law;

- 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;[95]

- entrusting the administration or realisation of all or part of the debtor's assets in the enacting State to the foreign representative or another person designated by the court;

- extending any interim relief granted pursuant to Article 19(1) of the Model Law; and

- granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State.

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92 See generally UNCITRAL Guide to Enactment, pp 87-89 at paras 189-195 and The Judicial Perspective, pp 57-64, paras 168-186.

93 For an identification and application of the principles applicable to the exercise of discretion in relation to applications for, or to discharge, a stay under art 21 of the MLCBI, see, eg, the judgment of the English court of 11 February 2011 *In the matter of Armada Shipping SA* [2011] EWHC 216 (Ch) at paras 35, 38, 45, 46 and 49 as well as the judgment of 5 June 2015 of the English court in *Re Pan Ocean Co Ltd ; Seawolf Tankers Inc and another v Pan Ocean Co Ltd and another* [2015], EWHC 1500 (Ch) at 23, 24, 28, 37, 38, 49, 50, 59 and 60.

94 UNCITRAL Guide to Enactment, pp 87-88, para 189 clarifies that: "(…) The types of relief listed in article 21(1) are typical of the relief most frequently granted in insolvency proceedings; however, the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case."

95 *In the matter of the estate of the late Rene Rivkin* [2008] EWHC 2609 (Ch), the English court had to deal with the intervention of an "interested person" within the meaning of art 22 MLCBI in the application of a foreign representative for disclosure of information relief under art 21(1)(d) MLCBI. In that context, the English court held that the intervener's right to protection of private life (which also extends to business life) under art 8 of the European Convention of Human Rights were engaged by the foreign representative's disclosure of documents application.

Paragraph 2 of Article 21 provides the court in the enacting State with discretionary power – at the request of the foreign representative – to hand over all or a part of the debtor's assets located in the enacting State to the foreign representative (or another person designated by the court), provided that the court is satisfied that the interests of the local creditors in the enacting State are adequately protected. As far as granting relief to a foreign representative of a foreign non-main proceeding is concerned, the court must – according to paragraph 4 of Article 21 – be satisfied that the relief relates to assets that – under the law of the enacting State[96] – should be administered in the foreign non-main proceeding, or concerns information required in that proceeding. In short, such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

8.3.2 Automatic relief when a foreign main proceeding is recognised (Article 20)[97]

The recognition of a foreign main proceeding (that is, where the COMI of the debtor is in the jurisdiction where the foreign proceeding was opened) has the following three automatic effects:

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

(b) a stay of execution against the debtor's assets; and

(c) a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

These automatic consequences are intended to allow time for steps to be taken to organise an orderly and fair cross-border insolvency proceeding. As the stay set forth in paragraph a) above also covers actions before an arbitral tribunal, Article 20 in effect establishes a mandatory limitation to the effectiveness of an arbitration agreement. However, if the arbitration does not take place in either the enacting State or the State where the foreign main proceedings are opened, it may nevertheless be difficult to enforce the stay of the arbitral proceedings. It should further be noted that paragraph 2 of Article 20 allows for appropriate protections to be included in the law of the enacting State so as to provide the court in the enacting State with authority to modify or terminate the automatic stay or suspension contemplated by paragraph 1 of Article 20 if it would be contrary to legitimate interests of a party in interest (including the debtor itself).[98] For example, the interests of the parties may be a reason for allowing an arbitral

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[96] This proviso reflects the principle underlying the Model Law that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding, as they may be prescribed by the law of the foreign State. Instead, recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State.

[97] See generally UNCITRAL Guide to Enactment, pp 83-86, paras 176-188 and The Judicial Perspective, pp 55-56, paras 161-167.

[98] An example of this is a new art 20(6) that is included in the UK enactment of the MLCBI (the CBIR) and reads: "In addition to and without prejudice to any powers of the court under or by virtue of paragraph 2 of this article, the court may, on the application of the foreign representative or a person affected by the stay and suspension referred to in paragraph 1, or of his own motion, modify or terminate such stay and suspension or any part of it, either altogether or for a limited time, on such terms and conditions as the court thinks fit." In the judgment of 7

proceeding to continue. Other exceptions that may exist in the law of the enacting State are, for example, the enforcement of claims by secured parties, initiation of court action for claims that have arisen after the commencement of the insolvency proceedings (or after recognition of a foreign main proceeding) or the completion of open financial-market transactions. Article 20 further clarifies, in paragraph 3, that the automatic stay and suspension contained in paragraph 1 does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor. Paragraph 4 also clarifies that the automatic stay and suspension contained in paragraph 1 does not affect the right to request the commencement of certain domestic insolvency proceedings, or the right to file claims in such a proceeding.

8.3.3 Interim collective relief prior to recognition of a foreign proceeding (Article 19)[99]

Where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, the court of the enacting State may, at the request of the foreign representative, grant relief of a provisional nature from the time of filing the recognition application until the application is decided upon. This interim relief – which applies to both foreign main and foreign non-main proceedings - can include:

- a stay of execution against the debtor's assets;

- entrusting the administration or realisation of all or part of the debtor's assets located in the enacting 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;

- any of the following post-recognition relief provided for in Article 21 of the Model Law:

  (a) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;

  (b) 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; and
  (c) granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State.

Paragraph 2 of Article 19 allows the enacting State to include an appropriate notice of the interim relief granted. If the interim relief would interfere with the administration of a foreign

September 2016 in *Ronelp Marine Ltd and Ors v STX Offshore & Shipbuilding Co Ltd and Mr Yoon Keung Jang (Administrator of First Respondent)* [2016] EWHC 2228 (Ch), the English court used that new art 20(6) in conjunction with 21(1)(b) to modify the automatic stay under article 21.1(a) of the CBIR to align it with the relief available under para 43 of Sch B1 of the Insolvency Act of 1986 for an English administration focused on restructuring instead of liquidation because in that case the foreign proceeding was a Korean restructuring proceeding.

[99] See generally UNCITRAL Guide to Enactment, pp 80-81, paras 170-175 and The Judicial Perspective, pp 50-52, paras 150-156.

main proceeding, the court may – based on paragraph 4 of Article 19 – refuse to grant such interim relief.[100]

8.3.4 Limits to appropriate relief (Article 21)

While Article 21(1) of the Model Law is drafted broadly, the appropriate relief the court of the enacting State can grant is not unlimited. In the next paragraphs three English cases will be briefly addressed in which the English court has determined certain limits to the appropriate relief under the Model Law it believes it is able to grant. In the first case, the English Supreme court concludes that the enforcement of an insolvency-related *in personam*[101] default judgment is not covered by the Model Law. In the second case, the English first instance Court concludes that – in effect – applying foreign insolvency law to an English law governed contract is outside the scope of appropriate relief the English court can grant. In the third case, of which both the decisions in first instance and appeal are addressed, the English court determined that it did not have jurisdiction to grant the Azeri foreign representative of a foreign main proceeding opened in Azerbaijan an indefinite continuation of the automatic moratorium that resulted from an earlier recognition order. It should be noted, however, that if these same cases had been judged in a different jurisdiction, for example in the United States, the outcomes may have been different.[102]

8.3.4.1 Rubin v Eurofinance SA[103]

In the UK, the Model Law has been implemented by way of the CBIR. In *Rubin v Eurofinance* the English Supreme Court was asked to rule on the question whether – pursuant to the CBIR – a US judgment based on insolvency avoidance powers, obtained in default of the appearance of the defendants, could be recognised and enforced in the UK.[104] Under English common law principles of private international law,[105] a foreign court outside the UK has jurisdiction to deliver a judgment capable of enforcement or recognition in the UK only when the judgment debtor:

(a) was present in the foreign jurisdiction when the proceedings commenced;

(b) had made a claim or counterclaim in the foreign proceedings;

(c) had submitted to the jurisdiction by voluntarily appearing in the proceedings; or

(d) had agreed to submit to the jurisdiction.

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[100] In this context it should be recalled that pursuant to Art 15(3) of the Model Law, the foreign representative must attach to the recognition application a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

[101] Latin for a judgment "directly related towards a particular person", enforceable against that person.

[102] For the second case, the *Re Condor Insurance Co Ltd* 601 F 3d 319 (Fifth Circuit 2010) may provide a basis for a US court to come to a different decision than the English court.

[103] [2010] UKSC 46.

[104] This case did not deal with the recognition of the insolvency proceedings or granting of assistance within those proceedings.

[105] Dicey, Morris & Collins, *Conflict of Laws* – Rule 43 in the 15th ed, 2012, paras 14R-054.

The Supreme Court approached the issue as one of pure policy and rejected the claim for recognition and enforcement of the insolvency related *in personam* default judgment. Accepting it would have amounted to creating a new rule that does not yet exist, as it would create a difference between insolvency-related judgments and non-insolvency judgments. According to the Supreme Court this is a matter for Parliament, not judge-made law and the CBIR does not include any express provision dealing with enforcing a foreign insolvency-related judgment against a third party.[106]

8.3.4.2 Fibria Celulose S/A v Pan Ocean Co Ltd[107]

This case will be referred to as the *Pan Ocean* case. In short, the facts in the *Pan Ocean* case were as follows. A long term English law shipping contract between a Brazilian company and a Korean company contained a so-called *ipso facto* clause (allowing termination of the contract upon one of the parties entering into insolvency proceedings). The Korean company filed for Korean insolvency proceedings under which Korean insolvency law declares *ipso facto* clauses null and void. The Korean liquidator, as foreign representative, made an application in the UK pursuant to the CBIR for recognition of the Korean insolvency proceedings as foreign main proceedings and the Korean liquidator also requested the English court to grant relief. Under the relief requested, the Korean liquidator tried to prevent the Brazilian party from exercising the *ipso facto* clause which under Korean insolvency law is deemed to be null and void. The English court considered the following two possible grounds for the requested relief:

- relief under Article 21(1)(a) – that is, a stay on "the commencement or continuation of individual actions or individual proceedings"; and

- appropriate relief under article 21(1)(g) – that is, to make available the relief that would have been available under Korean insolvency law.

In respect of the first ground, the English court considered that the service of a notice to terminate the contract is not the commencement or continuation of an individual action or proceedings. Therefore, the court does not have the power under Article 21(1(a) of the Model Law to restrain the Brazilian party from serving the termination notice. In respect of the second ground, the English court also rejected providing the requested appropriate relief as:

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[106] It should be noted that in its 51st session (25 June -13 July 2018) UNCITRAL adopted the Model Law on recognition and enforcement of insolvency-related judgments (the "Model Law on IRJ"), the text of which can be accessed via the following link: http://www.uncitral.org/pdf/english/texts/insolven/Interim_MLIJ.pdf, which aims to remedy the uncertainty created by the *Rubin v Eurofinance* decision and clarifies in Art X that appropriate relief under the Model Law includes the recognition and enforcement of insolvency-related judgments. See Part B below under 14 for an introduction to the Model Law on IRJ. However, whether following the adoption of the Model Law on IRJ in the UK, the English Supreme Court would decide the *Rubin v Eurofinance* case differently, is still uncertain and may depend, *inter alia*, on how the English Supreme Court would interpret and apply the grounds for refusing recognition and enforcement set forth in Art 14(g) of the Model Law on IRJ. See also "UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-related Judgments" by Jenny Clift and Neil Cooper in *INSOL World* – Fourth Quarter 2018, pp 24-25.

[107] [2014] EWHC 2124 (Ch).

- it did not consider the intention of "appropriate relief" in this context to include allowing the recognising court to go beyond the relief it would grant in a domestic insolvency;

- in *Belmond Park v BNY Corporate Trustee Services*[108] the English Supreme Court clarified that *ipso facto* clauses are in principle valid and enforceable in a UK insolvency;

- in the present case, the parties should not have expected that under the chosen English law, the English court would apply Korean insolvency law; and

- accepting or rejecting *ipso facto* clauses in an insolvency is a policy decision and there is no good reason for the English court to prefer the policy decision made in Korea over the policy decision made in the UK.

Going forward, the relevance of the *Pan Ocean* case will have to be considered in light of the new Corporate Insolvency and Governance Act 2020 (CIGA)[109] that was adopted on an accelerated basis in the UK in June 2020 in response to the worldwide Coronavirus (COVID-19) crisis, which also resulted in significant financial distress amongst many companies and individuals in the UK. The UK policy regarding *ipso facto* clauses has been reconsidered in the CIGA which now also provides that certain *ipso facto* clauses in contracts for the supply of goods or services will cease to have effect once the debtor has become subject to certain UK insolvency proceedings.

8.3.4.3 The UK "rule in Antony Gibbs" or the "Gibbs Rule"

The so-called "rule in Antony Gibbs" or "Gibbs Rule"[110] derives from the 1890 case, *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux*.[111] In short, the Gibbs Rule stands for the general proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. Discharge of a debt under the insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the law applicable to the contract.[112] However, the Gibbs Rule does not apply if the relevant creditor submits to the foreign insolvency proceeding, the rationale being that the creditor will be taken to have accepted that the law governing the foreign insolvency proceeding should determine the contractual rights that a creditor has elected to vindicate in that proceeding.[113] In particular, in the context of granting relief under the Model Law the Gibbs

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[108] *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38.

[109] https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted.

[110] The background to which is explained by the Court of Appeal in paras 23-26 of their decision of 18 December 2018 [2108] EWCA Civ 2802 (the *IBA* case appeal).

[111] (1890) LR 25 QBD 399. On p 5 of the US Chapter 15 Agrokor Opinion (*supra*, note 49), the US Bankruptcy Judge Martin Glenn summarised the Gibbs case as follows: "(…) the essence of the decision is that where a debtor, in that case domiciled in France, made a contract governed by English law and to be performed in England, was declared a bankrupt and its debts discharged under foreign law in a foreign proceeding (the, French law in a French proceeding), the plaintiff was not bound by the discharge and could maintain an action on the contract and recover damages in an English court. (….)"

[112] Description of the Gibbs Rule by Mr Justice Hildyard in *In the Matter of the OJSC International Bank of Azerbaijan and the CBIR 2006 – Bakshiyeva v Sberbank of Russia, et al.* [2018] EWHC 59 (Ch) (the "*IBA* case") at 44.

[113] The *IBA* case, *supra* note 112, at 46.

Rule has given English courts pause and raised the question as to what extent the Gibbs Rule is compatible with "the principles of (modified) universalism", which are part of English (common) law as well.[114]

8.3.4.4 The IBA case[115]

Mr Justice Hildyard had to extensively address the Gibbs Rule in the IBA case[116] – which is presently on appeal to the English Supreme Court – where an Azeri foreign representative, Ms Gunel Bakhshiyeva, following an earlier recognition order under the CBIR, requested appropriate relief under article 21 of the Model Law in the form of an indefinite continuation of the automatic moratorium that resulted from the earlier recognition order (the "Moratorium Continuation Application"). This Moratorium Continuation Application was contested by two creditors (the "Challenging Creditors") of the OJSC International Bank of Azerbaijan (IBA), who had unpaid claims against IBA under debt instruments governed by English law and had not submitted to the foreign insolvency proceedings in Azerbaijan to which IBA was subject, so the exception to the Gibbs Rule did not apply to the Challenging Creditors. A restructuring of IBA had taken place in Azerbaijan and a restructuring plan was approved which – pursuant to Azeri law – was binding on all creditors of IBA (including the Challenging Creditors). The concern was that, once the Azeri restructuring proceeding for IBA had ended, the Challenging Creditors would go to the UK and enforce their English law claims against IBA before an English Court arguing that, based on the Gibbs Rule, the Azeri restructuring plan of IBA cannot discharge the English law obligations of IBA towards the Challenging Creditors. In short, the Moratorium Continuation Application aimed to – in practice – prevent the Challenging Creditors from enforcing their English law claims while at the same time allowing the English court to recognise (pursuant to the Gibbs Rule) that the English law claims of the Challenging Creditors still exist and were not discharged – from an English law perspective – under the Azeri restructuring plan of IBA.[117]

While the High Court of Singapore has held that in its application of common law the Gibbs Rule does not apply,[118] Mr Justice Hildyard concluded that "there [is] presently and at this level no real doubt as to the continued application of the rule in Gibbs" and "there is similarly no real doubt that the fact of foreign insolvency, even one recognised formally in this jurisdiction, is not of itself a gateway for the application of foreign insolvency laws or rules or given them 'overriding effect' over ordinary principles of English contract law."[119] The real question in the IBA Case was therefore whether the principles of "modified universalism" as expressed in the

[114] It should be noted that if the Model Law on IRJ is adopted and implemented in the UK, the Gibbs Rule would be overridden by the mandatory obligation set forth in Article 13 to recognise and enforce insolvency related judgments.

[115] *Supra*, note 112.

[116] It should be noted that while the *IBA* case went on appeal which resulted in the decision of 18 December 2018 in the IBA case appeal, *supra* note 110, that decision was subjected to a further appeal to the English Supreme Court, but has now been settled without a judgment by the English Supreme Court.

[117] It is important to note that the Foreign Representative did not contend that the Azeri restructuring plan of IBA would substantially fail if the Moratorium Continuation Application did, though the plan will not be complete and perfect in its application in that event (*IBA* case, *supra*, note 112, at 39.)

[118] *Pacific Andes Resources Development Ltd* [2016] SGHC 210 at 48 (*IBA* case, *supra* note 112, at 53).

[119] *IBA* case, *supra*, note 112, at 57, and see further also at 51-56.

common law and in the Model Law (on which the CBIR is based), nevertheless enables the court to grant relief calculated to advance those principles without upsetting the Gibbs Rule, when properly understood and confined. More particularly, the question was whether at one and the same time the Gibbs Rule may formally be observed by accepting the continuation of the rights which English law confers, and yet the principles of modified universalism and the Model Law and the CBIR given effect to by preventing the exercise of those rights by a stay or moratorium.[120]

In the end, Mr Justice Hildyard denied the relief requested in the Moratorium Continuation Application as in his opinion a permanent stay cannot be deployed as the way round the Gibbs Rule.[121] In support of the Moratorium Continuation Application, examples were given showing that in practical terms the Gibbs Rule may have a limited scope in the context of a foreign liquidation because of the ability of the foreign liquidator to apply for an order remitting the English assets to the foreign liquidation. While acknowledging that the *IBA* case does not involve a foreign liquidation, but a foreign restructuring, there are precedents for making a distinction between the strict definition of legal rights and their enforcement, when applying the Gibbs Rule.[122]

But how could the relief requested in the Moratorium Continuation Application exist if there were no foreign proceeding or no foreign representative as defined in the CBIR anymore?[123] Mr Justice Hildyard considered in this context the decision of Mr Justice Norris in *Re BTA Bank JSC*[124] (the *BTA* case),[125] where the Kazakh bank BTA Bank JCS (BTA Bank) was subject to restructuring proceedings in Kazakhstan and a restructuring plan was approved by 93.8% of the affected creditors and sanctioned by the Kazakh court. Prior to the termination of the Kazakh restructuring proceeding of BTA Bank, the foreign representative applied to the English court for an order that the automatic stay of Article 20 of the Model Law was made permanent and such order was granted by Mr Justice Norris.[126] Mr Justice Hildyard found the *BTA* case decision to be insufficiently persuasive because in that case, unlike in the *IBA* case, the relief application was unopposed and no opposing creditors had emerged yet. Therefore, Mr Justice Norris approached the matter on the basis that the stay would only be permanent if and so long as it remained unopposed, and if any opposing creditors wished to challenge the stay then a more complete argument would be required. However, in the *IBA* case Mr Justice Hildyard was confronted with the question Mr Justice Norris expressly stated in the *BTA* case was not

[120] *Idem*, at 58-59.
[121] *Idem*, at 155.
[122] *Idem*, at 71-75.
[123] *Idem*, at 90.
[124] [2012] EWHC 4457 (Ch).
[125] Another judgment of Justice Norris addressed and considered by Mr Justice Hildyard, was that in the case of *re Atlas Bulk Shipping A/S Larsen and others v Navios International Inc* [2012] Bus LR 1124 (the "*Atlas Bulk* case") where relief based on Art 21 of the Model Law was granted to restrain the right to rely on set-off under English law in the context of a Danish insolvency proceeding. Compared to the *IBA* case, the differences and context in the Atlas Bulk Case were so material that Mr Justice Hildyard did not consider it analogous (*IBA* case, *supra*, note 112, at 116-124).
[126] *IBA* case, *supra*, note 112, at 106-110.

necessary for him to determine and on which he considered it therefore unnecessary for him to express a view.[127]

The *Pan Ocean* case (as addressed above in Section 8.3.4.2) was also considered by Mr Justice Hildyard.[128] In the *Pan Ocean* case the relief sought was, in effect, to apply Korean insolvency law regarding *ipso facto* clauses. In the *IBA* case Mr Justice Hildyard found that, as a matter of substance, the Moratorium Continuation Application sought a court order which had the intended effect of forever preventing the exercise by the Challenging Creditors of an English law right in order to conform the position of the Challenging Creditors to that they would be recognised as having under Azeri insolvency law, rather than English contract law. What was sought could not sensibly be distinguished from a discharge or variation of the right itself; its depiction as merely procedural belied its true and intended effect. In order words, the relief requested was presented as procedural, but was calculated to be substantive in its effect. Mr Justice Hildyard concluded that the *Pan Ocean* case correctly affirms that the Model Law and the CBIR do not empower the English court, in purported appliance of English law, to vary or discharge substantive rights conferred under English law by the expedient of procedural relief which as a practical matter has the same effect (and has been fashioned with the intention) of conforming the rights of English creditors with the rights which they would have under the relevant foreign law.

Even if Mr Justice Hildyard had concluded that he had jurisdiction to grant the relief based on Article 21 of the Model Law as requested in the Moratorium Continuation Application, he made it clear that he may still not have exercised his discretion due to the balancing of interests exercise he is required to undertake pursuant to Article 22 of the Model Law (which will be further addressed in section 8.3.5). Can the rights of a creditor under English law ever be "adequately protected" by intervention which, if effect and intention, negates or varies the rights? This is the question that Mr Justice Hildyard had to ask himself.[129] Another relevant factor in the context of exercising his discretion was, according Mr Justice Hildyard, that IBA could have sought to promote a parallel scheme of arrangement in the UK, which would admittedly have carried additional expense and possibly class issues.[130] Finally, Mr Justice Hildyard also considered that the introduction of the Model Law on Insolvency Related Judgments[131] may solve the problem created by the Gibbs Rule in a restructuring context.[132]

8.3.4.5 IBA case appeal[133]

In the *IBA* case appeal, the English Court of Appeal upheld the decision in the court of the first instance by Mr Justice Hildyard and focused in particular on the jurisdictional question raised. The question raised was in what sense it may be said that the English court lacked jurisdiction to grant the indefinite Moratorium Continuation requested by the foreign representative?[134]

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[127] *Idem*, at 113-115.
[128] *Idem*, at 129-146.
[129] *Idem*, at 158(4).
[130] *Idem*, at 158(5).
[131] *Supra*, note 101.
[132] *IBA* case, *supra*, note 112, at 160.
[133] See note 110, *supra*, for the case citation.
[134] *IBA* case appeal, *supra* note 110, at 83.

According to the Court of Appeal, the case did not involve an issue of jurisdiction in the strict sense (that is, the court had no power to deal with and decide the dispute). Instead, the real issue in this case was whether as a matter of settled practice the court should not exercise its power to grant the indefinite Moratorium Continuation where to do so would:

(a) in substance prevent the English creditors (that is, the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule; and / or

(b) prolong the stay after the Azeri reconstruction has come to an end.

The Court of Appeal answered both (a) and (b) in favour of the respondents (the Challenging Creditors).[135]

As far as (a) above is concerned, the court of Appeal held that an English court could only properly grant the indefinite Moratorium Continuation if it were satisfied of two things: first, the stay would have to be *necessary* to protect the interests of IBA's creditors and, secondly, the stay would have to be an appropriate way of achieving such protection. The Court of Appeal held that neither of these conditions had been satisfied.[136]

Based on the evidence presented to the court, it concluded that the IBA creditors needed no further protection in order for the foreign proceeding to achieve its purpose. While it could theoretically be argued that the IBA creditors who participated in the restructuring plan of IBA could be prejudiced if the ability of IBA to repay the new corporate bonds (that were issued as part of the plan) was jeopardised by the successful enforcement by the English creditors of their stayed claims, the court regarded this as being "far too indirect and imponderable a consideration to satisfy the test of necessity in article 21(1) of the Model Law."[137]

The court further found it to be material in this context that IBA could in principle have promoted a parallel scheme of arrangement in the UK, but chose not to do so. In this context it should be noted that since the adoption of the CIGA in June 2020, the UK now also has a new so-called "super" scheme of arrangement, which also provides for a so-called "cross-class cram-down" feature. In short, this means that under certain circumstances a restructuring plan can still be approved in the UK over the objections of one or more classes that have rejected the restructuring plan. In particular in the *IBA* case, the existence of such a "super scheme" at the time may have been an attractive option. If the power to grant a stay under article 21 of the Model Law had been intended to override the substantive rights of creditors under the proper law governing their debts, one would, according to the Court of Appeal, expect this to have been made explicit, or at the very least to have been the subject of discussion and a positive recommendation at the preparatory stage.[138]

In respect of (b) above, the Court of Appeal considered that the information obligation on the foreign representative contained in article 18 of the Model Law, regarding a substantial change

[135] *Idem*, at 84-85.
[136] *Idem*, at 86.
[137] *Idem*, at 87.
[138] *Idem*, at 88-89.

in the status of the foreign proceeding and the status of the foreign representative's own appointment, requires the foreign proceeding to still be in existence and the foreign representative to still be in office. From this, the strong implication is, according to the Court of Appeal, that once the foreign proceeding has come to an end and the foreign representative no longer holds office, there is no scope for further orders in support of the foreign proceeding to be made and any relief previously granted under the Model Law should terminate. The court further held that had the Model Law ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would surely have addressed the question explicitly and provided appropriate machinery for that purpose.[139]

The different approach taken in the US on these issues was not further explored by the Court of Appeal, as the background to the incorporation of the Model Law in the US differs significantly from that in Great Britain. As for the change in Azeri legislation that now makes it possible to further extend the life of the Azeri foreign proceeding of IBA (while its termination date was originally 30 January 2018), the Court of Appeal held that, as a matter of substance, the original purpose of the Azeri reconstruction was achieved before the termination date in January 2018 and IBA is now trading normally. While the reconstruction plan is being kept alive artificially, as an insolvency proceeding it has served its purpose and run its course.[140]

8.3.5 Balancing interests (Article 22)[141]

The court in the enacting State must strike an appropriate balance between the relief that may be granted to the foreign representative and the interests of the persons that may be affected by the relief. Article 22 specifically mentions the interests of creditors, the debtor and other interested parties. These interests should guide the court in exercising its discretionary powers to grant interim relief in Article 19 and post-recognition relief in Article 21. Relief can be tailored by subjecting it to certain conditions (Article 22(2)) or by modifying or terminating relief that has been granted (Article 22(3)).

8.3.6 Power to avoid antecedent transactions (Article 23)[142]

The standing afforded to the foreign representative in Article 23 extends only to actions that are available to the local insolvency representative in the context of an insolvency proceeding. Any actions of individual creditors fall outside the scope of Article 23. It should further be noted that Article 23 is drafted narrowly. It only ensures that a foreign representative is not prevented from initiating any action to avoid antecedent transactions by the sole fact that the foreign representative is not the insolvency representative appointed in the enacting State. By distinguishing between main and non-main proceedings in paragraph 2 of Article 23, it is clear that the relief in a non-main proceeding is likely to be more restrictive than for a main proceeding.

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[139] *Idem*, at 97-98.
[140] *Idem*, at 100-101.
[141] See generally UNCITRAL Guide to Enactment, pp 90-91, paras 196-199.
[142] *Idem*, pp 91-92, paras 200-203.

8.3.7 Standing (locus standi) to intervene in local proceedings (Article 24)[143]

Article 24 is limited to standing only to avoid a denial of standing because local procedural legislation in the enacting State may not have contemplated the foreign representative amongst those having such standing. The proceedings where the foreign representative might intervene (if all local requirements for such intervention have otherwise been met) could only be those proceedings which have not been stayed under Article 20 or Article 21 of the Model Law.

8.3.8 Benefits

The automatic relief available under the Model Law, specifically the stay of actions or of enforcement proceedings, is necessary to provide "breathing space" until appropriate measures are taken for reorganisation or liquidation of the assets of the debtor. The suspension of transfers provides an immediate restriction preventing multinational debtors from moving money and property across international boundaries, which is essential to prevent fraud and protect the legitimate interests of the parties involved until the position can be assessed and investigated, as necessary. The ability to apply for discretionary relief under the Model Law affords foreign representatives maximum flexibility and the ability to devise bespoke solutions tailored to the circumstances of the debtor and other interested parties. Finally, the ability to seek preliminary relief on an urgent basis on the filing of an application for recognition can help prevent dissipation of assets and preserve the *status quo* for the benefit of stakeholders generally until the application can be heard.

Self-Assessment Exercise 5

Question 1

How is a court in an enacting State likely to rule on a request for recognition of a foreign proceeding opened in a foreign State where the debtor has certain assets? Explain the steps the court will have to take.

Question 2

Would your answer be different if the debtor had its registered office in the foreign state, but not its COMI?

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

[143] *Idem*, pp 93-94, paras 204-208.

9. CO-OPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES (CHAPTER IV)

9.1 Introduction

Cross-border co-operation is dealt with in articles 25-27 of the Model Law.[144] As many jurisdictions lack a legislative framework for co-operation and co-ordination between judges in different jurisdictions, the Model Law fills a gap by expressly empowering courts to extend co-operation in certain specific areas. The objective is to enable courts and insolvency representatives from two or more countries to be efficient and achieve optimal results. A further aim is to help promote consistency of treatment of stakeholders across different jurisdictions. Such consistency, in turn, should enhance both transparency and predictability in cross-border insolvency cases. It should further avoid traditional time-consuming and cost-inefficient procedures, such as letters rogatory and requests for consular assistance.

Co-operation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition. Also, to the extent that cross-border judicial co-operation in the enacting State is based on the principle of comity, the Model Law offers an opportunity for making that principle more concrete and adapting it to the particular circumstances of cross-border insolvencies.

9.2 Domestic courts - mandatory co-operation and direct communication with foreign courts or foreign representatives (Article 25)

Article 25(1) provides that in cross-border insolvencies covered by Article 1 of the Model Law, the court must co-operate to the maximum extent possible with foreign courts or foreign representatives. Article 25(2) further provides that the court in the enacting State is entitled to communicate directly with, or to request information or assistance directly from, foreign courts and foreign representatives. Co-operation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere. As co-operation is not limited to foreign proceedings that would qualify for recognition under Article 17 of the Model Law, co-operation may also be available with respect to proceedings that are neither foreign main nor non-main proceedings on the basis of presence of assets.

9.3 Domestic insolvency office-holder - mandatory co-operation and direct communication with foreign courts or foreign representatives (Article 26)

In the exercise of its functions and subject to the supervision of the court in the enacting State, the insolvency office-holder (i) must co-operate to the maximum extent possible with foreign courts or foreign representatives (Article 26(1)) and (ii) is entitled to communicate directly with foreign courts and foreign representatives (Article 26(2)).

[144] *Idem*, pp 94-99, paras 209-223 and The Judicial Perspective, pp 65-76, paras 187-222.

9.4 Means of co-operation (Article 27)

Article 27 provides an indicative list of the types of co-operation that are authorised by the Model Law. The list is illustrative rather than exhaustive in order to avoid precluding certain forms of appropriate co-operation and limiting the ability of courts to fashion remedies in keeping with specific circumstances. The non-exhaustive list of appropriate means of co-operation is set out in Article 27, and includes:

- the appointment of a person or body to act at the direction of the court;
- communication of information by any means considered appropriate by the court;
- co-ordination of the administration and supervision of the debtor's assets and affairs;
- approval or implementation by courts of agreements concerning the co-ordination of proceedings;
- co-ordination of concurrent proceedings regarding the same debtor; and
- any additional forms of examples the enacting State may wish to list.

In addition, the following guidance is provided regarding appropriate communication:[145]

- communication between courts should be done carefully with appropriate safeguards for the protection of the substantive and procedural rights of the parties;
- communication should be done openly, with advance notice to the parties involved and in the presence of the parties, except in extreme circumstances;
- various communications might be exchanged, including formal court orders or judgments, informal writings of general information, questions and observations and transcripts of court proceedings;
- means of communication include telephone, video link, facsimile and e-mail; and
- where communication is necessary and is used appropriately, there can be considerable benefits for the parties involved in, and affected by, the cross-border insolvency.

9.5 The Practice Guide

As far as co-operation is concerned, the Practice Guide expands upon the forms of co-operation set out in Article 27 and incorporates, via sample clauses, practice and experience with the use of cross-border insolvency agreements or protocols. See paragraph 11 below for more details about the Practice Guide.

[145] See in particular, The Judicial Perspective, pp 67-66, paras 192-193.

Self-Assessment Exercise 6

Explain how co-operation under the Model Law relates to access and recognition under the Model Law?

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

10. CONCURRENT PROCEEDINGS (CHAPTER V)

10.1 Introduction

This part of the guidance text addresses Chapter V of the Model Law , which consists of Articles 28 – 32.[146] This Chapter provides for a hierarchy of proceedings in case more than one insolvency proceeding is opened in respect of a certain debtor. In short, the hierarchy is as follows:

(1) in the case of a foreign main or non-main proceeding and a domestic insolvency proceeding in the enacting State, primacy is given to the domestic proceeding (Articles 29);

(2) in the case of a foreign main proceeding and a foreign non-main proceeding, primacy is given to the foreign main proceeding (Article 30(a) and (b)); and

(3) in the case of more than one foreign non-main proceeding, no foreign proceeding is *a priori* treated preferentially (Article 30(c)).

10.2 The supremacy of domestic insolvency proceedings

The recognition of a foreign main proceeding will not prevent the commencement of domestic insolvency proceedings in the enacting State, provided that the debtor has assets in this State (Article 28). It would, however, not be contrary to the policy underlying the Model Law for the enacting State to adopt a more restrictive test, for example for the debtor to have at least an establishment in the enacting State before domestic insolvency proceedings can be opened. While, typically, a domestic insolvency proceeding is limited to assets located in the enacting State, in certain situations it may be meaningful for the local insolvency proceeding to also include certain assets abroad, especially when there is no foreign proceeding necessary or available in the foreign State where these foreign assets are situated. Article 28 of the Model Law caters for such an extension, albeit subject to the following two restrictions:

- the extension must be necessary to implement co-operation and co-ordination under articles 25-27 of the Model Law; and

[146] See generally, UNCITRAL Guide to Enactment, pp 100-107, paras 224-241 and The Judicial Perspective, pp 67-66, paras 192-222.

- the foreign assets included in the extension must be administered under the domestic law of the enacting State.

Concurrent domestic insolvency proceedings and foreign proceedings can exist either:

- at the time of the application for recognition of the foreign proceedings in the enacting State (Article 29(a)) – **Situation 1**; or

- after recognition, or the filing of the application for recognition, of the foreign proceeding (Article 29(b)) – **Situation 2.**

In **Situation 1**, any relief granted either on an interim basis based on Article 19, or post-recognition based on Article 21, must be consistent with the domestic insolvency proceedings. In the case of a foreign main proceeding, the automatic relief of Article 20 does not apply. Also, in granting relief to a foreign representative of a foreign non-main proceeding, the court must be satisfied that (Article 29(c)):

- the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding; or

- the relief concerns information required in the foreign non-main proceeding.

In **Situation 2**, any relief granted under either article 19 or article 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the domestic insolvency proceeding. For a foreign main proceeding, the same applies to any automatic relief that had been granted. For a foreign non-main proceeding, the requirements set out in article 29(c) apply as well.

It should be noted in this context that the commencement of domestic insolvency proceedings does not prevent or terminate the recognition of a foreign proceeding.

10.3 Concurrent foreign main and non-main proceedings

If the foreign main proceeding was recognised first in the enacting State, then any relief granted thereafter under either article 19 or article 21 to a representative of a foreign non-main proceeding must be consistent with the foreign main proceeding (Article 30(a)). If the application for recognition or the recognition of the foreign non-main proceeding comes first, then once the foreign main proceeding is recognised in the enacting State, any relief in effect under article 19 or article 21 must be reviewed by the court and must be modified or terminated if inconsistent with the foreign main proceeding (Article 30(b)).

10.4 Concurrent foreign non-main proceedings

In the event of two concurrent foreign non-main proceedings, the court must grant, modify or terminate relief for the purpose of facilitating co-ordination of the proceedings (Article 30(c)).

However, the Model Law does not contain any rule of preference between concurrent foreign non-main proceedings.

10.5 Presumption of insolvency (Article 31)

For the purposes of opening a domestic insolvency proceeding for the debtor in the enacting State, Article 31 of the Model Law provides for a rebuttable presumption that the recognition of a foreign main proceeding is proof that the debtor is insolvent.

10.6 The hotchpot rule (Article 32)

In essence, the hotchpot rule intends to avoid situations in which a creditor might obtain more favourable treatment than the other creditors in the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. The rule does not affect the ranking of claims as established under the law of the enacting State. The hotchpot rule as set out in Article 32, reads as follows:

> "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 [domestic proceeding in the enacting State] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionally less than the payment the creditor has already received."

So, if a creditor has already received a 5% payment on its claim in a foreign proceeding regarding the debtor and the rate of distribution is for example 15% in the debtor's domestic insolvency proceeding in the enacting State, then, in order to place this creditor in the same position as the other creditors of the same class in the domestic insolvency proceeding, this creditor would receive a rate of distribution of 10% instead of 15%.

Self-Assessment Exercise 7

Question 1

Discuss whether you, in view of the policy underlying the Model Law, find the supremacy of domestic insolvency proceedings understandable or surprising, or perhaps both.

Question 2

Answer True or False to the following questions:

2.1 An enacting State requiring at least an establishment in its own jurisdiction for the commencement of domestic insolvency proceedings, violates article 28 of the Model Law. [T/F]

2.2 A domestic insolvency proceeding in the enacting State cannot include foreign assets of the foreign debtor. [T/F]

2.3 If a domestic insolvency proceeding already exists in the enacting State when a foreign main proceeding is recognised, there is no automatic relief pursuant to Article 20 of the Model Law. [T/F]

2.4 If after a foreign non-main proceeding is recognised, a domestic insolvency proceeding is opened in the enacting State, the recognition of the non-main proceeding terminates. [T/F]

2.5 For the opening of a domestic insolvency proceeding in the enacting State, there is a rebuttable presumption that the recognition of a foreign non-main proceeding is proof that the debtor is insolvent. [T/F]

For commentary and feedback on self-assessment exercise 7, please see APPENDIX A

11. UNCITRAL PRACTICE GUIDE ON CROSS-BORDER INSOLVENCY CO-OPERATION

11.1 History

The Practice Guide arose from a proposal made to the Commission in 2005. A first draft was developed through consultations in 2006 and 2007, presented for discussion to UNCITRAL Working Group V in November 2008, and circulated to Governments for comment in late 2008. A revised version was finalised and adopted by consensus on 1 July 2009 and on 16 December 2009, the General Assembly adopted resolution 64/112 in which appreciation for the completion and adoption of the Practice Guide was expressed.

11.2 Purpose

The purpose of the Practice Guide is to provide information for practitioners and judges on practical aspects of co-operation and communication in cross-border insolvency cases, based upon a description of collective experience and practice with a focus on the use and negotiation of cross-border insolvency agreements (which are also referred to as "protocols").

11.3 Content

Chapter I of the Practice Guide introduces the various international texts relating to cross-border insolvency proceedings and discusses the increasing importance of co-ordination and co-operation in such proceedings. Article 27 of the Model Law, in particular the approval and implementation by courts of agreements concerning the co-ordination of proceedings (article 27(d)) is the focus of Chapter II of the Practice Guide. Various cross-border insolvency agreements (including so-called "sample clauses" contained therein) are analysed in detail in

Chapter III. Finally, Annex I to the Practice Guide provides summaries of 44 cases in which the cross-border insolvency agreements that form the basis of the Practice Guide, were concluded.

11.4 Sample clauses

Issues typically addressed in cross-border insolvency agreements include some or all of the following:[147]

(a) in respect of the different courts and insolvency representatives involved, an allocation of responsibility for various aspects of the conduct and administration of proceedings, including limitations on authority to act without approval;

(b) the availability and co-ordination of relief;

(c) co-ordination of the recovery of assets for the benefit of creditors generally;

(d) the submission and treatment of claims;

(e) the use and disposal of assets;

(f) methods of communication (including language, frequency and means);

(g) the provision of notice;

(h) the co-ordination and harmonisation of reorganisation plans;

(i) agreement-related issues (including amendment, termination, interpretation, effectiveness and dispute resolution);

(j) the administration of proceedings (for example, stays or standstills);

(k) choice of applicable law;

(l) allocation of responsibilities between contract parties;

(m) costs and fees;

(n) rights of appearance (*locus standi* or standing) before the courts involved;

(o) safeguards (for example, no derogation from court authority, public policy and applicable domestic law, disclosure to interested parties, protection of rights of non-signatory third parties, ability to revert to the court in case of dispute, and warranty of contract parties that they each of authority to enter into the agreement);

[147] Practice Guide, p 37, paras 28, 29, 35 and 36.

(p) corporate governance (including composition of the board of directors, actions the board can take and the procedures to follow in doing so, the relationship between management and shareholders, board and shareholders); and

(q) management of information flows.

The Practice Guide has various alternative sample clauses under the following headings:

(a) Background;[148]

(b) Scope, purpose and goals;[149]

(c) Resolution of disputes;[150]

(d) Stays of proceedings;[151]

(e) Investigation of assets;[152]

(f) Distribution;[153] and

(g) Effectiveness and conditions precedent to effectiveness.[154]

Other sample clauses included in the Practice Guide are clauses relating to: language,[155] terminology and rules of interpretation,[156] comity and independence of courts and allocation of responsibilities between courts,[157] treatment of claims,[158] insolvency representatives,[159] deferral,[160] right to appear and be heard,[161] future proceedings,[162] priority of proceedings,[163] applicable law,[164] general means of co-operation,[165] supervision of the debtor and reorganisation plans,[166] treatment of assets: supervision by the courts,[167] allocation of

[148] *Idem*, pp 45-46.
[149] *Idem*, pp 47-48.
[150] *Idem*, p 63.
[151] *Idem*, pp 70-71.
[152] *Idem*, pp 87-88.
[153] *Idem*, p 89.
[154] *Idem*, p 108.
[155] *Idem*, p 48.
[156] *Idem*, pp 49-50.
[157] *Idem*, p 61.
[158] *Idem*, p 62.
[159] *Idem*, pp 62-63.
[160] *Idem*, pp 63-64.
[161] *Idem*, p 64.
[162] *Idem*, pp 64-65.
[163] *Idem*, p 70.
[164] *Idem*, p 71.
[165] *Idem*, p 85.
[166] *Idem*, p 86.
[167] *Idem*, p 87.

responsibilities for commencing proceedings,[168] submission of claims, claims verification and admission and post-commencement finance,[169] communication between courts,[170] communication between the parties: information-sharing between insolvency representatives,[171] communication between the parties: sharing information with other parties and notice,[172] confidentiality of communication[173], amendment, revision and termination,[174] costs and fees,[175] preservation of rights,[176] preservation of jurisdiction,[177] and limitation of liability and warranties.[178]

Self-Assessment Exercise 8

How does the Practice Guide compare to the co-operation provisions contained in the Model Law?

For commentary and feedback on self-assessment exercise 8, please see APPENDIX A

12. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: THE JUDICIAL PERSPECTIVE

12.1 History

The Judicial Perspective was adopted by UNCITRAL on 1 July 2011, following a request made by judges attending the Eighth Judicial Colloquium co-hosted by UNCITRAL, INSOL International and the World Bank in Vancouver (Canada) in 2009. In 2013 it was updated to reflect the revisions to the UNCITRAL Guide to Enactment in the same year, as well as jurisprudence issued between July 2011 and 15 April 2013 applying and interpreting the Model Law.

12.2 Purpose

The aim of the Judicial Perspective is to discuss the Model Law from a judge's perspective. Rather than providing an article-by-article analysis of the Model Law, the text is ordered so as to reflect the sequence in which particular decisions would generally be made by a receiving court under the Model Law. In the text of the Judicial Perspective, reference is made to 30 decisions given in a number of jurisdictions and which are summarised in Annex I to the Judicial

[168] *Idem*, p 88.
[169] *Idem*, p 89.
[170] *Idem*, pp 102-103.
[171] *Idem*, pp 103-104.
[172] *Idem*, p 104.
[173] *Idem*, p 105.
[174] *Idem*, p 108.
[175] *Idem*, p 110.
[176] *Idem*, p 112.
[177] *Idem*, p 113.
[178] *Ibid*.

Perspective. 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. The Judicial Perspective does not purport to instruct judges on how to deal with applications for recognition and relief under their domestic legislation enacting the Model Law. All that is offered is general guidance on the issues a particular judge might need to consider. Flexibility of approach is all-important in an area where the economic dynamics of a situation may change suddenly.

12.3 Content

In paragraphs 4 to 10 of this guidance text, references have already been made to the relevant parts of the Judicial Perspective alongside references to the UNCITRAL Guide to Enactment.

Self-Assessment Exercise 9

How does the Judicial Perspective relate to the UNCITRAL Guide to Enactment?

For commentary and feedback on self-assessment exercise 9, please see APPENDIX A

13. DEALING WITH ENTERPRISE GROUPS IN CROSS-BORDER INSOLVENCY CASES

13.1 History

The treatment of enterprise groups in insolvency is addressed in part three of the UNCITRAL Legislative Guide on Insolvency (Legislative Guide – Part Three). The Legislative Guide arose from a proposal made in 1999 that UNCITRAL should undertake further work on insolvency law, especially corporate insolvency. In December 2000 an international colloquium was held, organised in conjunction with INSOL International and the IBA, and a first draft of the Legislative Guide was considered by UNCITRAL Working Group V in July 2001 with seven subsequent one week sessions ending with a final meeting in March 2004. The final negotiations on the draft Legislative Guide were held during the thirty-seventh session of UNCITRAL in New York from 14 to 21 June 2004 and the text was adopted by consensus on 25 June 2004. Subsequently, on 2 December 2004, the General Assembly adopted resolution 59/40 in which appreciation for completion and adoption of the Legislative Guide was expressed. Part One of the Legislative Guide is entitled "Designing The Key Objectives and Structure of an Effective and Efficient Insolvency Law" and Part Two is entitled "Core Provisions for an Effective and Efficient Insolvency Law". While Parts One and Two of the Legislative Guide were adopted on 25 June 2004, Part Three was only adopted on 1 July 2010. There is also Part Four of the Legislative Guide that was adopted on 18 July 2013 and deals with "Directors' Obligations in the Period Approaching Insolvency".

13.2 Purpose

The purpose of Legislative Guide – Part Three is to permit, in both domestic and cross-border contexts, treatment of the insolvency proceedings of one or more enterprise group members within the context of the enterprise group to address the issues particular to insolvency proceedings involving those groups. The aim of doing this is to achieve a better, more effective result for the enterprise group as a whole and its creditors. At the same, the key objectives of recommendation 1 of the Legislative Guide[179] should be promoted as well as addressing recommendation 5 of the Legislative Guide.[180]

13.3 Content

Chapter I addresses general features of enterprise groups. Chapter II deals with the insolvency of group members in a domestic context. Insofar as additional issues arise by virtue of the group context, a number of recommendations are proposed to supplement the recommendations of Part Two of the Legislative Guide. Chapter III addresses the cross-border insolvency of enterprise groups. While building on the Model Law and the Practice Guide, it does not address issues pertinent to the insolvency of different group members in different States. Instead, it focuses on promoting cross-border co-operation in enterprise group insolvencies, forms of co-operation involving courts and insolvency representatives and the use of cross-border insolvency agreements.

13.4 Recommendations

Similar to Parts One and Two of the Legislative Guide, Part Three also contains a number of recommendations, starting with recommendation 199 and ending with recommendation 254. Part One contains recommendations 1-7 and Part Two contains recommendations 8 – 198.

13.4.1 Joint application (Recommendations 199-201)[181]

These recommendations deal with a joint application for the commencement of insolvency proceedings in regard to two or more enterprise group members as well as the joint application itself, the persons permitted to apply and the competent courts. In short, the purpose of a joint application is to:

(a) facilitate a co-ordinated consideration of the application;

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[179] The key objectives listed in recommendation 1 of the Legislative Guide to establish and develop an effective insolvency law, are: (a) provide certainty in the market to promote economic stability and growth, (b) maximise value of assets, (c) strike a balance between liquidation and reorganisation, (d) ensure equitable treatment of similarly situated creditors, (e) provide for timely, efficient and impartial resolution of insolvency, (f) preserve the insolvency estate to allow equitable distribution to creditors, (g) ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information and (h) recognise existing creditors' rights and establish clear rules for the ranking of priority claims - Legislative Guide – Part One, p 14.

[180] Recommendation 5 of the Legislative Guide provides that the insolvency law should include a modern, harmonised and fair framework to address effectively instances of cross-border insolvency. Enactment of the Model Law is recommended - Legislative Guide – Part One, p 14.

[181] Part Three, pp 25-26.

(b) enable the court to obtain information concerning the enterprise group;

(c) promote efficiency and reduce costs; and

(d) To provide a mechanism to assess whether procedural co-ordination would be appropriate.

13.4.2 Procedural co-ordination (Recommendations 202-210)[182]

These recommendations deal with procedural co-ordination, the purpose and content of such procedural co-ordination, the timing, the persons permitted to apply, modification or termination of the procedural co-ordination order, competent courts and notice.

13.4.3 Post-commencement finance (Recommendations 211-216)[183]

These recommendations deal with post-commencement finance, its purpose, post-commencement finance *provided by* a group member subject to insolvency proceedings to another group member subject to insolvency proceedings, post-commencement finance *obtained by* a group member subject to insolvency proceedings from another group member subject to insolvency proceedings, priority of post-commencement finance and security for post-commencement finance.

13.4.4 Avoidance provisions (Recommendations 217-218)[184]

These recommendations deal with avoidance provisions, their purpose, avoidance transactions and elements of avoidance and defences.

13.4.5 Substantive consolidation (Recommendations 219-231)[185]

These recommendations deal with substantive consolidation, its purpose, the principle of separate legal identity, exclusions from substantive consolidation, the application for substantive consolidation (timing and people permitted to apply), the effects of a substantive consolidation order, the treatment of security interests in substantive consolidation, recognition of priorities in substantive consolidation, meetings of creditors, calculation of the suspect period, modification of a substantive consolidation order, competent court and notice of substantive consolidation.

13.4.6 Appointment of insolvency representatives in an enterprise group context (Recommendations 232-236)[186]

These recommendations deal with the appointment of a single or the same insolvency representative, the purpose of appointment of insolvency representatives in an enterprise

[182] *Idem*, pp 32-34.
[183] *Idem*, pp 46-47.
[184] *Idem*, pp 51-52.
[185] *Idem*, pp 71-74.
[186] *Idem*, pp 78-79.

group context, conflict of interest, co-operation between two or more insolvency representatives, co-operation between two or more insolvency representatives in procedural co-ordination, and co-operation to the maximum extent possible between insolvency representatives.

13.4.7 Reorganisation plans (Recommendations 237-238)[187]

These recommendations deal with reorganisation plans, their purpose, co-ordinated reorganisation plans, and including a solvent group member in a reorganisation plan for an insolvent group member.

13.4.8 Access to court and recognition of foreign proceedings (Recommendation 239)[188]

This recommendation aims to ensure that for foreign insolvency proceedings in regard to enterprise group members, recognition should be available under applicable law as well as access to courts.

13.4.9 Co-operation involving courts (Recommendations 240-245)[189]

These recommendations deal with co-operation involving courts in the context of multinational enterprise groups, its purpose, co-operation between the court and foreign courts or foreign representative, co-operation to the maximum extent possible involving courts, conditions applicable to cross-border communication involving courts, effect of communication and co-ordination of hearings.

13.4.10 Co-operation between insolvency representatives and between insolvency representatives and foreign courts (Recommendations 246-250)[190]

These recommendations deal with co-operation between insolvency representatives and between insolvency representatives and foreign courts, its purpose, direct communication, and co-operation to the maximum extent possible.

13.4.11Appointment of the insolvency representative in the context of multinational enterprise groups (Recommendations 251-252)[191]

These recommendations deal with the appointment of a single or the same insolvency representative, its purpose, and conflict of interest.

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[187] *Idem*, p 82.
[188] *Idem*, p 89.
[189] *Idem*, pp 100-103.
[190] *Idem*, pp 104-105.
[191] *Idem*, p 107.

13.4.12 Cross-border insolvency agreements (Recommendations 253-254)[192]

These recommendations deal with cross-border insolvency agreements, their purpose, authority to enter into them and approval or implementation of cross-border insolvency agreements.

Self-Assessment Exercise 10

How does the Legislative Guide – Part Three, relate to the Model Law?

For commentary and feedback on self-assessment exercise 10, please see APPENDIX A

[192] *Idem*, pp 110-111.

PART B: THE UNCITRAL MODEL LAW ON RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS

Please note that candidates will NOT be examined on the content of Part B.

14. INTRODUCTION TO THE UNCITRAL MODEL LAW ON RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS

14.1 Introduction

This part of the Module aims to introduce you to the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (the IRJ Model Law), which was adopted by UNCITRAL on 2 July 2018. At the time of finalising this guidance text, no States had yet enacted the IRJ Model Law in their own national laws.

In 2014 UNCITRAL Working Group V was provided with a mandate to develop the IRJ Model Law. It was negotiated between December 2014 and May 2018 and final negotiations on the draft text took place during the fifty-first session of UNCITRAL held in Vienna from 25 June to 13 July, 2018.[193] The work on the IRJ Model Law had its origin, in part, in certain judicial decisions, with the *Rubin v Eurofinance* decision of the English Supreme Court being one of the most important decisions in this context[194] that led to uncertainty about the ability of some courts, in the context of recognition proceedings under the Model Law or MLCBI, to recognise and enforce so-called "insolvency-related judgments", on the basis that neither article 7 nor 21 of the MLCBI explicitly provided the necessary authority. The concern was that such decisions might – based on the international effect set forth in article 8 MLCBI – be regarded as persuasive authority in other States that had enacted the MLCBI.[195] In addition to addressing that concern, the IRJ Model Law also aims to address the fact that the recognition and enforcement of insolvency related judgments is either generally absent from applicable international conventions or other regimes, or explicitly excluded. Very few States have recognition and enforcement regimes that specifically address insolvency-related judgments and even in States that do have such regimes, they may not cover all orders that might broadly be considered to relate to insolvency proceedings.[196] In short, the IRJ Model Law fixes some uncertainty created in respect of the scope of the MLCBI as well as providing an independent basis for those States that have not yet enacted the MLCBI, to facilitate recognition and enforcement of insolvency-related judgments.

Similar to other UNCITRAL texts, the IRJ Model Law has also developed new terms with defined meanings, which will be further addressed below when article 2 of the IRJ Model Law is

[193] See UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment, April 2019 (the IRJ Guide to Enactment), Pt two at paras 11 to 12.
[194] For further details of the *Rubin v Eurofinance* case, see Part A, Section 8.3.4.1 above.
[195] IRJ Guide to Enactment, Pt two, at para 2.
[196] *Idem*, at paras 3 and 8.

highlighted.[197] However, the term "insolvency" has purposely not been defined, despite the fact that the term features in the new terms "Insolvency proceeding" and "Insolvency representative", which are defined.[198] The undefined word "State" refers to "the enacting State" and the undefined word "originating State" refers to "the State in which the insolvency related judgment was issued".[199] Use of the phrase "recognition and enforcement" should not be regarded as requiring enforcement of all recognised judgments where it is not required. Also, while enforcement may presuppose recognition of a foreign judgment, it goes beyond recognition. Furthermore, while enforcement must be preceded by recognition, recognition need not always be accompanied or followed by enforcement.[200] While the IRJ Model Law uses the term "court" throughout, the body competent to perform the functions of the IRJ Model Law with respect of recognition and enforcement in the receiving State may also be an administrative authority. The same applies to the body that issues the insolvency-related judgment in the originating State, provided that such a decision has the same effect as a court decision.[201]

14.2 Main features of the IRJ Model Law

With a preamble at the outset and an additional article X at the end, the IRJ Model Law consists of 16 articles, which will each be briefly addressed below. However, the main features of the IRJ Model Law can be summarised as follows:

14.2.1 Scope[202]

The insolvency related judgment must be issued in a State other than the enacting State in which recognition and enforcement is sought. The location of the insolvency proceedings to which the judgment relates are not material in this context. They can either be foreign proceedings or local proceedings in the enacting State.

14.2.2 Types of Judgment covered[203]

An insolvency related judgment does not include a judgment commencing an insolvency proceeding[204] nor does it include any interim measure of protection. To be covered, a foreign judgment (i) must arise as a consequence of or be materially associated with an insolvency proceeding[205] and (ii) must be issued on or after the commencement of that insolvency proceeding.[206]

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[197] *Idem*, at para 20.
[198] *Idem*, at paras 22-23.
[199] *Idem*, at para 24.
[200] *Idem*, at paras 25-27.
[201] *Idem*, at paras 28-29.
[202] *Idem*, at para 31.
[203] *Idem*, at para 32.
[204] IRJ Model Law, art 2(d)(ii).
[205] *Idem*, art 2(d)(i)(a).
[206] *Idem*, art 2(d)(i)(b).

14.2.3 Relationship with MLCBI[207]

In those States where the MLCBI has already been enacted, the IRJ Model Law is intended to complement that legislation[208] and clarify it, but it does not intend to replace legislation enacting the MLCBI or limit the application of that legislation.[209] While the MLCBI applies to the recognition of specified foreign insolvency proceedings, in comparison, the IRJ Model Law has a narrower scope, addressing the recognition and enforcement of insolvency-related judgments that bear the necessary relationship to an insolvency proceeding. The decision commencing the insolvency proceeding is the subject of the MLCBI and specifically excluded from insolvency-related judgments covered by the IRJ Model Law. Both the MLCBI and the IRJ Model Law establish a framework for cross-border recognition, permit provisional relief and seek certainty of outcome.

An optional provision included in the IRJ Model Law for those States that have enacted the MLCBI, is the ground for refusal of recognition and enforcement of an insolvency-related judgment set forth in article 14(h). The general rule set out in article 14h is that the recognition and enforcement of an insolvency-related judgment may be refused if the judgment originates from a State whose insolvency proceeding is not or would not be recognised under the MLCBI (that is, the debtor has neither a COMI nor an establishment in the State in which the insolvency proceedings have been opened and to which the insolvency-related judgment relates). However, article 14(h) also provides for the following exception to that general rule: the rule in article 14(h) will apply unless[210]

(a) the insolvency representative of the proceeding that is or should have been recognised under the MLCBI 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

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

Both the IRJ Model Law and the MLCBI have a requirement for protection of the interests of creditors and other interested persons, including the debtor, but in different situations. Under the MLCBI the protection is for the granting, modifying or terminating of relief (article 22). Under the IRJ Model Law, such protection is relevant only in so far as article 14(f) gives rise to a ground for refusing recognition and enforcement where those interests were not adequately protected in the proceeding, giving rise to certain types of judgment which – in short - materially affect the rights of creditors generally.[211]

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[207] IRJ Guide to Enactment, at paras 35-41.
[208] IRJ Model Law, Preamble 1(f).
[209] *Idem*, Preamble 2(b).
[210] Such exception with respect of recognition of insolvency proceedings is not available under the MLCBI.
[211] For example, a judgment confirming a plan of reorganisation.

Finally, article X in the IRJ Model Law allows States that have enacted the MLCBI to clarify that the discretionary relief under article 21 of the MLCBI includes the recognition and enforcement of insolvency-related judgments, notwithstanding any prior interpretation to the contrary.

14.3 Preface, Scope and Definitions (Articles 1 and 2)

The Preface consists of only two articles. The first sets out the purpose of the IRJ Model Law and the second sets out what the IRJ Model Law is not intended to do. It is not intended to create substantive rights. Instead, it provides general orientation for the users and it assists with the interpretation of the IRJ Model Law.[212]

The scope of application of the IRJ Model Law is set out in Article 1 which confirms that the IRJ Model Law is intended to address the recognition and enforcement in the enacting State of an insolvency-related judgment issued in a different (foreign) State whereby the insolvency proceedings to which the judgment relates can be opened in either the enacting State or a foreign State. Paragraph 2 of Article 1 allows the enacting State to exclude certain types of the judgment from the scope of the IRJ Model Law. The IRJ Guide to Enactment gives the following examples: "judgments concerning foreign revenue claims, extradition for insolvency-related matters, family law matters or judgments relating to entities excluded from the IRJ Model Law, such as banks and insurance companies."[213]

Article 2 provides for the following four new defined terms:

14.3.1 "Insolvency Proceeding" (sub-paragraph (a))[214]

This definition draws upon the definition of "foreign proceeding" in the MLCBI and contains the following elements:

(1) it must be a judicial or administrative proceeding of a collective nature;

(2) the proceeding must have a basis in insolvency-related law of the originating State;

(3) the proceeding must provide for an opportunity for involvement of creditors collectively;

(4) there must be control or supervision of the assets and affairs of the debtor by a court or another official body; and

(5) the purpose of the proceeding must be reorganisation or liquidation of the debtor.

By referring to assets that "are or were subject to control", the definition intends to also address situations where the insolvency proceeding has closed at the time recognition of the insolvency-

[212] IRJ Guide to Enactment, Pt two, at paras 43-45.
[213] *Idem*, at paras 46-47.
[214] *Idem*, at paras 48-49.

related judgment is sought, or where all assets were transferred at the start of a proceeding pursuant to a pre-packaged reorganisation plan.[215]

14.3.2 "Insolvency representative" (sub-paragraph (b))[216]

This definition draws upon the definition of "foreign representative" in the MLCBI. The term "insolvency representative" is used in the IRJ Model Law to refer to the person fulfilling the range of functions that may be performed in a broad sense without distinguishing between those different functions in different types of proceeding. The IRJ Model Law does not specify that the insolvency representative must be authorised by a court, but the definition is sufficiently broad to include appointments that might be made by a special agency other than a court. It also includes appointments on an interim basis.

14.3.3 "Judgment" (sub-paragraph (c))[217]

This is a purposefully broad definition focused upon judgments issued by a court but also including judgments issued by an administrative authority, provided such a decision has the same effect as a court decision. There is no requirement that a specialised court with insolvency jurisdiction must have issued the judgment. An interim measure of protection is not considered a judgment for purposes of the IRJ Model Law. Such interim measures typically serve two principal purposes, (i) to maintain the *status quo* pending determination of the issues at trial and (ii) to provide a preliminary means of securing assets out of which the ultimate judgment may be satisfied, It should further be noted that without additional court orders, legal effects that might apply by operation of law, such as a stay applicable automatically on commencement of insolvency proceedings, may not be considered a judgment for the purposes of the IRJ Model Law.

14.3.4 "Insolvency-related judgment" (sub-paragraph (d))[218]

An insolvency-related judgment would include any equitable relief, including the establishment of a constructive trust, provided for in that judgment or required for its enforcement, but would not include any element of a judgment imposing a criminal penalty (although article 16 may enable the criminal penalty to be severed from other elements of the judgment). While the judgment commencing an insolvency proceeding is not covered by the definition, other judgments issued at the time of commencement of insolvency proceedings are covered, such as the appointment of an insolvency representative, judgments or orders addressing payment of employee claims and continuation of employee entitlements, retention and payment of professionals, the acceptance or rejection of executory contracts, the use of cash collateral and post-commencement finance. The IRJ Guide to Enactment provides the following non-exhaustive list of examples of types of judgments that might be considered insolvency-related judgments:

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[215] *Idem*, at paras 48-49.
[216] *Idem*, at paras 50-51.
[217] *Idem*, at paras 52-56.
[218] *Idem*, at paras 57-62.

(a) a judgment dealing with the constitution and disposal of assets of the insolvency estate;

(b) a judgment determining whether a transaction involving the debtor or assets of its insolvency estate should be avoided;

(c) a judgment determining that a representative or director of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency;

(d) a judgment determining whether the debtor owes or is owed a sum or any other performance;

(e) a judgment (i) confirming or varying a plan of reorganisation or liquidation, (ii) granting discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement; and

(f) a judgment for the examination of a director of the debtor, located in a third jurisdiction.

The cause of action leading to the judgment need not necessarily be pursued by the debtor or its insolvency representative and "cause of action" should be interpreted broadly to refer to the subject matter of the litigation.

14.4 Articles 3-8

Similar to the corresponding article in the MLCBI, article 3 of the IRJ Model Law expresses the principle of supremacy of international obligations of the enacting State over domestic law.[219] The same applies to article 4 of the IRJ Model Law which provides for the competent court or authority and article 5 which provides for authorisation to act in another State in respect of an insolvency-related judgment issued in the enacting State, as permitted by applicable foreign law. The additional assistance under other laws is set out in article 7 of the MLCBI and in the IRJ Model Law it is article 6. As a consequence, while the public policy exception in the MLCBI is set out in article 6, in the IRJ Model Law it is captured in article 7. The scope and interpretation of both articles is, however, the same. The public policy exception in article 7 of the IRJ Model Law has at the end added the words "*including the fundamental principles of procedural fairness*" to focus attention on serious procedural failings in order to accommodate those States with a relatively narrow concept of public policy (and which treat procedural fairness and natural justice as being distinct from public policy)[220]. Article 8 on interpretation is again the same in the MLCBI and the IRJ Model Law.

14.5 Effect and enforceability of an insolvency-related judgment (Article 9)[221]

Recognition requires that the judgment has effect in the originating State. Having effect generally means that the judgment must be legal, valid and operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations. Similarly, the

[219] *Idem*, at para 63.
[220] *Idem*, at paras 73-74.
[221] *Idem*, at paras 77-79.

judgment will only be enforced if it is enforceable in the originating State. The question of effect and enforceability must thus be determined by reference to the law of the originating State, recognising that different States have different rules on the finality and conclusiveness of judgments. As such, article 9 highlights the distinction between recognition (that is, that the receiving court will give effect to the originating court's determination of legal rights and obligations reflected in the judgment) and enforcement (being the application of the legal procedures of the receiving court to ensure compliance with the judgment issued by the originating court). For the purpose of the IRJ Model Law, a decision to enforce a judgment must be preceded or accompanied by recognition of the judgment. In contrast, recognition need not be accompanied by enforcement.

14.6 Effect of review in the originating Stat on recognition and enforcement (Article 10)[222]

Paragraph 1 of article 10 provides that if the judgment is subject to review in the originating State, or if the time limit for seeking ordinary review has not expired, the receiving court has discretion to adopt various approaches to the judgment including to:

(1) refuse to recognise the judgment;

(2) postpone recognition and enforcement until it is clear whether the judgment is to be affirmed, set aside or amended in the originating State;

(3) proceed to recognise the judgment, but postpone enforcement; or

(4) recognise and enforce the judgment.

Ordinary review referred to in article 10 typically describes a review that is subject to a time limit and conceived as an appeal with a full review (of facts and law). This is in contrast to an "extraordinary review", such as an appeal to a court of human rights or internal appeals for violation of fundamental rights.

14.7 Procedure for seeking recognition and enforcement of an insolvency-related judgment (article 11)

The aim of article 11 of the IRJ Model law is to provide a simple, expeditious structure to be used for recognition and enforcement of insolvency-related judgments.

- Recognition may also be raised by way of defence or as an incidental question in the course of a proceeding[223] and either an insolvency representative or another person authorised under the law of the originating State to act on behalf of an insolvency proceeding may seek recognition and enforcement of an insolvency-related judgment (**paragraph 1**);[224]

[222] *Idem*, at paras 80-82.
[223] See also IRJ Model Law, art 4.
[224] IRJ Guide to Enactment, *supra* note 187, Pt two, at para 84.

- **Paragraph 2** sets out what documents are required for recognition and enforcement. To avoid refusal of recognition because of non-compliance with a mere technicality, sub-paragraph (c) provides the court with discretion to also accept "other evidence". What constitutes a "certified copy" should be determined by reference to the law of the State in which the judgment was issued. It is desirable to also provide a copy of the judgment that opened the insolvency proceedings to which the judgment to be recognised relates to.[225]

- The court has discretion to also require a translation of all or some of the documents (**paragraph 3**).

- While authenticity of the documents submitted can be presumed by the court, discretion remains for the court not to rely on this in cases of doubt, or when evidence to the contrary prevails. The presumption is useful because legalisation[226] procedures may be cumbersome and time-consuming (**paragraph 4**).[227]

- In order for the party against whom recognition and enforcement is sought to be able to exercise the right to be heard, notice of the application and the details of the hearing must be sent to this party (**paragraph 5**).[228]

14.8 Provisional relief (article 12)[229]

"Urgently needed" relief may be ordered at the discretion of the court and is available from the moment recognition is sought until a decision on recognition and, if appropriate, enforcement is made. Such provisional relief may include staying the disposition of any assets of any party against whom the insolvency-related judgment has been issued (**paragraph 1(a)**) and any other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgment (**paragraph 1(b)**). It is up to the enacting State to decide if an *ex parte* application for provisional relief is allowed and what (if any) notice requirements must be complied with (**paragraph 2**). Unless extended, relief terminates when a decision on recognition and enforcement of the insolvency-related judgment is made (**paragraph 3**).

14.9 Decision to recognise and enforce an insolvency-related judgment (article 13)[230]

Recognition should be granted if:

(a) the judgment is an insolvency-related judgment (article 2(d));

(b) the requirements for recognition and enforcement have been met (that is, the judgment if effective and enforceable in the originating State under article 9);

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[225] *Idem*, at paras 85-86.
[226] "Legalisation" is a term used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced, certifies the authenticity of the signature, the capacity in which the person signed the document has acted and, where appropriate, the identity of the seal or stamp on the document.
[227] IRJ Guide to Enactment, Pt two, at paras 88-91.
[228] *Idem*, at para 92.
[229] *Idem*, at paras 93-95.
[230] *Idem*, at paras 96-97.

(c) recognition is sought by a person referred to in article 11(1) from a court or authority referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such court or authority;

(d) the documents or evidence required under article 11(2) have been provided;

(e) recognition is not contrary to public policy (article 7); and

(f) the judgment is not subject to any grounds for refusal (article 14).

No provision is made for the recognising court to embark on a consideration of the merits of the foreign court's decision to issue the insolvency-related judgment, or issues related to the commencement of the insolvency proceeding, to which the judgment is related. In short, article 13 aims to establish clear and predictable criteria for recognition and enforcement of an insolvency-related judgment.

14.10 Grounds to refuse recognition and enforcement of an insolvency-related judgment (article 14)

In addition to the public policy exception contained in article 7, the list of grounds for the refusal of recognition and enforcement of an insolvency-related judgment is intended to be an exhaustive list. The use of the term "may" in article 14 makes it clear that, even if one of the grounds set forth in article 14 exists, the court is not obliged to refuse recognition and enforcement. The onus of establishing any of the grounds set out under article 14 rests upon the party opposing recognition or enforcement.[231]

14.10.1 No proper notification of proceedings giving rise to the insolvency-related judgment (article 14(a))[232]

This sub-paragraph is in article 14(a)(i) concerned with the interests of the defendant in the proceedings and article 14(a)(ii) with the interests of the receiving State. As far as the interests of the defendant are concerned, the test of whether notification has been given in sufficient time is purely a question of fact which depends on the circumstances of each case. The notification should further also be effected "in such a manner" as to enable the defendant to arrange a defence, which may require documents written in a language that the defendant is unlikely to understand to be accompanied by an accurate translation. However, this ground for refusal is not available if the defendant entered an appearance and presented their case without contesting notification, even if they had insufficient time to prepare their case properly, unless it was not possible to contest notification in the court of origin. The interests of the receiving State are only considered in article 14(a)(ii) where the receiving State is the State in which the notification was given. In this context it should be noted that procedural irregularities that are capable of being cured retrospectively by the court in the receiving State would **not** be sufficient to justify refusal.

[231] *Idem*, at para 98.
[232] *Idem*, at paras 99-102.

14.10.2 Fraud (article 14(b))[233]

A fraud involves a deliberate act; mere negligence does not suffice. The fraud must be committed in the course of the proceedings giving rise to the judgment. While in some legal systems fraud may be considered as falling within the scope of the public policy provision, this is not true for all legal systems. Accordingly, article 14(b) is included as a form of clarification.

14.10.3 Inconsistency with another judgment (Articles 14(c) and (d))[234]

Article 14(c) is concerned with the case where the foreign judgment is inconsistent with a judgment issued by a court in the receiving State, provided that the parties are the same, but it is not necessary for the cause of action or the subject matter to be the same.

Article 14(d), on the other hand, concerns foreign judgments where the judgment for which recognition and enforcement is sought is inconsistent with an earlier judgment issued in another State, provided that: (i) it was issued after the conflicting judgment (so that priority in time is a relevant consideration), (ii) the parties to the dispute are the same, (iii) the subject matter is the same (so that inconsistency goes to the central issue of the cause of action), and (iv) the earlier conflicting judgment fulfils the conditions necessary for recognition in the enacting State.

14.10.4 Interference with insolvency proceedings (article 14(e))[235]

This ground addresses the desirability by the IRJ Model Law of avoiding interference with the conduct and administration of the debtor's insolvency proceedings. Those proceedings could be the proceeding to which the judgment is related or other insolvency proceedings (that is, concurrent proceedings) concerning the same debtor. As the concept of interference is somewhat broad, article 14(e) gives examples of what might constitute interference.

14.10.5 Judgments implicating the interests of creditors and other stakeholders (article 14(f))[236]

This ground for refusal set out in article 14(f) would only apply to judgments that materially affect the rights of creditors and other stakeholders. In article 14(f)(i) this is illustrated as follows: "*(…) such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtors or the debts should be granted or a voluntary or out-of-court restructuring agreement should be approved (…)*". For refusal to be granted, the receiving court must be convinced that the interests of those parties were not taken into account and adequately protected in the proceeding giving rise to the judgment to be recognised and enforced (article 14(f)(ii)). This ground does not apply more generally to other types of insolvency-related judgments that resolve bilateral disputes between two parties.

The basis of jurisdiction of the originating court can also be a ground for refusal (article 14(g)).[237]

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[233] *Idem*, at para 103.
[234] *Idem*, at paras 104-106.
[235] *Idem*, at paras 107.
[236] *Idem*, at paras 108-109.
[237] *Idem*, at paras 110-115.

If the originating court exercises jurisdiction solely on a ground **other than** the one listed in article 14(g)(i)-(iv), recognition and enforcement may be refused. In other words, one of the so-called "safe harbours" set out in article 14(g)(i)-(iv) **must** be met.

In article 14(g)(i) the existence of explicit consent by the judgment debtor is a question of fact to be determined by the receiving court. For purposes of article 14(g)(ii), the matter of raising the objection to jurisdiction is a matter for the law of the originating State. A receiving court, in an appropriate case, may, however, make inquiries where matters giving rise to concern become apparent. The ground in article 14(g)(iv) is similar to the ground in 14(g)(iii), but broader. The purpose of article 14(g)(iv) is to discourage courts from refusing recognition and enforcement of a judgment in cases in which the originating court's exercise of jurisdiction was not unreasonable, even if the precise basis of jurisdiction would not be available in the receiving State, provided that exercise was not incompatible with the central tenets of procedural fairness in the receiving State.

14.10.6 Optional additional ground for States that have already enacted the MLCBI (article 14(h))[238]

Article 14(h) establishes the key principle that recognition of an insolvency-related judgment can be refused when the judgment originates from a State whose insolvency proceeding is not or would not be susceptible to recognition under the MLCBI (that is, because that State is neither the location of the insolvency debtor's COMI nor of an establishment). In this context it is not required that an insolvency proceeding has already been commenced in that originating State. However, article 14(h)(i) and (ii) outline the following two conditions that must be met in order to establish an exception to the general principle of non-recognition:

(1) the insolvency representative of the proceeding that is or should have been recognised under the MLCBI 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**

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

In article 14(h)(i), participation would mean that the insolvency representative was a party to the proceedings as a representative of the debtor's insolvency estate, or had standing to intervene in those proceedings by appearing in court and making representations on the substantive merits of the case.

14.10.7 Equivalent effect (article 15)[239]

Article 15 aims to enhance the practical effectiveness of judgments and to ensure the successful party receives meaningful relief. This article is triggered where the receiving State does not know

[238] *Idem*, at paras 116-120.
[239] *Idem*, at paras 121-123.

the relief granted in the originating State or when the receiving State knows a form of relief that is "formally", but not "substantively", equivalent. In article 15(1) the enacting State is given a choice of the following two approaches:

(1) giving the judgment the same effect in the receiving State as it had in the originating State (the "First Choice"); or

(2) giving the judgment the same effect as it would have had if it had been issued in the receiving State (the "Second Choice").

The rationale of the First Choice is to ensure that the judgment has, in principle, the same effect in all States. The rationale of the Second Choice is based upon maintaining equality, fairness and certainty as between domestic and foreign judgments, as well as the practical difficulties that a court in the enacting State may have in determining the precise "effects" of a judgment under the law of the originating State. If the insolvency-related judgment provides for relief that is either not available or not known in the receiving State, then article 15(2) allows the court in the receiving State to provide a form of relief that has equivalent effect and gives effect to the judgment to the extent permissible under its national law,

14.10.8 Severability (article 16)[240]

If a judgment as a whole cannot be recognised and enforced in the receiving State, but one or more severable parts of the judgment could, then each severable part of the judgment should be treated in the same manner as a judgment that is wholly recognisable and enforceable. Whether or not a severable part of the judgment is capable of standing alone would usually depend on whether recognising and enforcing only that part of the judgment would significantly change the obligations of the parties. Any issues of law relating to this would have to be determined by the law of the receiving State.

14.11 Article X – recognition of an insolvency-related judgment under the MLCBI[241]

The purpose of article X is to make it clear to States enacting (or considering enactment of) the MLCBI that the relief available under article 21 of the MLCBI includes recognition and enforcement of an insolvency-related judgment, irrespective of any prior interpretations of article 21 to the contrary. Since article X relates to the interpretation of the MLCBI, it is not intended that it be included in legislation enacting the IRJ Model Law.

[240] *Idem*, at paras 124-125.
[241] *Idem*, at paras 126-127.

PART C: THE UNCITRAL MODEL LAW ON ENTERPRISE GROUP INSOLVENCY

Please note that candidates will NOT be examined on the content of Part C.

15. INTRODUCTION TO THE UNCITRAL MODEL LAW ON ENTERPRISE GROUP INSOLVENCY

15.1 Introduction

This part of the Module aims to introduce you to the UNCITRAL Model Law on Enterprise Group Insolvency (the EGI Model Law), which was also adopted by UNCITRAL on 15 July, 2019 at its 52nd session in Vienna. At the time of finalising this text, no States had yet enacted the EGI Model Law in their own national laws. In Section 13 of this guidance text the topic of enterprise groups in cross-border insolvency cases has only been touched upon briefly and was limited to a very brief summary of what is covered in Part Three of the Legislative Guide. The EGI Model Law is designed to equip States with modern legislation addressing the domestic and cross-border insolvency of enterprise groups, complementing the MLCBI and Part Three of the Legislative Guide.[242]

In 2014, the Commission expressed its support for continuing the work on insolvency of enterprise groups at the 47thsession in New York from 7-18 July. This work was completed with the negotiation of the EGI Model Law by Working Group V between April 2014 and December 2018.[243]

Similar to other UNCITRAL texts, including the MLCBI and the IRJ Model Law, the EGI Model Law also introduces several new terms such as "group representative", "group insolvency solution" and "planning proceeding".[244] However, what distinguishes the EGI Model Law from the MLCBI is that the focus of the EGI Model Law is on insolvency proceedings relating to multiple debtors that are members of the same enterprise group, while the MLCBI only concerns itself with insolvency proceedings of a single debtor.[245]

15.2 Main features of the EGI Model Law[246]

The structure of the EGI Model Law is similar to that of the MLCBI and the IRJ Model Law. Part A with the Core Provisions starts with general provisions in Chapter 1, which follow the same structure as the MLCBI – preamble, scope (article 1), definitions (article 2), international obligations of the enacting State (article 3), jurisdiction of the enacting State (article 4),

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[242] For this part of the Module 2A Guidance Text we have used the draft guide to enactment for the EGI Model Law as published by the General Assembly of the United Nations on 20 March 2019 (V.19-01719 (E)) in A/CN.9/WG.V/WP.165 (hereinafter the EGI Guide to Enactment) . https://undocs.org/en/A/CN.9/WG.V/WP.165. See EGI Guide to Enactment, p 2.

[243] EGI Guide to Enactment, at p 3, under 5 and 6.

[244] *Idem*, at p 5, under 15.

[245] *Idem*, at p 3, under 3.

[246] *Idem*, at pp 6-7, under 26 to 30.

competent court or authority (article 5), public policy exception (article 6), interpretation (article 7) and additional assistance under other laws (article 8).

Chapter 2 (articles 9-18) provides a framework for cross-border co-operation and co-ordination with respect to multiple proceedings affecting enterprise group members. These provisions draw upon the MLCBI and the recommendations of Part Three of the Legislative Guide. Chapters 1, 3 (relief available in a planning proceeding in the enacting State – articles 19-20) and 5 (protection of creditors – article 27) are intended to supplement domestic insolvency law and facilitate the conduct of insolvency proceedings affecting two or more enterprise group members in the enacting State. Chapter 4 (articles 21-26) provides a framework for recognition of a foreign planning proceeding, the provision of relief to assist the development of an insolvency solution for the enterprise group, as well as approval of a group insolvency solution, again drawing upon the recognition regime provided by the MLCBI.

Chapter 6 (articles 28 – 29) permits the claims of an enterprise group member located in one jurisdiction (a non-main jurisdiction) to be treated in a main proceeding concerning another enterprise group member taking place in another jurisdiction in accordance with the law applicable to those claims, provided that an undertaking to accord such treatment has been given in the main proceeding. Where such an undertaking has been given, Chapter 6 enables the court in the non-main jurisdiction to approve that treatment in the main proceeding and to stay or decline to commence a local non-main proceeding, provided the interests of creditors are adequately protected. The enacting State may be either the location of the main proceeding or of a non-main proceeding.

Part B (article 30-32) sets out supplemental provisions that have been included for States that may wish to adopt a more extensive approach with respect to treatment of the claims of foreign creditors. While creditors and other third parties usually expect that a company would be subject to insolvency proceedings in the jurisdiction of that company's COMI, the use of the supplemental provisions of Part B might bring a different result. This should be limited to exceptional circumstances, namely to cases where the benefit in terms of efficiency outweighs any negative effect on creditors' expectations and on legal certainty in general. Examples of such circumstances include:

- jurisdictions where courts traditionally hold a large degree of discretion and flexibility in conducting insolvency proceedings;

- where the enterprise group in question was closely integrated; and

- where the use of the provisions of Part A (if available) could not achieve a similar result.

15.3 Preamble and scope (article 1)[247]

The text of the EGI Model Law is intended to: (a) support cross-border co-operation and co-ordination with respect to the insolvency proceedings commenced in different States for two or more members of an enterprise group and (b) establish new mechanisms that can be used to foster the development and implementation of an insolvency solution for the enterprise group as a whole or for a part or parts of the group (a group insolvency solution) through a single proceeding (a planning proceeding).

Similar to the MLCBI, the preamble provides a succinct statement of the basic policy objectives of the EGI Model Law. Also similar to the MLCBI, article 1(2) allows the enacting State to list exclusions to the application of the EGI Model Law. Stating exclusions expressly is encouraged as it makes the domestic insolvency law of the enacting State more transparent, in particular for the benefit of foreign users.

15.4 Definitions (article 2)[248]

The definitions contained in article 2(a)-(c) ("enterprise", "enterprise group" and "control") derive from Part Three of the Legislative Guide. The definition of "enterprise group member" is provided to circumscribe the limits of the use of that term throughout the text. The definition of "enterprise" is not intended to refer to a division of a company in a particular region or State. Other definitions are taken from, or are based upon, the MLCBI: "insolvency proceeding", "insolvency representative", "main proceeding", "non-main proceeding" and "establishment". The definition of "group representative" is based upon the definitions of "foreign representative" in the MLCBI and "insolvency representative" in the Legislative Guide. Although some powers are already provided for in the EGI Model Law, the domestic law of the enacting State would need to address in more detail the powers of the group representative in the enacting State with respect to domestic planning proceedings.

The new term "**group insolvency solution**" is a flexible concept as the solution may be achieved in different ways, depending on the circumstances of the specific enterprise group, its structure, business model, degree and type of integration between the enterprise group members and other factors. It could include the reorganisation or sale as a going concern of the whole or a part of the business, or assets of one or more of the enterprise group members, or a combination of liquidation and reorganisation proceedings for different enterprise group members.

Another new term is "**planning proceeding**". A group insolvency solution is intended to be developed, co-ordinated and implemented through a planning proceeding, and it may or may not require insolvency proceedings to be commenced for all relevant enterprise group members. While, as a general rule, a planning proceeding is a "main proceeding", the additional text in sub-paragraph (g) indicates that a court could, subject to sub-paragraphs (g)(i)-(iii), recognise as a planning proceeding a proceeding that is separate to the main proceeding,

[247] *Idem*, at pp 8-10, under 33 to 38.
[248] *Idem*, at pp 11-13, under 39 to 48.

provided that the separate proceeding has been approved by the court with jurisdiction over the main proceeding. In some circumstances, such as where the enterprise group is horizontally organised in relatively independent units, or where different plans are required for different parts of the enterprise group, more than one planning proceeding could be envisaged. The enterprise group member with respect to which the planning proceeding commences must be one that is likely to be a necessary and integral part of the resolution of the enterprise group's financial difficulties. However, the EGI Model Law does not provide any specific criteria for determining this. Such criteria would relate to the degree of integration between members, the group solution being proposed and the group members that need to be included therein. Participation in a planning proceeding is voluntary and its legal effect is set fout in article 18 of the EGI Model Law. As a general rule, (provisional) relief (articles 20(2), 22(4) and 24(3)) in support of a planning proceeding cannot be granted over assets or operations of an enterprise group member for which no insolvency proceeding has been commenced, unless the reason for not commencing relates to the goal of minimising commencement of insolvency proceedings under the EGI Model Law. The rationale is to avoid the costs and complexity associated with managing and co-ordinating multiple concurrent insolvency proceedings, when other mechanisms to simplify insolvency proceedings relating to the enterprise group might be available (for example article 28).

A group representative must be appointed in a planning proceeding and this may be the same person as the insolvency representative appointed in the relevant main proceeding, or a different person. The EGI Model Law does not address the manner in which a group representative might be appointed, the qualifications required for appointment or the obligations applicable on appointment. These issues are left to be determined in accordance with the applicable law of the State in which the planning proceeding commences.

15.5 Articles 3 to 8[249]

Similar to the MLCBI, article 3 expresses the principle of supremacy of international obligations of the enacting State. Article 4 is intended to clarify the scope of the EGI Model Law by indicating that it is not seeking to interfere with the jurisdiction of the courts of the enacting State in the areas mentioned in sub-paragraphs (a)-(d). Article 5 allows the enacting State to tailor the text to its own system of court competence. This will increase the transparency and ease of use of the legislation for the benefit of foreign insolvency and group representatives and foreign courts. The public policy exception in article 6 is similar to that in the MLCBI and in the IRJ Model Law. Article 7 on interpretation has been modelled on article 8 MLCBI and article 8 of the IRJ Model Law. The law of the enacting State may, at the time of enacting the EGI Model Law, already have in place various provisions under which a group representative could obtain assistance. It is not the purpose of the EGI Model Law to replace or displace those provisions to the extent they provide assistance that is additional to or different from the type of assistance dealt with in the EGI Model Law, This is reflected in article 8.

[249] *Idem*, at pp 14-17, under 49 to 58.

15.6 Chapter 2 – Co-ordination and co-operation (articles 9-18)

Chapter 2 draws upon the MLCBI and its Guide to Enactment (Chapter IV, paras 209-223) as well as the recommendations and commentary of Part Three of the Legislative Guide (Chapter III, para. 14-54 and recommendations 239-254).[250]

While it may be possible in some instances to treat each enterprise group member in an enterprise group entirely separately, for many enterprise groups, resolution of the financial difficulty of a number of enterprise group members may be achieved through a more widely-based, potentially group wide, insolvency solution that reflects the manner in which the enterprise group conducted its business before the onset of insolvency and addresses the future of the enterprise group as a whole or in part. Where the business of the enterprise group is conducted in a closely integrated manner, this is of particular importance. It may therefore be desirable for an insolvency law to recognise the existence of enterprise groups and the need for courts to co-operate with other courts, with insolvency representatives of different enterprise group members and with group representatives, both domestically and cross-border. The MLCBI has limited applicability to enterprise groups with multiple debtors in different States because the MLCBI is focused only on a single debtor, albeit with assets in different States. [251]

In short, the provisions of Chapter 2 deal with the following:

- Co-operation and direct communication between **a court of the enacting State** and other courts, insolvency representatives any group representative appointed (**article 9**);
- The scope of co-operation to the maximum extent possible under article 9 is set out in **article 10**;
- The limitation of the effect of communication under article 9 is set out in **article 11**;
- Co-ordination of hearings (**article 12**);
- Co-operation and direct communication between **a group representative**, insolvency representatives and courts (**article 13**);
- The scope of co-operation to the maximum extent possible under article 13 is set out in **article 15**;
- Co-operation an direct communication between **an insolvency representative appointed in the enacting State**, other courts, insolvency representatives of other group members and any group representative appointed (**article 14**)
- The scope of co-operation to the maximum extent possible under article 14 is set forth in **article 15**;

[250] *Idem*, at p 18, under 71.
[251] *Idem*, at p 18, under 68 to 69.

- Authority to enter into agreements concerning the co-ordination of insolvency proceedings (**article 16**);

- Appointment of a single or the same insolvency representative (**article 17**);

- Participation by enterprise group members in an insolvency proceeding commenced in the enacting State (**article 18**).

15.7 Article 9[252]

This article applies both domestically and in a cross-border context. The ability and willingness of courts to take a global view of the business of the enterprise group and what is occurring in proceedings relating to different enterprise group members in different States might be key to the resolution of the enterprise group's overall financial difficulties.

15.8 Article 10[253]

Drawing upon recommendation 241 of Part Three of the Legislative Guide, this article provides an indicative list of the types of co-operation that are authorised, but this list is not intended to be exclusive or exhaustive. The agreements referenced in sub-paragraph (f) are analysed and discussed extensively in the Practice Guide. An over-arching consideration with respect to co-ordination is that the advantages of enterprise group insolvency should not be outweighed by the associated costs. The implementation of co-operation would be subject to any mandatory rules applicable in the enacting State. For example, rules restricting communication of information, such as for reasons of protection of privacy or confidentiality, would apply. Subject to the so-called hotchpot rule of article 32 MLCBI, sub-paragraph (j) permits recognition of cross-filing where it may be used in the enterprise group context as a means of facilitating co-ordination and co-operation between proceedings with respect to the treatment of claims.

15.9 Article 11[254]

This article is based on recommendation 244 of the Legislative Guide. The mere fact that communication has taken place does not imply a substantive effect on the authority or powers of the court, the matters before it, its orders or the rights and claims of parties participating in the communication. As such, this article aims to reduce the likelihood of objections to planned communication. Paragraph 2 elaborates on the effect of communication under article 9 with some specific examples of what should not be implied from the court's participation in such communication.

[252] *Idem*, at p 19, under 72 to 73.
[253] *Idem*, at pp 20-21, under 75 to 82.
[254] *Idem*, at p 22, under 83 to 84.

15.10 Article 12[255]

This article is based upon recommendation 245 of the Legislative Guide as well as the Practice Guide (Chapter III, paragraphs 154-159). For purposes of the EGI Model Law, "concurrent insolvency proceedings" means proceedings taking place at the same time with respect to different enterprise group members, irrespective of whether they are in the same or different jurisdictions.[256] Co-ordinated hearings can significantly promote the efficiency of concurrent insolvency proceedings involving enterprise group members by bringing relevant parties in interest together at the same time to share information and discuss as well as resolve outstanding issues or potential conflicts. However, each court should reach its own decision independently and without influence from any other court. As such hearings are in particular difficult to organise in an international setting, it is advisable to agree on procedures (for example, competence and limitations) as well as conditions (for example, the use of pre-hearing conferences, conduct of the hearings, language, notice, methods of communication, right to appear and be heard, (manner of) submission and availability of documents, confidentiality, (limits to) jurisdiction and rendering decisions) before co-ordinated hearings are held to avoid deadlock.

15.11 Articles 13 and 14[257]

These two articles draw upon recommendations 246-249 0f the Legislative Guide as well as the Practice Guide (Chapter III, paragraphs 160-166). They address co-operation and co-ordination between the various office holders appointed in insolvency proceedings concerning enterprise group members and between those office holders and the relevant courts, whether in the enacting State or another jurisdiction.

15.12 Article 15[258]

Based on recommendation 250 of the Legislative Guide, the indicative list of types of co-operation set forth in this article is not intended to be exclusive or exhaustive. The proviso in sub-paragraph (a) regarding confidential information, should not be interpreted as providing a basis for declining information sharing but appropriate safeguards need to be put in place to ensure that non-public information is protected, as required, to ensure that third parties cannot take unfair advantage.

15.13 Article 16[259]

The co-ordination agreements mentioned in this article are drawn upon recommendations 253-254 of the Legislative Guide and are analysed in some detail in the Practice Guide (Chapter III, paragraphs 48-54). Since many laws may lack the provisions necessary to enable a court to approve or recognise an agreement relating not only to debtors subject to its jurisdiction, but

[255] *Idem*, at p 23, under 85 to 88.
[256] *Idem*, at p 19, under 73.
[257] *Idem*, at p 24, under 89 to 91.
[258] *Idem*, at p 25-26, under 92 to 94.
[259] *Idem*, at p 26, under 95 to 96.

also to debtors that are not, even if they are members of the same enterprise group, article 16 provides the relevant authorisation. As different States may have different form requirements in order for agreements to be effective, article 16 does not require the agreement to be approved by the court, but leaves that issue to domestic law and the decision of the representatives involved.

15.14 Article 17[260]

Article 17 is intended to apply both when multiple proceedings take place in the enacting State, as well as when this happens in a cross-border context. The same or single insolvency representative (whether a natural or legal person) would need to meet the applicable requirements in the appointing jurisdictions. Although the administration of each of the relevant enterprise group members would remain separate, an appointment of a single or the same insolvency representative could help to ensure co-ordination of the administration of the various enterprise group members, reduce related costs and delays and facilitate the gathering of information on the enterprise group as a whole. In this context it should be noted that the EGI Model Law contemplates that the insolvency representative might also be a debtor-in-possession. An enterprise group with complex financial and business relationships and different groups of creditors presents the potential for loss of neutrality and independence if a single or the same insolvency representative is appointed. For example, conflicts of interest may arise in situations involving cross-guarantees, intra-group claims and debts, post-commencement finance, lodging and verification of claims or wrongdoing by one enterprise group member with respect to another enterprise group member. As a safeguard against possible conflicts, the insolvency representative could be required to provide an undertaking or be subject to a practice rule or statutory obligation to seek direction from the court. Alternatively, in conflicts situations a so-called conflicts insolvency representative could be appointed to deal with the conflict.

15.15 Article 18[261]

This article provides an additional tool for co-operation by facilitating the participation of enterprise group members (wherever located) in the main proceeding (as meant in article 2(j)) commenced in the enacting State with respect to an enterprise group member having its COMI in that State. The "bundle of rights" that might constitute "participation" is indicated in paragraph 4, including:

- to appear and to be heard in the main proceeding;
- to make written submissions to the court of the enacting State on matters affecting the interests of that enterprise group member; and
- to take part in negotiations to develop and implement a group insolvency solution, where relevant.

[260] *Idem*, at pp 27-28, under 97 to 103.
[261] *Idem*, at pp 29-30, under 104 to 112.

Paragraph 2 contains the only limitation applicable to participation. An enterprise group member with its COMI in a State other than the enacting State is permitted to participate, unless the law or a court in the other State prohibits it from doing so. Participation is in principle voluntary (paragraph 3). Paragraph 4 provides a so-called "safe conduct" rule similar to article 10 MLCBI in response to concerns that participation might trigger exposure to all-embracing jurisdiction. However, the limitation on jurisdiction is not absolute. It is only intended to shield the enterprise group member to the extent necessary to make court access for the purposes of participation a meaningful proposition. For participation under article 18, no distinction is made between an enterprise group member that might be subject to insolvency proceedings and an enterprise group member that is not (that is, solvent and insolvent enterprise group members). For a solvent enterprise group member to participate, the decision is likely to be an ordinary business decision (subject to article 18(2)). However, the availability for relief of assets and operations of a solvent enterprise group member that is participating, is subject to restrictions as set out in articles 20(2), 22(4) and 24(3) of the EGI Model Law (as addressed further below). A participating enterprise group member has a right to information (that is, to be kept informed of actions relating to the development of a group insolvency solution) pursuant to paragraph 5 of article 18. How and by whom the information should be provided, is left to the applicable domestic law.

15.16 Chapter 3 – Relief available in a planning proceeding in the enacting State (articles 19-20)

15.16.1 Article 19[262]

Article 19(1) allows a group representative to be appointed in a main proceeding commenced in respect of an enterprise group member if one or more enterprise group members, in addition to the enterprise group member subject to the main proceeding, are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution and the enterprise group member subject to that main proceeding is likely to be a necessary and integral participant in that group solution (article 2(g)(i) and (ii)). Following the appointment of the group representative, that proceeding would qualify as a "planning proceeding" and, prior to recognition of that planning proceeding, the group representative would be allowed – pursuant to **article 19(2)** – to seek "pre-recognition relief" under article 20. While the group representative appointed in the planning proceeding could be the same person as the insolvency representative appointed in the main proceeding, their tasks are different. The task of the group representative is representation of the planning proceeding and development of a group insolvency solution, while the focus of the appointed insolvency representative is the administration of the insolvency proceedings with respect to individual members. **Article 19(3)** is further intended to equip the group representative with the authorisation required to act abroad as foreign representative of the planning proceeding. The group representative's ability to act in the foreign State will, however, depend upon what is permitted by the foreign law and the courts. The authority given by the enacting State to the group representative to act in a foreign State is not conditional on whether that foreign State has also enacted legislation on the EGI Model Law (that is, no reciprocity requirement). In addition, see in this context also article 25 (allowing the group representative to participate in any proceedings relating to enterprise

[262] *Idem*, at pp 31-32, under 115 to 122.

group members in a State recognising the planning proceeding) and articles 28 or 30 (authorising the group representative to give, jointly with an insolvency representative, an undertaking relating to the treatment of foreign claims).

15.16.2 Article 20[263]

The list of relief set out in this article is not exhaustive and should be considered in conjunction with the "adequate protection"-test set out in article 27. While article 20(1)(c) is also meant to include actions before an arbitral tribunal, if the arbitration does not take place in the same State as the planning proceeding, it may be difficult to enforce the stay of the arbitral proceedings. Article 20(1)(c) further not only includes "individual actions" but also "individual proceedings" (including enforcement measures initiated by creditors outside of the court system). The rationale behind the possible stay of insolvency proceedings under article 20(1)(f) is that it may be essential to the negotiation of a group insolvency solution that that enterprise group member and its assets are preserved. Article 20(1)(g) aims to also include post-commencement finance.

Please note that paragraph 2 makes a distinction between group enterprise members subject to insolvency proceedings and group enterprise members not subject to insolvency proceedings (instead of referring to "solvent" and "insolvent"). As a general rule, the assets and operations of the former cannot be part of any relief unless "an insolvency proceeding was not commenced for the purpose of minimising the commencement of insolvency proceedings in accordance with the EGI Model Law." (the "exception"). Relief granted in respect of assets and operations of an enterprise group member with its COMI outside of the enacting State, should not interfere with the administration of any insolvency proceedings concerning that enterprise group member that are taking place in the COMI State (article 20(3)).

15.17 Chapter 4 – Recognition of a foreign planning proceeding and relief (articles 21 to 26)

Similar to the recognition framework provided in the MLCBI, the goal of Chapter 4 is to provide a simple, expeditious procedure through which a group representative can obtain recognition of a planning proceeding as well as relief, both of interim nature and on recognition, where it may be required to support the possibility of developing a group insolvency solution in the planning proceeding.[264]

15.17.1 Article 21[265]

This article makes no provision for the receiving court to embark on a consideration of whether the proceeding that has led to the planning proceeding was correctly commenced under applicable law. Provided the requirements of article 21 are met, recognition should follow in accordance with article 23. However in article 21(3)(c) the group representative is required to make the following statements:

[263] *Idem*, at pp 33-36, under 123 to 136.
[264] *Idem*, at p 36, under 137.
[265] *Idem*, at pp 37-39, under 138 to 151.

- a statement to the effect that the enterprise group member subject to the foreign planning proceeding has its COMI in the jurisdiction in which the proceeding is taking place; and

- a statement that the foreign planning proceeding is likely to result in added overall combined value for the enterprise group members subject to and participating in the foreign planning proceeding.

Article 21(5) is based on article 10 MLCBI and article 21(6) is based upon article 16(2) MLCBI.

15.17.2 Article 22[266]

This article deals with "urgently needed" interim relief which is available as of the moment recognition of a foreign planning proceeding is sought. That relief, if granted, terminates when the application for recognition is decided upon (article 22(3)), but the court is given an opportunity to extend the interim relief under article 24(1)(a). Article 24 provides for discretionary relief post-recognition. Unlike under the MLCBI, there is no automatic relief under the EGI Model Law. The discretionary "collective" relief under article 22 is slightly narrower than the post-recognition relief under article 24. With the exception of article 21(1)(g) (relief on funding arrangements), the relief available under article 22 is not limited to a single enterprise member and can relate to both the enterprise group member subject to the planning proceeding, as well as other enterprise group members participating in the planning proceeding. Similar to article 20(2), the general rule is that the assets and operations of an enterprise group member not subject to an insolvency proceedings cannot be part of the interim relief granted, unless the exception applies (article 22(4)). Also similar to relief granted under article 20, any interim relief granted under article 22 is subject to the "adequate protection"-test of article 27.

15.17.3 Article 23[267]

Article 23 is designed to ensure that, if the application meets the requirements set out in it and the public policy exception does not apply, recognition is granted in a process that is certain, predictable and expeditious. Article 23(2) clarifies that a decision on the recognition application should be made "at the earliest possible time" (which allows the court some flexibility). Article 23(3) further provides the court with an ability to review the recognition decision, which ability is assisted by the information obligation *vis-à-vis* the court imposed on the group representative in article 23(4) from the time the recognition application has been made regarding "material changes".

15.17.4 Article 24[268]

Article 24 reflects the basic principle of the EGI Model Law to provide the relief considered necessary for the orderly and fair conduct of a cross-border insolvency. As such, the text does not take a position on whether the consequences of the foreign law are imported into the

[266] *Idem*, at pp 40-42, under 152 to 164.
[267] *Idem*, at pp 43-44, under 165 to 172.
[268] *Idem*, at p 46, under 173 to 180.

insolvency system of the enacting State, or whether the relief in the foreign proceeding includes the relief that will be available under the law of the enacting State. Similar to the relief granted under articles 20 and 22, any relief granted under article 24 must meet the "adequate protection"-test of article 27, this includes any "turn-over" under article 24(2). The list of relief set out in article 24(1) is not meant to be exhaustive. Article 24(3) is similar to articles 22(4) and 20(2), as addressed above, and article 24(4) is similar to articles 22(5) and 20(3).

15.17.5 Article 25[269]

The purpose of article 25 is to ensure that – post-recognition – the group representative will have standing to participate in any proceeding (including insolvency proceedings, but also individual actions brought by or against the enterprise group by a third party) taking place in the enacting State with respect to an enterprise group member participating in the planning proceedings. Under article 25(2), the court may also approve participation by the group representative in any proceeding (including insolvency proceedings, but also other proceedings brought by the enterprise group member or against it by a third party) in another State affecting a group member that is not participating in the foreign planning proceeding. In this way effect is given to the group representative's ability in article 19(3)(c) to seek such participation. Article 25 is limited to giving the group representative standing and does not vest that representative with any specific powers or right.

15.17.6 Article 26[270]

The basic principle underlying article 26 is that while the group insolvency solution might be developed globally to address the insolvency of the enterprise group as a whole or in part, the group insolvency solution should be approved locally with respect to the affected enterprise group members, by the court of the State in which each affected enterprise group member has a COMI or an establishment, in accordance with the laws of that State. Article 25 does not address the procedure for seeking approval of the group insolvency solution, leaving it to the law of the approving State to indicate the approvals and procedures required. Article 26(2) establishes standing for the group representative to be heard in the enacting State on any issues relating to the approval and implementation of the group insolvency solution.

15.18 Chapter 5 Protection of creditors (article 27)[271]

Article 27 draws upon article 22 MLCBI and also aims to strike a balance between the relief available under the EGI Model Law (under articles 20, 22, and 24) and the protection of interests of the persons (natural and legal) affected by such relief. Affected persons may include the enterprise group member subject to the relief as well as other enterprise group members participating in the planning proceeding, creditors of participating enterprise group members and other stakeholders. In this context, the "adequate protection"-test is intended to ensure that, for example, the value of the creditor's lien does not deteriorate or that other interested parties will not be disadvantaged as a consequence of the relief granted. Article 27(1) makes it clear

[269] *Idem*, at p 47, under 181 to 184.
[270] *Idem*, at p 48, under 185 to 187.
[271] *Idem*, at pp 49-50, under 188 to 191.

that "creditors" only refers to creditors of those enterprise group members participating in the planning proceeding. Article 27(2) allows the court to make the relief "tailor-made" by attaching appropriate conditions to it. Article 27(3) further allows the court in the enacting State to modify or terminate any relief granted. An additional feature is that article 27(3) also expressly gives standing to the group representative, as well as any person who may be affected by any relief granted, to petition the court to modify or terminate those consequences. As far as notice requirements are concerned, as domestic laws vary as to form, time and content of notice required to be given of the recognition of foreign planning proceedings, the EGI Model Law does not attempt to modify those laws. The general policy of the EGI Model Law is that all creditors, wherever they might be considered to be located, should be treated fairly and as far as possible be accorded the same treatment. This applies in the context of article 27 as well. While the "adequate protection"-test of article 27(1) provides the court guidance in exercising its powers under articles 20, 22 and 24 in particular, that guidance is also relevant under articles 29 and 30 of the EGI Model Law.

15.19 Chapter 6 – Treatment of foreign claims (articles 28 and 29)[272]

Rather than having multiple actual non-main proceedings alongside main proceedings, the measures set out in Chapter 6 created so-called "synthetic non-main proceedings". In short, though an undertaking given by the insolvency representative of the main proceedings, jointly with the group representative, if one has been appointed, which undertaking is approved by the relevant court in which the main proceeding takes place, the claim of a foreign creditor is accorded the same treatment in the main proceedings as it would receive in a foreign non-main proceeding under the applicable law, were such a non-main proceeding to commence. The term "treatment" for these purposes means that when the insolvency representative giving the undertaking distributes assets or proceeds received as a result of the realisation of assets, it will comply with the distribution and priority rights under the domestic law that governs those claims, thus according them the treatment they would have received in non-main proceedings.

The purpose of these measures is to facilitate the co-ordinated treatment of claims and to minimise the need, or to limit the circumstances in which it might be necessary, to commence a non-main proceeding. Benefits of the use of these measures include:

- cost savings associated with minimising the number of insolvency proceedings;
- shorter time-frames for completion of the proceedings with fewer disputes and less competition between different proceedings;
- more efficient creditor participation;
- reduced need for co-ordination and co-operation between potentially numerous concurrent proceedings;
- more efficient cross-border reorganisation; and

[272] *Idem*, at pp 50-51, under 192 to 198.

- reduction of obstructions caused by the removal of part of the assets of the debtor from the control of the insolvency representative of the main proceeding.

However, the measures contemplated in Chapter 6 might be less appropriate in the following situations:

- where the law applicable to the foreign claims in their State of origin cannot be applied in the main proceedings in the other State;

- where the claims in the State of origin are not of a purely monetary nature and cannot realistically be treated in the main proceeding as they may, for example, require some sort of sanction by the court of the State of origin; or

- where there are irreconcilable differences between the insolvency law of the State of origin of the claims and the law applicable to the main proceeding.

15.19.1 Article 28[273]

The measures referred to in article 28 are intended to apply independently of the existence of a planning proceeding. If a planning proceeding exists, the undertaking should be given jointly by the insolvency and the group representatives. The reason for this is that the group representative is appointed as a representative of the planning proceeding, rather than of a particular estate, so there are no assets that can be relied upon to support the giving by the group representative alone of an undertaking referenced in article 28(1). This would be different if the insolvency representative of the underlying COMI proceeding and the group representative are the same person, in which case provisions addressing potential conflict of interest would become relevant. To ensure that the undertaking becomes enforceable and binding on the insolvency estate of the main proceeding, approval by the court of the treatment to be accorded to the foreign claims pursuant to the undertaking is required as well.

15.19.2 Article 29[274]

This article enables (but does not require) the court of the enacting State, which is the State in which the claim could have been brought but for the article 28 undertaking given, to approve the treatment accorded in the (foreign) main proceeding and to stay any non-main proceedings already commenced or refuse the commencement of such proceedings. Article 27 would apply so the court should be satisfied that the "adequate protection"-test contained therein is met. Recognition of the foreign main proceeding is not a requirement for a court to take the action contemplated by article 29 and the other relief provisions of the EGI Model Law therefore do not apply. Relevant considerations in respect of the commencement of non-main proceedings may include the following:

[273] *Idem*, at pp 52-53, under 199 to 206.
[274] *Idem*, at pp 53-54, under 207 to 209.

- would it improve either the protection of the creditor's interests or the realisation of assets in the enacting State?;

- are non-main proceedings required to address the claims or the realisation of assets in the enacting State?;

- might the non-main proceedings impede achievement of the purpose of the main proceedings (for example, where the goal of those proceedings was reorganisation and any proceedings sought in the enacting State would be liquidation)?; and

- might the non-main proceedings interfere with the conduct of the main proceedings and the development and implementation of a global group insolvency solution?

15.20 Part B – Supplemental provisions (articles 30 to 32)[275]

These optional supplemental provisions aim to take the core provisions of Chapter 6 in Part A one step further. Since the application of these supplemental provisions would mean departing from the basic principle of commencing proceedings on the basis of COMI, they should be limited to exception circumstances only.

In short:

- article 30 permits use of the measures in articles 28 and 29 in a proceeding taking place in the enacting State with respect to an enterprise group member whose COMI is in another jurisdiction;

- under article 31, the court of the enacting State is permitted to approve the use of such measures;

- under article 32(1) the court is also authorised to provide additional relief, including staying or declining to commence a main proceeding; and

- under article 32(2), with respect to a group insolvency, the court is also given the power to approve the portion of a group insolvency solution relating to a local enterprise group member, provided it determines that creditors are or will be adequately protected under the group insolvency solution (making article 26 in that case inapplicable).

15.20.1 Article 30[276]

This supplemental article expands article 28. The undertaking can be made by either an insolvency representative appointed in a State other than the enacting State, or by a group representative appointed in a planning proceeding in the enacting State. There is no requirement ("may") for the court of the enacting State to approve the treatment to be accorded

[275] *Idem*, at p 54, under 210 and 211.
[276] *Idem*, at p 55, under 212 to 214.

pursuant to the undertaking. However, the undertaking given under article 30 enables the court in the other State to decline to commence a main proceeding, pursuant to article 31(b).

15.20.2 Article 31[277]

The enacting State may be the location of the relevant enterprise group member's COMI. Article 31 enables the court of the enacting State to approve the treatment to be afforded to the claims of local creditors in the foreign (non-main) proceeding and to stay any main proceeding already commenced or decline to commence such a main proceeding, provided that the "adequate protection"-test of article 27 is met.

15.20.3 Article 32[278]

Since the application of article 32 requires recognition of a planning proceeding, it provides relief that is additional to that under article 24 EGI Model Law. Article 32 is broader than articles 29 and 31 because the court's decision is not based upon an undertaking of the kind referred to in articles 28 or 30, but rather on the court satisfying itself that adequate protection is or will be provided in the planning proceeding. Where the court decides not to commence a proceeding under article 32(1), relief under article 24 is still available via the exception contained in article 24(3). Article 32(2) provides an alternative to article 26. It further contains a specific authorisation to the court to grant any relief under article 24, which would otherwise only be available following recognition of a planning proceeding, which is not a pre-condition for the operation of article 32(2).

[277] *Idem*, at p 55, under 215.
[278] *Idem*, at p 56, under 216 to 219.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

How did the Model Law come about and why? Explain also whether the chosen format (that is, a model law) was deliberate and what this format attempts to achieve.

Commentary and feedback on Self-assessment Exercise 1

On 23 June 1993, in its twenty-sixth session, UNCITRAL decided to pursue the issue of cross-border insolvency and the work on cross-border insolvency that ultimately resulted in the Model Law was primarily undertaken by UNCITRAL's WG V. The Model Law was adopted by UNCITRAL on 30 May 1997 and subsequently adopted by the General Assembly in a resolution of 15 December 1997.

The Model Law was established as a result of work done and pressure exerted by a number of groups, including INSOL and the IBA and during its development WG V took into account other international regulations and proposals from other non-governmental bodies.

The timing of the Model Law was not entirely accidental. In 1994, it was recognised in a colloquium held by UNCITRAL and INSOL that "practical problems caused by disharmony among national laws governing cross-border insolvencies warranted further study of legal issues in cross-border insolvencies and possible internationally acceptable solutions." In 1995, the European Community unsuccessfully proposed the introduction of the European Convention on Insolvency Proceedings. A sense of urgency developed as practitioners were faced with diversity and often inconsistency in legal approaches applied to cross-border insolvencies and in the absence of statutory authorisation, many judges were unclear about the degree of discretion that might available to them in the context of cross-border insolvencies.

The "model law" format of the Model Law, which is not a convention or treaty, but merely a recommendation and a form of "soft law", is a recognition of the significant concerns that existed then (and still exist today) about the feasibility to harmonise rules on international aspects of insolvency. Historically, substantive laws and rules of insolvency have been jurisdiction specific. Those rules reflect the differences in laws, legal systems, political interest and self-interest that characterise each State. To harmonise such substantive rules on insolvency in a treaty would take a lot of time and may ultimately be unsuccessful. A "model law" format focused on procedural rules only limited to access, recognition, relief and co-ordination would not only be a lot less intrusive, but also allow each State to decide on its own whether or not to adopt the Model Law in whole or in part in its domestic legislation. Rather than forcing new (foreign) substantive insolvency laws on States, the Model Law aims instead to provide each State with a necessary procedural framework that brings with it a level of transparency and predictability to allow cross-border insolvencies to be dealt with in a more cost and time efficient manner avoiding value destruction and, where possible, allow for value creation.

The Model Law is in the flexible form of model legislation that takes into account diffing approaches in national insolvency laws and the varying propensities of States to co-operate and co-ordinate in insolvency matters.

Self-Assessment Exercise 2

Please answer the following questions by answering TRUE (T) or FALSE (F) only.

1. The Model Law aims to provide enacting States with additional, modern and efficient substantive insolvency law fit for cross-border insolvencies? [T/F]

2. The procedural framework the Model Law provides to enacting States aims to make cross-border insolvencies in the enacting State more transparent and predictable in outcome? [T/F]

3. While fitting and operating as an integral part of the existing insolvency law of the enacting State, the Model Law limits the enacting State's sovereignty because it introduces foreign law into the enacting State. [T/F]

4. With the enactment of the Model Law, a statutory basis is created in the enacting State for various forms of appropriate co-operation and direct communication between (foreign) courts and foreign representatives in cross-border insolvencies. [T/F]

Commentary and feedback on Self-assessment Exercise 2

1. False – The Model Law aims to provide a procedural framework for co-operation between jurisdictions and promotes a uniform approach to cross-border insolvency. The Model Law does **not** attempt a substantive unification of insolvency law.
2. True
3. False – While the Module law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems, it aims to leave the Enacting State's sovereignty untouched. This is evidenced by the existence of the public policy safeguard contained in article 6 of the Model Law which preserves the possibility of excluding or limiting any action in favour of the foreign proceeding on the basis of overriding public policy considerations. It is further evidenced by the fact that the Model Law does not specify how co-operation and communication may be achieved. This is left to each jurisdiction to determine by application of its own domestic laws and practices.
4. True

Self-Assessment Exercise 3

Question 1

Explain how the definitions of "foreign proceeding" and "foreign representative" limit the application of the Model Law.

Question 2

Explain why both the public policy exception and its restrictive application are important.

Commentary and feedback on Self-assessment Exercise 3

Question 1

Both the defined term "foreign proceeding" and "foreign representative" contain a number of requirements or characteristics in them that need to be met in order for a proceeding to qualify as a "foreign proceeding" and a representative to qualify as "foreign representative" within the meaning of the Model Law. If all elements are not met, an application under the Model Law will have to be denied.

For a proceeding to qualify as a "foreign proceeding" within the meaning of the Model Law it needs to meet the following elements:

1. **Collective nature**: While the proceeding may include an interim proceeding, it must be judicial or administrative and collective in nature
2. **Law related to insolvency**: The proceeding must be in a foreign State authorised or conducted under a law related to insolvency
3. **Subject to control or supervision by a foreign court**: the assets and affairs of the debtor must be subject to control or supervision by a foreign court; and
4. **Purpose of reorganisation or liquidation**: the proceeding must be for the purpose of reorganisation or liquidation.

For a representative to qualify as a "foreign representative" within the meaning of the Model Law the representative needs to meet the following elements:

1. **Appointed authorised person or body**: It needs to be an appointed person or body (including appointed on an interim basis) authorised in the foreign proceeding; and
2. **Administer debtor's assets or affairs or act as representative**: the authorisation of the representative is either to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding.

Question 2

For the enacting State to be comfortable that the Model Law is not going to limit or prejudice its sovereignty but will respect it, the public policy exception contained in article 6 of the Model Law is important. It gives the courts in the enacting State the necessary discretion to deny applications that are manifestly contrary to the public policy of the enacting State. At the same time, the success of the Model Law to a great extent depends on consistent application which will outcomes to be more predictable. This predictability of outcome is key for investors and debtors alike to get comfortable on a State's ability to appropriately deal with cross-border insolvencies. Therefore, a restrictive interpretation and application of the "public policy exception" is equally important and ensured by the requirement that for the "public policy exception" to apply an application must be **manifestly** contrary to the public policy of the enacting State.

Self-Assessment Exercise 4

Explain how access rights and non-discrimination principles in Chapter II of the Model Law may give foreign investors comfort in the jurisdiction of the enacting State.

Commentary and feedback on Self-assessment Exercise 4

The access rights provided to the foreign representative in article 9 of the Model Law give the foreign representative standing before the courts in the enacting State without the need for the foreign proceeding opened in the foreign State to recognised in the enacting State. Article 11 of the Model Law also gives the foreign representative standing to open domestic insolvency proceedings in the enacting State, provided that all requirements for such an opening are otherwise met. Article 13 of the Model Law gives foreign creditors the same rights as creditors domiciled in the enacting State without affecting the ranking of claims in the enacting State. However, a claim of a foreign creditor cannot be given a lower priority than that of general unsecured claims solely because the holder of such claim is a foreign creditor.

These access rights, together with the safe conduct rule of article 10 of the Model Law, should give foreign investors comfort because these rights ensure that local tools are available to the foreign representative without the need for any separate proceedings in the enacting State to obtain such standing. This saves time and cost, both of which are very important in cross-border insolvencies. As a result, foreign creditors could be comfortable that recoveries are being maximised without being burdened with unnecessary domestic proceedings and without the standing creating any adverse jurisdictional consequences in the enacting State. The foreign creditors will further take comfort from the fact that Model Law articles implemented in the enacting State will be breached if foreign creditors are being discriminated against or not provided with timely notice (as ensured by article 14 of the Model Law). With standing before the local courts, the foreign representative would be able to raise such breaches, and also that should give the foreign investors further comfort.

Self-Assessment Exercise 5

Question 1

How is a court in an enacting State likely to rule on a request for recognition of a foreign proceeding opened in a foreign State where the debtor has certain assets? Explain the steps the court will have to take.

Question 2

Would your answer be different if the debtor had its registered office in the foreign State, but not its COMI?

Commentary and feedback on Self-assessment Exercise 5

Question 1

In accordance with article 17(1)(a) and (b) of the Model Law, the court in the enacting State will first assess whether the foreign proceeding and the foreign representative meet all the required characteristics as set forth in the definitions of those terms in article 2 of the Model Law and in this respect the court is entitled to rely on the presumptions set forth in Article 16(1) of the Model Law..

Assuming that (i) both the foreign proceeding and the foreign representative meet all required characteristics, (ii) there are no grounds to invoke the public policy exception of article 6 of the Model Law and (iii) also the requirements set forth in article 17(1)© and (d) of the Model Law are met, the court in the enacting State will need to determine – in accordance with article 17(2) of the Model Law – whether the debtor's COMI is in the foreign State in which the foreign proceedings are opened, in which case the foreign proceedings can be recognised as foreign main proceedings, or whether the debtor has an establishment in the foreign State where the foreign proceedings were opened, in which case the foreign proceedings can be recognised as foreign non-main proceedings.

If the debtor only has "certain assets" in the foreign State and nothing else, it is unlikely that the court in the enacting State will conclude that the COMI of the debtor is in the foreign State. An "establishment" is defined in article 2(f) of the Model Law as "*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.*" The existence of certain assets of the debtor in the foreign State seems – on its own without anything else –also unlikely to convince the court in the enacting State that there is an establishment.

If neither the COMI nor an establishment of the debtor exists in the foreign State where the foreign proceedings were opened, then the court in the enacting State will have to deny the recognition application.

Question 2

While – according to the interpretation of the COMI under the EIR which is followed for purposes of the Model Law and article 16(3) of the Model Law – there is a rebuttable presumption that the place of the registered office of the debtor is the place of its COMI, here it is a given that the COMI of the debtor is not in the foreign State where the foreign proceedings were opened. Therefore, the court in the enacting State will again have to assess whether or not an establishment of the debtor exists in the foreign State. The fact that the registered office of the debtor is in the foreign State seems again – on its own and without anything else – to be insufficient to conclude that the debtor has an establishment in the foreign State. Therefore, the answer here would not be different from the answer to question 1.

Self-Assessment Exercise 6

Explain how co-operation under the Model Law relates to access and recognition under the Model Law?

Commentary and feedback on Self-assessment Exercise 6

The objective of co-operation is to enable courts and insolvency representatives from two or more countries to be efficient and achieve optimal results as well as to help promote consistency of treatment of stakeholders in cross-border insolvencies across jurisdictions. The access rights in the Model Law that provide foreign representatives standing before courts in the enacting State (without the need for separate proceedings to achieve such standing) clearly facilitate co-operation as they allow foreign representatives to communicate with the court. That co-operation is further facilitated by recognition of the foreign proceedings which allow the court to provide the foreign representative with appropriate and more-tailor made relief, as and when required. This in turn promotes optimal results. However, co-operation is not dependent on recognition and the Model Law is not prescriptive in what appropriate co-operation is in any given circumstances, but instead provides a procedural framework to allow co-operation to take place and the Model Law further provides – by way of guidance – a non-exhaustive list of appropriate means of co-operation. Access rights and recognition should therefore be used and understood in conjunction with co-operation as procedural tools the Model Law makes available to enable better results being achieved in cross-border insolvencies. In this context it should further be noted that the anti-discrimination principles applicable to foreign creditors as provided for in the Model Law promote consistency of treatment of stakeholders in cross-border insolvencies, which is also one of the goals co-ordination in the Model Law aims to achieve.

Self-Assessment Exercise 7

Question 1

Discuss whether you, in view of the policy underlying the Model Law, find the supremacy of domestic insolvency proceedings understandable or surprising, or perhaps both.

Question 2

Answer True or False to the following questions:

2.1 An enacting State requiring at least an establishment in its own jurisdiction for the commencement of domestic insolvency proceedings, violates article 28 of the Model Law. [T/F]

2.2 A domestic insolvency proceeding in the enacting State cannot include foreign assets of the foreign debtor. [T/F]

2.3 If a domestic insolvency proceeding already exists in the enacting State when a foreign main proceeding is recognised, there is no automatic relief pursuant to Article 20 of the Model Law. [T/F]

2.4 If after a foreign non-main proceeding is recognised, a domestic insolvency proceeding is opened in the enacting State, the recognition of the non-main proceeding terminates. [T/F]

2.5 For the opening of a domestic insolvency proceeding in the enacting State, there is a rebuttable presumption that the recognition of a foreign non-main proceeding is proof that the debtor is insolvent. [T/F]

Commentary and feedback on Self-assessment Exercise 7

Question 1

In particular for those enacting States that may have concerns about the Model Law limiting their sovereignty it should provide additional comfort to read in article 29 of the Model Law that – in case of a concurrence of foreign proceedings and domestic proceedings – primacy is given to domestic proceedings. Viewed in that light, it could therefore be said that the supremacy of domestic proceedings is understandable.

However, if the foreign proceedings are main proceedings this primacy of domestic proceedings may not in all circumstances be appropriate. This could in particular apply to those situations where the domestic proceedings limit their scope to domestic interests only and the best interests of the debtor's stakeholders generally in both the foreign main proceedings and the domestic proceedings differs from those domestic interests. In this context it is further important to keep in mind that the procedural framework provided by the Model Law aims to avoid the need to open any separate domestic proceedings because with recognition and relief (both interim and post-recognition relief) the expectation is that a situation can be created "as if" a domestic proceeding has been opened, without the need for actually opening one. Viewed in that light, the supremacy of domestic proceedings could be considered a bit surprising as well.

Question 2

2.1 False. While article 28 of the Model Law only requires the debtor to have assets in the enacting State in order to open domestic proceedings, it is not contrary to the policy underlying the Model Law for the enacting State to adopt a more restrictive test, such as requiring the debtor to at least have an establishment in the enacting State.

2.2 False. Article 28 of the Model Law allows for domestic proceedings to be extended to include foreign assets provided that (i) the extension is necessary to implement co-operation and co-ordination under articles 25-27 of the Model Law and (ii) the foreign assets included in the extension must be administered under the domestic law of the enacting State.

2.3 True. See article 29(a)(ii) of the Model Law.

2.4 False. Pursuant to article 29(b)(i) and (c) of the Model Law the court in the enacting State needs to review any relief granted under article 19 or 21 of the Model Law in the foreign non-main proceeding and that relief (not the recognition) shall only be modified or terminated if inconsistent with the domestic proceedings that have been opened.

2.5 False. According to article 31 of the Model Law the rebuttable presumption of insolvency only applies to the recognition of a foreign main proceeding, not a foreign non-main proceeding.

Self-Assessment Exercise 8

How does the Practice Guide compare to the co-operation provisions contained in the Model Law?

Commentary and feedback on Self-assessment Exercise 8

While the co-operation provisions contained in the Model Law aim to provide judges in the enacting State with a statutory basis for co-operation and for those jurisdictions that lack a legislative framework for co-operation and co-ordination, the Model Law fills a gap by expressly empowering courts to extend co-operation in certain specific areas. The Model Law is not prescriptive regarding what type of co-operation or co-ordination is most appropriate in any given set of circumstances, but only provides an illustrative, non-exhaustive list of appropriate means of co-operation. The Practice Guide supplements the provisions in the Model Law by providing more information for practitioners and judges on the practical aspects of co-ordination and communication. The focus of the Practice guide is on the use and negotiation of cross-border insolvency agreements (or "protocols"). Collective experience and practice are shared and analysed in the Practice Guide, which also contains a great number of sample clauses developed and used in practice as well as a summary of 44 cases in which cross-border insolvency agreements were concluded.

Self-Assessment Exercise 9

How does the Judicial Perspective relate to the UNCITRAL Guide to Enactment?

Commentary and feedback on Self-assessment Exercise 9

The UNCITRAL Guide to Enactment provides an article-by-article analysis, commentary and interpretation of the Model Law. The first version came out in 1997 and there was an undated version in 2014. While the Judicial Perspective also provides analysis, commentary and interpretation of the Model Law it does so from a judge's perspective and not on an article-by-article basis, but in an order to tries to reflect the sequence in which particular decisions would generally be made by a receiving court under the Model Law. The Judicial Perspective came out in 2011 and was also updated in 2014 alongside the UNCITRAL Guide to Enactment. In an Annex to the Judicial Perspective, 30 Model Law decisions in various enacting States are summarised and throughout the text of the Judicial Perspective references to these Model Law cases are made, where appropriate. When discussing the various provisions of the Model Law in this guidance text, you will have seen that references have been made to both the UNCITRAL Guide to Enactment and the Judicial Perspective as they very much cover the same ground albeit from a different perspective and in a different order.

Self-Assessment Exercise 10

How does the Legislative Guide – Part Three, relate to the Model Law?

Commentary and feedback on Self-assessment Exercise 10

The Legislative Guide is another significant project of UNCITRAL Working Group V, which was also the architect of the Model Law. Part Three of the Legislative Guide focuses on the treatment, in both domestic and cross-border contexts, of enterprise group members within the context of the enterprise group and addresses issues particular to insolvency proceedings involving these groups. Cross-border insolvency of enterprise groups is dealt with in Chapter III of the Legislative Guide – Part Three. While building on the Model Law and the Practice Guide, it does not address issues pertinent to the insolvency of different group members in different States. Instead, it focuses on promoting cross-border co-operation in enterprise group insolvencies, forms of co-operation involving courts and insolvency representatives and the use of cross-border insolvency agreements.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency

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Introduction to the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency

THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

1. The Model Law on Cross-Border Insolvency (MLCBI), adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State in which the insolvency proceeding is taking place. In principle, the proceeding pending in the debtor's centre of main interests (COMI) is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs.

2. The MLCBI respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency. Those solutions include:

(a) Providing the person administering a foreign insolvency proceeding ("foreign representative") with access to the courts of the enacting State,[1] thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State 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 more effectively with foreign courts and foreign representatives involved in an insolvency matter;

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

(f) Providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State;

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

3. The text of the MLCBI focuses on four key elements identified, through studies and consultations conducted in the early 1990s prior to the negotiation of the MLCBI, as being the areas upon which international agreement might be possible:[1]

(a) Access to local courts for representatives of foreign insolvency proceedings and for creditors and authorization for representatives of local proceedings to seek assistance elsewhere;

(b) Recognition of certain orders issued by foreign courts;

(c) Relief to assist foreign proceedings;

(d) Cooperation among the courts of States in which the debtor's assets are located and coordination of concurrent proceedings.

4. The MLCBI takes into account the results of other international efforts, including the negotiations leading to the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EIR), the European Convention on Certain International Aspects of Bankruptcy (1990),[2] the Montevideo treaties on international commercial law (1889 and 1940), the Convention regarding Bankruptcy between Nordic States (1933) and the Convention on Private International Law (Bustamante Code) (1928).[3] Since some terms are common to the MLCBI and the EIR and the jurisprudence interpreting those terms in the context of the EIR may thus be relevant to interpretation of the MLCBI, it is included in the Digest as appropriate.[4]

5. UNCITRAL considered that the MLCBI would be a more effective tool if it was accompanied by background and explanatory information. While such information would primarily be directed to executive branches of Governments and legislators preparing the necessary legislative revisions, it would also provide useful insight to those charged with interpretation and application of the MLCBI, such as judges, and other users of the text, such as practitioners and academics. Such information might also assist States in considering which, if any, of the provisions should be adapted to address particular national circumstances. The *Guide to Enactment* (GE) was prepared by the secretariat pursuant to the request made by UNCITRAL at the close of its thirtieth session,

in 1997. It was based on the deliberations and decisions of the Commission at that thirtieth session, when the MLCBI was adopted, as well as on considerations of Working Group V (Insolvency Law), which conducted the preparatory work.

6. Over time, the interpretation of the concept of COMI in article 16 of the MLCBI resulted in uncertainty and unpredictability that led to a proposal to UNCITRAL in 2010[5] to provide more information and guidance on the concept in the GE. The revisions were based on the deliberations of Working Group V (Insolvency Law)[6] at its thirty-ninth (2010), fortieth (2011), forty-first (2012), forty-second (2012) and forty-third (2013) sessions, as well as the deliberations of the Commission at its forty-sixth session (2013), and were adopted by the Commission as the *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (GEI) on 18 July 2013.

7. As at 30 September 2020, the MLCBI has been adopted in 48 States for a total of 51 jurisdictions. Those enacting States have different economies and levels of development and represent all legal traditions.[7] The number of academic works dedicated to the MLCBI grows constantly,[8] as does the amount of related case law available from various sources. The contribution of the MLCBI to the goal of unification of international trade law is significant.

PROMOTING UNIFORM INTERPRETATION OF UNCITRAL INSTRUMENTS: CLOUT AND DIGESTS OF CASE LAW

8. In accordance with its mandate,[9] UNCITRAL has undertaken the preparation of the tools necessary for a thorough understanding of the instruments it develops and for their uniform interpretation.

9. UNCITRAL has established a reporting system for case law on UNCITRAL texts (CLOUT).[10] CLOUT was established to assist judges, arbitrators, lawyers and parties to business transactions by making available decisions of courts and arbitral tribunals interpreting UNCITRAL texts and, in so doing, to further the uniform interpretation and application of those texts. CLOUT covers case law related to conventions and model laws prepared by UNCITRAL and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention).[11]

10. A network of national correspondents, appointed by the Governments of States that are party to the New York Convention or at least one of the United Nations conventions emanating from the work of UNCITRAL or have enacted at least one of the UNCITRAL model laws, monitors the relevant judicial decisions in the respective countries and reports them to the UNCITRAL secretariat in the form of an abstract. Voluntary contributors can also prepare abstracts for the attention of the secretariat, which may publish them, in agreement with the national correspondents. The secretariat edits and indexes the abstracts received and publishes them in the CLOUT series. The network of national correspondents ensures coverage of a large number of domestic jurisdictions. The availability of CLOUT in the six official languages of the United Nations greatly enhances the dissemination of the information. These two elements are essential to promote uniformity of interpretation on the widest possible scale.

11. In the light of the large number of cases collected in CLOUT on certain UNCITRAL texts, in particular the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (the CISG),[12] the Commission requested a tool specifically designed to present selected information on the interpretation of the CISG in a clear, concise and objective manner.[13] A second request concerned the UNCITRAL Model Law on International Commercial Arbitration.[14] The digests prepared in response to those requests serve to assist in the dissemination of information on the texts covered, further promoting their adoption as well as their uniform interpretation and assisting judges, arbitrators, practitioners, academics and government officials to use the case law relating to those texts more efficiently. The digests do not constitute an independent authority on the interpretation to be given to individual provisions of those texts, but rather serve as reference tools for identifying relevant case law on interpretation and summarizing those decisions for dissemination.

12. The growing number of cases collected in CLOUT interpreting the MLCBI led the Commission to agree that a digest should be prepared on that text to provide wider and more ready access to those cases, including those referred to in other UNCITRAL texts relating to insolvency (primarily, the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, adopted in 2011 (updated 2013) (the JP), and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, adopted in 2009 (the Practice Guide)) and to draw attention to emerging trends in the interpretation of the MLCBI.[15] The goal of uniform interpretation of the MLCBI has been assisted by CLOUT, and it is expected that this Digest will further support that goal. As highlighted by article 8 of the MLCBI, in the interpretation of the MLCBI, "regard is to be had to its international origin", and the Digest is aimed at promoting uniformity in the application of the MLCBI by encouraging judges to consider how the MLCBI has been applied by courts in jurisdictions where it has been enacted.

13. As noted in the JP,[16] some differences in approach to the interpretation of the terms of the MLCBI (or any adaptation of its language) may arise from the way in which judges from different legal traditions approach their respective tasks. Although general propositions are fraught with difficulty, the greater codification of law in some jurisdictions may tend to focus more attention on the text of the MLCBI than would be the case in other jurisdictions without the same degree of codification or in which many superior courts have an inherent jurisdiction to determine legal questions in a manner that is not contrary to any statute or regulation or have the authority to develop particular aspects of the law for which there is no codified rule.

14. The Digest presents the information in a format based on chapters corresponding to chapters of the MLCBI. Each chapter contains a synopsis of the relevant case law for each article, highlighting common views and reporting any divergent approach. This Digest was prepared using the full text of the decisions cited in the CLOUT abstracts.

15. When enacting the MLCBI, States have in certain instances made modifications to certain provisions, despite recommendation to make as few changes as possible when incorporating the text into their legal system. To the extent possible, the Digest indicates those instances where a diverging interpretation of a specific provision originates from a modification made to the MLCBI provision by the enacting legislation.

16. It might be noted that the majority of cases involving applications for recognition under the MLCBI are straightforward and do not give rise to issues of interpretation of the articles of the text. These cases are not included in the Digest, although some have been reported in CLOUT as examples of applications under the MLCBI.[17] The Digest does not refer to every case that has considered the MLCBI, instead limiting itself to those cases that give rise to issues of interpretation of the articles of the MLCBI.

ACKNOWLEDGEMENT OF CONTRIBUTIONS

17. The Digest is the result of cooperation between national correspondents, the UNCITRAL secretariat and delegates to UNCITRAL Working Group V (Insolvency Law). Special acknowledgement is made of the contribution by Jenny Clift, former Secretary of Working Group V, who prepared the initial draft of this Digest, with the assistance of members of the Working Group and other experts, including INSOL International, which responded to an invitation to contribute that was extended to stakeholders who attend sessions of UNCITRAL and its Working Group V.

18. For questions or comments on the Digest, please contact the secretariat of UNCITRAL (International Trade Law Division, Office of Legal Affairs, United Nations, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria, uncitral@un.org).

REFERENCE MATERIALS

References to cases

19. References to specific cases are included throughout the present text. For ease of reading the footnotes, the titles of cases that are often cited have been shortened, but the full title and citation is included in the case list in the annex. For example, the United States of America case with respect to the debtor "Bear Stearns High-Grade Structured Credit Strategies Master Fund" is referred to as "Bear Stearns", followed by the appropriate case citation. References to page or paragraph numbers in association with the cases included are references to the relevant portion of the version of the judgment cited in the case list in the annex. Paragraph numbers, whether of a judgment or an UNCITRAL document, are indicated by the use of square brackets ([para. 74]). Page numbers are indicated as numbers with no brackets or parentheses. For example, "389 B.R. 325, 330" indicates page 330 of a judgment commencing on page 325. Cases on the MLCBI included in the Digest that are reported in the UNCITRAL system of case law on UNCITRAL texts (CLOUT) include a CLOUT reference number in the case citation; abstracts of those cases published in the system are available in the six official languages of the United Nations at https://uncitral.un.org.

References to texts

20. The Digest includes references to several texts dealing with cross-border insolvency. Subparagraphs *(a)–(e)* below refer to texts developed by UNCITRAL, while subparagraphs *(g)–(i)* refer to texts developed by other institutions that, as noted in the GEI,[18] are relevant to both the development and interpretation of that text:

(a) "Guide to Enactment" (GE) (1997): Guide to Enactment of the UNCITRAL MLCBI;

(b) "Guide to Enactment and Interpretation" (GEI): Guide to Enactment and Interpretation of the UNCITRAL MLCBI, as revised and adopted by the Commission on 18 July 2013;

(c) "Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004), including parts three (2010) and four (2013, as amended in 2019);

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

(e) "Judicial Perspective" (JP): UNCITRAL MLCBI: The Judicial Perspective (updated 2013);

(f) "EIR": European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings;[19]

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

(h) "European Convention": Convention on Insolvency Proceedings of the European Union (1995);[21]

(i) "Virgos-Schmit Report": M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996.[22]

References to institutions

21. References to the ECJ are references to the Court of Justice of the European Union.

References to the GE and GEI

22. The introduction to each article of the MLCBI contains references to the relevant section of the GEI and the JP. Where there is an equivalent paragraph of the earlier GE, it is indicated in the footnotes.

Notes

[1] A detailed explanation of those key elements of the MLCBI is included in the *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (United Nations publication, 2014) (GEI) [paras. 24–45].

[2] *European Treaty Series*, No. 136.

[3] League of Nations, *Treaty Series*, vol. LXXXVI, No. 1950.

[4] See GEI [paras. 81–84].

[5] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17) [para. 259].

[6] At the beginning of 2002, the name of the Working Group changed from "Working Group on Insolvency Law" to "Working Group V (Insolvency Law)". For ease of reference, the current name of the Working Group, i.e., "Working Group V (Insolvency Law)", is used throughout the Digest.

[7] Information on jurisdictions having enacted legislation based on the MLCBI is provided on the UNCITRAL website at https://uncitral.un.org.

[8] Every year, UNCITRAL prepares a bibliography of recent writings related to its work, available on its website at https://uncitral.un.org.

[9] UNCITRAL should be active, inter alia, in "[…] promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade [and] collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade; […]": General Assembly resolution 2205 (XXI) of 17 December 1966, available on the UNCITRAL website at https://uncitral.un.org. For details concerning the mandate for the progressive development of the law of international trade, see also the report of the Secretary-General contained in document A/6396 (*Official Records of the General Assembly, Twenty-first Session, Annexes,* agenda item 88, document A/6396, reproduced in *UNCITRAL Yearbook,* vol. I: 1968–1970, part one, chap. II, sect. B); the report of the Sixth Committee of the General Assembly at its twenty-first session on the relevant agenda item (*Official Records of the General Assembly, Twenty-first Session, Annexes,* agenda item 88, document A/6594, reproduced in *UNCITRAL Yearbook,* vol. I: 1968–1970, part one, chap. II, sect. D); and the relevant summary records of the proceedings of the Sixth Committee, which are contained in the *Official Records of the General Assembly, Twenty-first Session,* Sixth Committee, 947th–955th meetings and of which excerpts are reproduced in the *UNCITRAL Yearbook,* vol. I: 1968–1970, part one, chap. II, sect. C.

[10] *Official Records of the General Assembly, Forty-third Session, Supplement No. 17* (A/43/17) [paras. 98–109]. CLOUT reports are published as United Nations documents A/CN.9/SER.C/ABSTRACTS/1 to A/CN.9/SER.C/ABSTRACTS/XX. The CLOUT reports are also available on the UNCITRAL website at https://uncitral.un.org.

[11] United Nations, *Treaty Series,* vol. 330, No. 4739.

[12] Ibid., vol. 1489, No. 25567.

[13] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* (A/56/17) [paras. 390–395].

[14] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17) [paras. 87–91].

[15] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17) [para. 156].

[16] JP [para. 19].

[17] See, for example, *Australia*: Hur v Samsun Logix Corporation [2009] FCA 372, CLOUT 921. England: European Insurance Agency AS, High Court (Ch), case No. 6-BS30434 (7 September 2006), CLOUT 769; Namirei Showa Co. Ltd., High Ct (Ch) 16 October 2008, 7542/08, CLOUT 1004; Rajapakse [2007] B.P.I.R 99 (28 November 2006), CLOUT 787. *Japan*: Lehman Brothers Asia Holdings Ltd, Tokyo District Court, 1 of 2007 (1 June 2009); 2 of 2007, Lehman Brothers Asia Capital Company; 3 of 2007, Lehman Brothers Commercial Corporation Asia Ltd; 4 of 2007, Lehman Brothers Securities Asia Ltd. (30 September 2009), CLOUT 1479. *Mexico*: Proceedings No. 29/2001, Re Jacobo Xacur Eljure, Felipe Xacur Eljure and Jose Maria Xacur Eljure, Mexico City Federal District Court, 19 December 2002, CLOUT 693. *New Zealand*: Jeong v TPC Korea Company Ltd [2009] NZHC 1431, CLOUT 1221. *United States*: Amerindo Internet Growth Limited, case No. 07-10327 (Bankr. S.D.N.Y. Mar. 6, 2007), CLOUT 758; North American Steamships Ltd, case No. 06-13077, Bankr. S.D.N.Y. Jan. 25, 2006, CLOUT 756; Thow, case No. 05-30432 (Bankr. W.D. Wash, Nov. 10, 2005), CLOUT 762; TriGem Computer Inc., case No. 07-11482 (Bankr. C.D. Cal, Dec.7, 2005), CLOUT 764.

[18] GEI [paras. 10–11, 141]; the JP also notes the relevance of those texts to interpretation of certain concepts used in the MLCBI, particularly "COMI" and "establishment".

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

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

[21] For information of the history of the Convention and its relevance to the MLCBI, see the JP [paras. 94–95]; see also the report of the European Union Parliament of 23 April 1999 on the Convention on Insolvency Proceedings of the European Union (1995) available at www.europarl.europa.eu (accessed on 30 September 2020).

[22] In anticipation of ratification the European Convention by all European Union member States, this explanatory report was prepared to provide guidance on various concepts in the draft Convention, in particular COMI. Notwithstanding the demise of the Convention, the report has been accepted generally as an aid to interpretation of the concept of COMI that was subsequently used in EIR. For further information on the history see the JP [paras. 94–95]. The report is available from https://globalinsolvency.com/resource-article/virgos-schmit-report-convention-insolvency-proceedings-now-regulation-insolvency (accessed on 30 September 2019).

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on the preamble are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session *(Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 136–139]. See also summary records of that session (*UNCITRAL Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [paras. 19–23]; A/CN.9/433 [paras. 22–28]; A/CN.9/435 [para. 100];

(b) GE (1997): A/CN.9/436 [paras. 37–38]; A/CN.9/442 [paras. 54–56];

(c) GEI (2013): A/CN.9/738 [paras. 14–16]; A/CN.9/742 [para. 23]; A/CN.9/766 [paras. 21–25].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 52].

INTRODUCTION

1. The GEI [paras. 46–52][1] explains that the preamble provides both a succinct statement of the policy objectives of the MLCBI, as well as orientation for users of the MLCBI and useful information with respect to its interpretation; it is not intended to create substantive rights.

CASE LAW ON THE PREAMBLE

2. Not all enactments based on the MLCBI have adopted the preamble, but where it has been included, courts typically refer to its provisions as providing guidance on the principles underlying the MLCBI and forming the basis of the substantive articles.[2] One such principle is the ancillary nature of recognition proceedings,[3] which is clear from the purpose of the MLCBI to maximize assistance to the foreign court conducting the main proceeding. As such, a court in that State tasked with addressing an application for recognition acts as an adjunct or arm of a foreign bankruptcy court where the main proceedings are conducted.[4] Some courts have specifically suggested that recognizing the foreign proceedings in question would support the goals of the MLCBI as enumerated in the preamble.[5]

3. It has also been said that when a statute includes an explicitly stated purpose, it should be interpreted consistently with that purpose, even if another canon of statutory construction might seem to point in a different direction.[6] The general objective of cooperation between courts should not be construed, it is suggested, as implying restrictions on a local court's ability to commence proceedings, as requiring the unilateral acceptance of a foreign court's ruling or for the exclusivity of one court's ruling – rather it calls for certainty, fairness, efficiency and facility.[7] Those qualities are underlined by article 22, which courts have referred to as giving effect to the preamble by implementing fair, efficient and cooperative procedures designed to maximize the value of the debtor's assets for distribution.[8]

4. One action said to be inconsistent with the goals of the MLCBI as reflected in the preamble was dismissal of a local proceeding following recognition of a foreign main proceeding.[9] Courts have also indicated that a diversity of outcomes with respect to the time by reference to which a COMI determination is to be made would not promote the goals of the preamble.[10] Those goals would also be

frustrated, it has been suggested if, for example, the term "foreign proceeding" was to be interpreted in a manner that cut off assistance at a time when cooperation, certainty, fairness, protection of asset values and financial relief were most needed.[11] To take that approach, the court said, would be inimical to the goals the MLCBI advances.[12]

5. One court has also referred to the preamble as possibly being relevant to interpretation of the MLCBI in the light of article 31 of the Vienna Convention on the Law of Treaties (1969) (the Vienna Convention)[13], notwithstanding it was unlikely the MLCBI could be described as a treaty. The court indicated that the approach to treaty interpretation might be enlightening to interpretation of the MLCBI given the international element and the potential role of the preamble to the MLCBI, and because the Vienna Convention requirement to take into account subsequent developments might be relevant in relation to the GEI.[14]

6. It has been emphasized that the MLCBI does not attempt to unify the insolvency law of different States. It does not address issues such as choice of law, conflict of laws, attachment, set-off, recoupment or similar property rights, leaving such decisions to the discretion of courts.[15]

Notes

[1] GE [paras. 54–56].

[2] For example, the United States Bankruptcy Code (11 U.S.C. sect. 1501 *(a)* (1)–(5)) (enacting the preamble, MLCBI) – inclusion of the stated purpose of the legislation is unique to Ch. 15 of the Code; see SPhinX, Ltd. 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006), affirmed, 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768.

[3] The United States Bankruptcy Code (11 U.S.C. 1504) enacting art. 4 of the MLCBI, makes it clear that an application for recognition under that chapter of the Code is ancillary to the foreign proceeding pending elsewhere.

[4] *United States*: ABC Learning Centres Limited 728 F.3d 301, 306 (3d Cir. 2013), CLOUT 1338; Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd) 601 F.3d 319, 329 (5th Cir. 2010), CLOUT 1006.

[5] *United States*: Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd) 610 F.3d 319, 324 (5th Cir. 2010), CLOUT 1006 – court said reference to the stated purpose (as reflected in the preamble) and structure of Ch. 15 reflects its international origin and suggests that art. 21, subpara. 1 *(g)*, does not exclude avoidance actions under foreign law; Octaviar Administration Pty Ltd. 511 B.R. 361, 374–375 (Bankr. S.D.N.Y. 2014), CLOUT 1483; Daebo Int'l Shipping Co., Ltd. 543 B.R. 47, 54 (Bankr. S.D.N.Y. 2015), CLOUT 1626 – court said it was consistent with the purpose of Ch. 15 under subpara. *(a)* of the preamble to cooperate with foreign courts and to give effect to the law of the Republic of Korea and a stay order.

[6] *United States*: RHTC Liquidating Co. 424 B.R. 714, 724 (Bankr. W.D.Pa. 2010) – court refused to dismiss plenary proceedings commenced by certain creditors, notwithstanding the recognition given to foreign representatives, following a detailed analysis of the case by reference to the preamble.

[7] *Australia*: Bank of Western Australia v Henderson (No. 3) [2011] FMCA 840 [14], CLOUT 1216; Tucker, in the matter of Aero Inventory (UK) Limited (No. 2) [2009] FCA 1481, CLOUT 922; see para. 6 of discussion below on art. 2, subpara. *(a)*, and para. 2 of the discussion below on art. 22.

[8] *United States*: SPhinX, Ltd., 351 B.R. 103, 113 (Bankr. S.D.N.Y. 2006) affirmed on appeal 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768; *Australia*: Akers v Saad Investments [2013] FCA 738 [38], CLOUT 1219 affirmed on appeal [2014] FCAFC 57, CLOUT 1332.

[9] *United States*: RHTC Liquidating Co., 424 B.R. 714, 724–729 (Bankr. W.D. Pa. 2010) – where a proceeding in Canada was recognized as foreign main proceeding, a motion to dismiss the local United States case was denied on the basis that the stated purposes of the cross-border legislation (reflecting the preamble of the MLCBI), were not best served by dismissal.

[10] *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 38], CLOUT 1475. *Japan*: Think3, case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 2 (1), CLOUT 1335; see discussion on timing under art. 17, para. 2.

[11] *United States*: Oversight & Control Commission of Avanzit, S.A. 385 B.R. 525, 534 (Bankr. S.D.N.Y. 2008), CLOUT 925 – this was in response to a creditor arguing that because the reorganization plan had been confirmed, the proceeding no longer satisfied the definition of "foreign proceeding".

[12] Ibid., 536.

[13] United Nations, *Treaty Series,* vol. 1155, No. 18232.

[14] *England*: In the matter of Sturgeon Central Asia Balanced Fund Ltd (in liq) [2019] EWHC 1215 (Ch) [paras. 45–47], CLOUT 1819. On the relevance of the Vienna Convention to interpretation and application of the MLCBI, see also discussion below under case law on article 8.

[15] *United States*: Sivec SRL, 476 B.R. 310, 323 (Bankr. E.D. Okla. 2012), CLOUT 1312.

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].

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 1 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 141–150]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [paras. 24–33]; A/CN.9/433 [paras. 29–32]; A/CN.9/435 [paras. 102–106, 179];

(b) GE (1997): A/CN.9/436 [paras. 39–42]; A/CN.9/442 [paras. 57–66];

(c) GEI (2013): A/CN.9/742 [para. 24]; A/CN.9/763 [para. 22]; A/CN.9/766 [para. 26].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 61].

INTRODUCTION

1. The GEI [paras. 53–61][1] explains that article 1, paragraph 1, outlines the types of issue that may arise in cases of cross-border insolvency and for which the MLCBI provides solutions. "Assistance" is intended to cover various situations dealt with in the MLCBI, in which a court or an insolvency representative in one State may make a request, directed to a court or insolvency representative in another State, for assistance within the scope of the MLCBI. The MLCBI specifies some of the types of assistance available, e.g., articles 19, 21 and 27. The GEI [paras. 55–60] discusses the rationale of article 1, paragraph 2, which encourages an enacting State to expressly indicate the types of entity that it may wish to exclude from the scope of the MLCBI. In many States, the insolvency of the types of entity cited are typically administered under a special regulatory regime because of the need to protect vital interests of a large number of individuals or because of a need for particularly prompt and circumspect action. The GEI [para. 61][2] also discusses application of the MLCBI to natural persons.

CASE LAW ON ARTICLE 1

2. Several cases suggest that the MLCBI does not apply until assistance has been actively sought or a foreign representative has instigated recognition of foreign proceedings.[3] Courts have indicated that until that time, action could be brought locally to protect a party's interests[4] as there was nothing express or implied in the MLCBI that required the court not to deal with a foreign debtor's assets located in the receiving court's jurisdiction unless and until the MLCBI had been triggered.

ARTICLE 1, PARAGRAPH 1

3. Reported cases have not dealt with issues of interpretation of paragraph 1.

ARTICLE 1, PARAGRAPH 2

4. Enacting legislation includes a variety of exclusions from application of the MLCBI, including specially regulated entities such as banking, credit and insurance institutions;[5] financial and investment institutions; commodity exchange members; clearing houses; certain licensed financial service providers; consumers;[6] and stock and commodity brokers.

Notes

[1] GE [paras. 57–66].

[2] GE [para. 66].

[3] *Australia*: Chow Cho Poon (Private Limited) [2011] NSWSC 300 [64], CLOUT 1218; *United States*: Trikona Advisers, Ltd. v Chugh, 846 F.3d 22 (2d Cir. 2017) – appeal court said the MLCBI was not of general application and that the instant non-bankruptcy action was unconnected to any foreign or United States bankruptcy proceeding. Even assuming, arguendo, that the wind-up proceeding was the type of case that Ch. 15 would ordinarily cover, it did not apply when a court in the United States simply gave preclusive effect to factual findings from an otherwise unrelated foreign liquidation proceeding, as was the case here.

[4] *Australia*: Winter v Winter and Ors [2010] FamCA 933 [paras. 208, 210–211]; Bank of Western Australia v Henderson (No. 3) [2011] FMCA 840 [para. 15], CLOUT 1216 – receiving court noted that since assistance was not being sought by the foreign representative, the foreign court or by foreign creditors and it was not seeking assistance from the foreign court, the case came within the ambit of the MLCBI only because concurrent proceedings existed. *United States*: United States v J.A. Jones Constr. Group, LLC 333 B.R. 637, 638 (E.D.N.Y. 2005), CLOUT 763; see also Paul Andrus v Digital Fairway Corp., Civil Action No. 3: 08-CV-119-O (N.D. Tex. June 26, 2009).

[5] United States Bankruptcy Code (11 U.S.C.), Ch.15 permits foreign banks and insurance companies to seek recognition and relief, even though they would not be eligible to commence insolvency proceedings under United States insolvency law – for example, Tri-Continental Exchange, Ltd., 349 B.R. 627 (Bankr. E.D. Cal. 2006), CLOUT 766; British-American Insurance Co., Ltd., 425 B.R. 884 (Bankr. S.D.Fla. 2010), CLOUT 1005; Irish Bank Resolution Corporation Limited, 538 B.R. 692, 697 (D. Del 2015), CLOUT 1628 – United States Bankruptcy Code, sect. 1501 *(c)* (1), excludes a foreign bank that has a branch or agency in the United States. The court found that the corporation no longer had branches at the time of the application for recognition, which was the relevant time period for consideration (following Morning Mist Holdings Ltd. V Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 133 (5th Cir. Apr. 16, 2013), CLOUT 1339).

[6] United States Bankruptcy Code (11 U.S.C.), Ch. 15 excludes ordinary consumers who are either citizens or permanent residents of the United States – see Steadman, 410 B.R. 397, 403 (Bankr. D.N.J. 2009), CLOUT 1213, where recognition was denied in the United States to the United Kingdom of Great Britain and Northern Ireland receiver of a United Kingdom debtor who had married an American and held a United States resident alien card with conditional permanent residence.

Article 2. Definitions

For the purposes of this Law:

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

(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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 2 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)) [paras. 152–158]. See also summary records of that session (Yearbook, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 95–117]; A/CN.9/422 [paras. 34–65]; A/CN.9/433 [paras. 33–41, 147]; A/CN.9/435 [paras. 108–113];

(b) GE (1997): A/CN.9/436 [paras. 43–45]; A/CN.9/442 [paras. 67–75];

(c) GEI (2013): A/CN.9/738 [paras. 17–19]; A/CN.9/742 [paras. 25–36, 58]; A/CN.9/763 [paras. 23–25]; A/CN.9/766 [paras. 27–28].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 90].

INTRODUCTION

1. The GEI [paras. 62–90][1] and the JP contain considerable explanatory material on the various definitions included in article 2. For ease of reference, a brief overview is given below for each subparagraph, with cross references to the relevant paragraphs of those explanatory texts.

CASE LAW ON ARTICLE 2

ARTICLE 2, SUBPARAGRAPH *(a)*: FOREIGN PROCEEDING

(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;

2. The GEI [paras. 62–80][2] explains that in order for a foreign proceeding to be eligible for recognition under the MLCBI it must satisfy all of the elements of the definition in subparagraph *(a)*. These are: a judicial or administrative proceeding with its basis in insolvency-related law of the enacting State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding. Subparagraph *(a)* is also discussed in the JP [paras. 32, 59–61, 70–92].

3. Although discussed separately below, courts have confirmed that the characteristics of the subparagraph are cumulative and should be considered as a whole.[3] The inquiry to be made is factual in nature and, in view of article 8, the elements should be interpreted and applied in the light of their international origins.[4]

Collective judicial or administrative proceeding

Judicial or administrative proceeding

4. The first requirement is that the foreign proceedings be either judicial or administrative in nature. Several courts have discussed this requirement and suggested that only one of those characteristics is required, even if some proceedings have both judicial and administrative elements.[5] As to what constitutes a "proceeding", few courts have considered that question in the context of insolvency. One court that did suggested that in the context of corporate insolvencies, the hallmark of a "proceeding" was "a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets".[6]

Collective proceeding

5. The GEI [paras. 69–72] and the JP [paras. 71–78] discuss what is intended by the requirement that the insolvency proceeding be "collective". The GEI indicates that the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the MLCBI be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State,[7] or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The MLCBI may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the MLCBI. If a proceeding is collective it must also satisfy the other elements of the definition, including that it be for the purpose of liquidation or reorganization.

6. The GEI [para. 70] also indicates that in evaluating whether a given proceeding is collective for the purpose of the MLCBI, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors.[8] However, a proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors' rights is unaffected by it. An example would be insolvency proceedings that exclude encumbered assets from the insolvency estate, leaving those assets unaffected by the commencement of the proceedings and allowing secured creditors to pursue their rights outside of the insolvency law.

7. Courts have identified "collective" proceedings as having various characteristics, including:

(a) Imposition of an orderly regime[9] that affects the rights and obligations of all creditors[10] and all of the assets of the debtor.[11] A proceeding would "affect" all creditors if it realized assets for the general benefit of all creditors.[12] The rights and obligations of all creditors must be taken into account,[13] not just those of the petitioning creditor;[14]

(b) All creditors need not receive a share of the distribution – by addressing potential distribution to other creditors, a foreign representative could acknowledge their overall duty to creditors in general.[15] Where assets are distributed, it should be in accordance with statutory priorities.[16] The fact that a debtor's assets might be entirely leveraged, leaving nothing for distribution to creditors, would not affect the collective nature of the proceeding;[17]

(c) Interested parties should not be able to individually enhance their position by exploiting some fortuitous circumstance which may yield an unfair advantage;[18]

(d) Creditor participation must be a reality;[19] this requirement might be satisfied where, notwithstanding that the governing law did not provide for creditor participation, it could be shown that, in practice, unsecured creditors did have a voice and could object to any scheme that was put before the administrative authority to be confirmed or sanctioned;[20]

(e) Creditors should also have the opportunity to seek appellate review of the proceeding;[21]

(f) Adequate notice should be provided to creditors, including general unsecured creditors, under the applicable foreign law[22]

Receiverships

8. Specific questions have arisen in several cases as to whether a receivership can be considered a collective proceeding. Courts have suggested the need to look at the terms of the specific receivership; the fact that some may be classified as insolvency proceedings did not mean that all receiverships would be collective proceedings for the purposes of the MLCBI.[23] In several cases, a foreign receivership was held 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 thus not "collective") and was designed primarily to allow a certain party to collect its debts[24] or followed regulatory intervention "to prevent a massive ongoing fraud" to prevent detriment to investors and did not include authority to liquidate and distribute assets to satisfy creditor claims.[25] In another case concerning one of the same debtors, the court expressed the view that the receivership was collective because it had been instituted at the request of the regulator for the benefit of all of the investor-victims and creditors of the debtor entities.[26]

9. One court recognized a foreign receivership as amounting to a foreign proceeding relying, under article 16, paragraph 1, on the foreign court's declaration that the receiver was the foreign representative of a foreign proceeding and was specifically authorized to seek recognition in the receiving State.[27]

Pursuant to a law relating to insolvency[28]

10. The GEI [para. 73] explains that the MLCBI includes the requirement that the foreign proceeding be "pursuant to a law relating to insolvency" to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g., company law), but that nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained[29] and irrespective of whether the law that contained the rules related exclusively to insolvency.[30] The GEI explains that a simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress for the purposes of article 2, subparagraph *(a)*. One court has adopted this view.[31]Another court has indicated that the fact that a foreign court may subsequently make orders which bring into force a process that can be recognized as an insolvency proceeding is immaterial unless and until it does so (see article 18). The principles of the common law and equity, the court said, do not "relate to insolvency" unless and until they are activated for that purpose.[32] The JP [paras. 79–83] also discusses this requirement.

11. A scheme of arrangement was found to be a proceeding pursuant to a law relating to insolvency, where insolvency was interpreted in the recognizing State to include a company that was "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring."[33] A liquidation commenced in the originating State on just and equitable grounds against an insolvent debtor based upon regulatory misbehaviour was found to be pursuant to a law relating to insolvency;[34] "just and equitable grounds" under the relevant legislation included insolvency, as well as infringements of regulatory requirements. Another court also found that a law might be one "relating to insolvency" where it dealt with winding up on grounds that included insolvency, even though, in a particular case, the winding up proceeded on a ground that was not itself apparently concerned with the insolvency of the company (i.e., that it was just and equitable to wind up the company) and without any finding (express or implied) of insolvency.[35] The relevance of article 31 of the MLCBI to this issue has also been noted, the court observing that that article assumed a foreign proceeding could be recognized without a finding of insolvency and there was no suggestion in article 31 that a subsequent displacement of the rebuttable presumption of insolvency made the recognition invalid.[36] In another case, the court decided that the mere fact that a subsidiary or affiliate company or companies not subject to any threat of insolvency on its own may be joined in the same foreign proceeding as a holding or other group company subject to such a threat did not mean that the proceeding was not brought under a law relating to insolvency.[37]

In which the assets and affairs of the debtor are subject to control or supervision by a foreign court

12. The GEI [para. 74] notes that the MLCBI specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. The GEI indicates that although it is intended that the control or supervision required under article 2, subparagraph *(a)*, should be formal in nature, it may be potential rather than actual. The JP [paras. 84–90] also discusses this requirement.

13. Courts have indicated that control or supervision may be exercised not only directly by the court, but also indirectly by an insolvency representative where, for example, the insolvency representative itself is subject to control or supervision by the court or other regulatory authority.[38] The GEI [para. 74] suggests that mere supervision of an insolvency representative by a licensing authority would not be sufficient.

14. Courts have indicated that the requirement for control and supervision can be met in a variety of situations in which the courts do not direct the day-to-day operations of the debtor,[39] including where liquidators can proceed with their duties largely without court involvement; where the relevant law gives the court various control and supervisory roles with respect to liquidation proceedings;[40] where the court may ultimately become involved because the debtor is found to be insolvent and the nature of the proceeding has to change;[41] and where the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor in possession.[42] Cases involving judicial management by a court on regulatory grounds, for example pursuant to insurance regulations, and judicial winding-up on just and equitable grounds,[43] have been found to satisfy this requirement of article 2.[44] It has also been suggested that if it could be concluded that overall a proceeding was subject to the control and supervision of the court, it was irrelevant that the Government of the originating State also had powers in relation to the proceeding.[45] In a case concerning the insolvency of an insurance company, the recognizing court found that the body with oversight of the insurance industry was a body competent to control or supervise the assets and affairs of the debtor.[46]

15. Courts have confirmed that both the assets and affairs of the debtor must be subject to control to meet the definition.[47]

16. The GEI [para. 75] notes that proceedings in which the court exercises control or supervision at a late stage of the insolvency process or in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so, should not be

excluded. An example of the latter might be a case where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceeding nevertheless remains open or pending and the court retains jurisdiction (e.g., to settle any dispute over the interpretation of the plan or to oversee the debtor's performance pursuant to the plan) until implementation is completed.[48]

For the purposes of liquidation or reorganization

17. The GEI [para. 77] indicates that some types of proceeding that may satisfy certain elements of the definition of foreign proceeding may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation. They may take various forms, as indicated in the GEI, including proceedings that are designed to prevent dissipation and waste, or to prevent detriment to investors, rather than to liquidate or reorganize the insolvency estate; or proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization or are limited to doing no more than preserving assets. The GEI [para. 78] indicates some of the types of procedure that might not be eligible for recognition. The JP [paras. 91–92] also discusses this requirement of subparagraph *(a)*.

18. Courts have confirmed that proceedings designed to prevent dissipation and waste, or to prevent detriment to investors, rather than to liquidate or reorganize the insolvency estate,[49] proceedings in which the foreign representative does not have the authority to liquidate and distribute assets to satisfy creditor claims[50] and proceedings designed to allow a certain party to collect its debts,[51] do not satisfy this requirement of article 2.

19. In considering this requirement, it has been suggested that it may be appropriate for the court to take account of circumstances arising after the application for recognition is made, as contemplated by article 18, subparagraph *(a)*. If, for example, the foreign court makes further orders after that time and the foreign proceeding then becomes one for the purposes of liquidation or reorganization, that fact should be taken into account by the court considering the application for recognition.[52]

20. In a case where recognition was sought for proceedings relating to the insolvency of a branch entity, it was argued that those proceedings could not be for the purposes of liquidation or reorganization of the debtor as a whole, as the branch insolvency did not have a comprehensive impact resulting in overall reorganization of the debtor. In rejecting that argument, the court said that article 21, paragraph 3, recognized that the scope of non-main proceedings might be less than all-encompassing and that the scope of the foreign proceeding was to be considered in fashioning appropriate relief.[53]

ARTICLE 2, SUBPARAGRAPH *(b)*: FOREIGN MAIN PROCEEDING

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

21. The GEI [paras. 81–84][54] discusses the origin of the term and the reference to COMI. It notes the relevance of COMI to the EIR and includes material from the Virgos-Schmit Report in relation to its interpretation.[55] The meaning of COMI is discussed in detail below in the context of articles 16, paragraph 3 and 17. It is also discussed in the JP [paras. 62, 67–69].

22. Cases considering the definition of "foreign main proceeding" have also looked at the meaning of the words "taking place in the State". One court has indicated that that phrase refers to the location of the foreign case (situs), not the stage of the proceeding (status).[56]

ARTICLE 2, SUBPARAGRAPHS *(c)* AND *(f)*: FOREIGN NON-MAIN PROCEEDING[57] AND ESTABLISHMENT

> *(c)* "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph *(f)* of this article;
>
> *(f)* "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

23. In an early decision under legislation enacting the MLCBI,[57] the court recognized a foreign proceeding as a non-main proceeding because, notwithstanding that the debtor did not have an establishment in the originating State, no other proceedings were pending and the debtor had to be wound up. The court noted that no negative consequences would appear to result from that course of action and there was no objection to that course of action.[58] Subsequent cases have distinguished that case and emphasized the requirement under article 17, paragraph 2 to decide, when recognizing a foreign proceeding, whether it is either a main *or* a non-main proceeding (emphasis added);[59] if it is neither a main nor a non-main proceeding, recognition should be denied.[60] On that basis, a proceeding that failed to qualify as a main proceeding would not automatically be a non-main proceeding; for recognition as a non-main proceeding, it would have to meet the requirements of the definition in subparagraphs *(c)* and *(f)*.

24. The GEI [art. 2, para. *(c)* [para. 85], and art. 2, para. *(f)* [paras. 88–90]][61] explains the origin of the concept of "establishment" in article 2, paragraph *(h)*, of the European Convention, the precursor of the EIR. That concept was revised in the EIR recast to add a time requirement.[62] The concept is also discussed in the JP [para. *(c)* [para. 64] and para. *(f)* [paras. 136–143]].

25. Under the EIR, the question of whether or not the debtor has an establishment in a particular State is to be determined, according to ECJ, in the same way as the location of a debtor's COMI, i.e., on the basis of objective factors that are ascertainable by third parties.[63] The GEI [para. 90] notes that under the MLCBI the inquiry as to whether the debtor has an establishment is a purely factual one and will thus turn on the specific evidence adduced; unlike "foreign main proceeding" there is no presumption to assist with that inquiry. In a case decided under the MLCBI, the court emphasized that the definition of "establishment" must be read as a whole, not broken down into discrete elements as each element coloured the others.[64]

Interpretation of words and phrases

"Place of operations" and "economic activity"

26. The Virgos-Schmit Report on the European Convention [para. 7.1] provides some further explanation of the terms "place of operations" and "economic activity":[65]

> 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.

27. Interpretation by courts[66] of those paragraphs from the Virgos-Schmit Report suggests that the following two elements are required to satisfy the definition of establishment or show the existence of an establishment:

(a) Some activity external to the company itself, and which is apparent to the outside world; internal activities which do not operate on the market are insufficient;

(b) That there be somewhere that amounts to a *place* (emphasis in original) of operations or shows the existence of an establishment; operations by themselves not linked to some sort of location are insufficient. Thus, a collection of "roving salesmen" without connection to a location from which such activities could be said to be conducted, was found to be insufficient. In a case decided under the MLCBI, the court said what was envisaged was a fixed place of business.[67]

28. In a case decided under the EIR, the court said that "economic activity" did not imply external market activity – the parent of the local subsidiary was already subject to insolvency proceedings in another jurisdiction and external market activities were inconsistent with the generality of companies in liquidation, which by definition did not engage in external market activities. That was not to say, the court went on to indicate, that the activities did not have to be outward in the sense of enabling the existence of its establishment to be ascertained by third parties on the basis of objective factors.[68]

29. In a case decided under the MLCBI, the court said the terms "operations" and "economic activity" required that a local effect on the marketplace had to be shown.[69]

"Human means" and "goods"[70]

30. The ECJ has observed[71] that the fact the definition in the EIR links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organization and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an "establishment". Other cases decided under the EIR indicate that the reference to "human means" is not limited to employees of the debtor, but could include people employed by another group company[72] or independent contractors[73] on the basis that they are all human instruments through which economic activity can be conducted.[74] It has been suggested that the words "goods" can be interpreted more widely than "chattels" and would be better rendered as "assets", so that land and money would qualify.[75]

"Non-transitory activity"

31. The GEI [para. 90] suggests that there is a legal issue as to whether the term "non-transitory" in the MLCBI refers to the duration of a relevant economic activity or to the specific location at which the activity is carried out. Several courts have equated non-transitory economic activity under the MLCBI with the debtor having, where it is a legal entity (see below for natural persons), a local place of business or a "seat for local business activity",[76] which consists in dealings with third parties and not acts of internal administration.[77]

32. In a case decided under the EIR, the court said that the concept of "non-transitory" was intended to encapsulate such things as "the frequency of the activity, whether it was planned or accidental or uncertain in its occurrence, the nature of the activity and the length of time of the activity itself".[78]

33. Activities carried out in a particular location but considered by some courts to be insufficient to establish conduct by the debtor of non-transitory activity in that location for the purposes of the MLCBI, either alone in various combinations, have included:[79]

(a) The fact of incorporation and record-keeping;

(b) Retention of counsel and accountants;

(c) The maintenance of property;

(d) The conduct of auditing activities;

(e) The preparation of incorporation papers;

(f) The conduct of investigations by the provisional liquidators into whether antecedent transactions could be avoided and reporting to the court;

(g) The conduct or pendency of insolvency and similar types of proceeding;

(h) The activities of judicial managers conducted pursuant to their appointment.

Establishment – natural persons

34. The difficulties inherent in identifying an establishment for a natural person debtor are recognized in the GEI [para. 61],[80] which suggests that an enacting States might wish to exclude from the scope of application of the MLCBI insolvencies that relate to natural persons residing in an enacting State, whose debts had been incurred predominantly for personal or household purposes (as opposed to commercial or business purposes) or those that relate to non-traders.[81] It has been suggested by one court that those observations reflect the fact that UNCITRAL is primarily concerned with trade and the need, for economic reasons, to provide workable mechanisms to resolve cross-border insolvencies involving trading entities with assets or liabilities in different States.[82]

35. With respect to natural persons, courts have considered whether the same test of establishment as applicable to a legal entity should or could apply or whether it should be some lesser test. The mere presence of assets in a given location has been held, by itself, not to constitute a place of operation. Equating a corporation's principal place of business to an individual debtor's primary or habitual residence, the court said 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 foreign representative claimed the debtor had an establishment.[83]

36. Where the debtor had carried on a business in the originating State and could thus be subject to its insolvency law on the basis that the debtor was still in the process of winding up business activities there, the receiving court held that was not a reason for finding the debtor had an establishment in the originating State, i.e., a place of operations from which "a non-transitory economic activity with human means and goods or services" was carried out, as required by article 16, paragraph 3.[84]

ARTICLE 2, SUBPARAGRAPH *(d)*:
FOREIGN REPRESENTATIVE

> *(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;

37. The GEI [para. 86] notes that article 2, subparagraph *(d)*, recognizes that the foreign representative may be a person authorized in the foreign proceedings either to administer those proceedings, which the GEI suggests would include seeking recognition, relief and cooperation in another jurisdiction, or for the purposes of representing those proceedings. The JP [paras. 32–38] also discusses this requirement. Since the MLCBI does not specify that the foreign representative must be authorized *by the foreign court* (emphasis added), the GEI [para. 86] notes that the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court.[85] The GEI [paras. 71, 74, 86][86] also indicates that the definition would include debtors who remain in possession after the commencement of insolvency proceedings, as well as interim appointments [paras. 79–80]. Article 16, paragraph 1, enables the court to presume the facts indicated in the documents provided under article 15, paragraph 1, which includes those concerning the appointment of the foreign representative (see article 15).

38. Courts have indicated that the focus is upon the authorization being provided "in the context of" or "in the course of" the proceeding, rather than upon the body providing the authorization, which might include the court, the law or even appointment by the debtor itself,[87] such as an appointment made by the board of directors of the debtor.[88] The disjunctive in subparagraph *(d)*, that the person be authorized to administer *or* to represent (emphasis added) has also been noted.[89] It has also been observed that provided the foreign representative is appointed and authorized, there is no requirement in article 2, subparagraph *(d)*, for them to satisfy a disinterested test or to be free of conflict of interest.[90]

39. While the MLCBI does not define the words "person" or "body", courts have found that a foreign representative might be a firm of accountants, if otherwise qualified, on the basis that a firm can constitute a "person" as required by subparagraph *(d)*,[91] and a "body" has been interpreted as meaning "an artificial person created by a legal authority" (citing Black's law dictionary).[92] The GEI [para. 86] indicates that the fact of appointment of the foreign representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purposes of the MLCBI.

40. Where the first arm of the definition is relied upon, the foreign representative must have the power to administer the reorganization or liquidation of the debtor's assets or affairs at the time of the application for recognition.[93] In one case, a receiver was found not to 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.[94] Where a foreign representative does not have those powers at the time of the application for recognition, but is subsequently granted those powers, article 18 could be relevant.

ARTICLE 2, SUBPARAGRAPH *(e)*:
FOREIGN COURT

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

41. The GEI [para. 87][95] notes that no distinction is drawn, in the definition of "foreign court", between reorganization and liquidation proceedings controlled or supervised by a judicial 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". This definition is also discussed in the JP [para. 84].

42. The following entities have been found by the courts of one State to satisfy the definition:

(a) An administrative agency authorized to function as an administrative tribunal under certain legislation and to exercise powers similar to a court and oversee the possible rehabilitation of debtors under its authority, to regulate fraudulent and preferential transfers and to suspend the operation of contracts, settlements and awards, where parties could appeal adverse decisions of the agency to the courts;[96]

(b) A banking commission that controlled and supervised the liquidation of entities performing banking or securities brokers functions, including acting as a bankruptcy court for the reorganization and liquidation of those entities, where appeals from decisions of the commission could be taken to the court.[97]

OTHER ISSUES

Use of the term "debtor"[98]

43. The MLCBI does not define the term "debtor" as it is not an element of the recognition regime; the MLCBI provides only for recognition of the foreign proceeding at the request of the foreign representative. Nevertheless, there have been cases in which the court has considered whether or not the entity subject to the foreign proceeding is a debtor for the purposes of the law to be applied by the receiving court.

44. In one case, the court decided that a debtor that qualified as such under the law of the originating State would qualify for recognition even though it was not a debtor under the law of the receiving State.[99] In another case, the court said that as to whether the company was a debtor, no separate attention had been given to that requirement in other cases and the expression was not defined in the MLCBI. Each of the courts whose decisions on recognition applications were considered had, the court said, apparently been content to work on the basis that an entity subject to a foreign proceeding was, for that reason alone, within the relevant "debtor" concept.[100]

Enterprise groups[101]

45. The MLCBI addresses itself to multiple proceedings concerning a single debtor. It does not address multiple proceedings affecting different members of an enterprise group or the enterprise group as a single entity. Nevertheless, it has found wide application in situations where there are multiple debtors that might be members of an enterprise group where each of those individual entities had their COMI or an establishment in the originating State.

46. In a case involving foreign special administration proceedings, the receiving court suggested that while enterprise group aspects of the foreign law governing that proceeding were novel, the recognition applications dealing with nine separate entities that each had their COMI in the foreign State did not push the boundaries of cross-border insolvency law.[102] In another case where a group included entities from different States that had operated as integrated entities to some extent, the receiving court considered the various connections between the group members and the States and found that none of those indicated a place of operations from which market-facing activities were conducted, and there was therefore no establishment for certain members of the group in the originating State.[103] In a case where the applicant for recognition treated different group members as one, the receiving court found that it was essential to observe the separate legal personalities of those members and to treat each entity on its own, unless there was sufficient reason shown to deal with them as one (which in this case there was not).[104] In the context of foreign proceedings concerning a company and controlled affiliates, the receiving court found there was nothing in the legislation enacting the MLCBI in that State that would prevent recognition of those proceedings being sought with respect to a particular individual debtor.[105]

Notes

[1] GE [paras. 67–75].

[2] GE [paras. 23–25, 67–71].

[3] *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 23], CLOUT 1003.

[4] *United States*: Betcorp Limited 400 B.R. 266, 276 (Bankr. D.Nev. 2009), CLOUT 927.

[5] *Australia*: Raithatha v Ariel Industries PLC [2012] FCA 1526 [paras. 31–33] – in reaching its conclusion that the creditor's voluntary liquidation in England was a foreign proceeding, the court considered the powers of the liquidator under the relevant legislation and of the court. The court also said that the judicial or administrative proceeding requirements could not be divorced from the additional requirement that the proceeding be "pursuant to a law relating to insolvency". *England*: New Paragon Investments Limited [2012] BCC 371 [para. 7], CLOUT 1272 – court found that "foreign proceeding" included an extrajudicial or administrative proceeding provided it related to liquidation. *United States*: Betcorp Limited 400 B.R. 266, 280–281 (Bankr. D. Nev. 2009), CLOUT 927 – administrative aspects of the proceeding (a voluntary winding up) included sending notice of the liquidation and requesting proofs of debt payments to creditors. In the absence of creditor objection, the court said the entire voluntary winding up may be a purely administrative proceeding. Where the actions of the liquidator were reviewed by the court, the process became judicial; if there were insufficient funds, the winding up would have to be converted to a form of administration requiring more judicial involvement; ABC Learning Centres Limited 728 F.3d 301, 308 (3d Cir. 2013), CLOUT 1338.

[6] *United States*: Irish Bank Resolution Corporation (IBRC) Limited, 538 B.R. 692, 697 (D. Del 2015), CLOUT 1628 *citing* Betcorp Limited 400 B.R. 266, 278 (Bankr. D. Nev. 2009), CLOUT 927 – court found a winding up directed by the IBRC was a proceeding, the majority of tasks undertaken by the special liquidator and the Minister of Finance were administrative in nature, any creditor could seek a ruling of the High Court with respect to any question arising in the proceeding, and it was collective in nature because it adopted the same distribution scheme the Companies Act applied to any other corporation; Manley Toys Limited, 580 B.R. 632, 638 (Bankr. D. N. J. 2018); see also discussion below under art. 20, para. 1.

[7] E.g., *United States*: Betcorp Limited 400 B.R. 266, 281 (Bankr. D. Nev. 2009), CLOUT 927.

[8] E.g., *United States*: British American Isle of Venice, Ltd. 441 B.R. 713, 719 (Bankr. S.D. Fla. 2010); British-American Insurance Co., Ltd. 425 B.R. 884, 902 (Bankr. S.D.Fla. 2010), CLOUT 1005 – court analysed relevant provisions of the foreign law and the evidence of the foreign representatives as to interpretation and operation of that law; Poymanov, 580 B.R. 55 (Bankr. S.D.N.Y. 2017).

[9] *England*: Larsen v Navios International Inc. [2011] EWHC 878 (Ch) [para. 23 *(j)*], CLOUT 1273. *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 903 (Bankr. S.D.Fla. 2010).

[10] Reference is made in some cases to the preamble of the MLCBI (see discussion above), in particular subpara. *(c)*, which provides "Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor". For example: *Australia*: Tucker, in the matter of Aero Inventory (UK) Limited (No. 2) [2009] FCA 1481, CLOUT 922: an administration of a United Kingdom company was held to be a foreign main proceeding because it affected creditors collectively and not only the private rights and obligations of the immediate parties to the administration; *New Zealand*: Downey v Holland [2015] NZHC 595 [para. 19], CLOUT 1480 – court referred to "all of the debtor's known creditors"; *United States*: ABC Learning Centers, 728 F.3d 301, 308 (3d Cir. 2013), CLOUT 1338; Manley Toys Limited, 580 B.R. 632, 640 (Bankr. D. N. J. 2018).

[11] *Australia*: Katayama v Japan Airlines Corporation [2010] FCA 794 [para. 24].

[12] *United States*: Betcorp Limited 400 B.R. 266, 281 (Bankr. D. Nev. 2009), CLOUT 927; Gold & Honey, Ltd. 410 B.R. 357, 370 (Bankr. E.D.N.Y. 2009), CLOUT 1008.

[13] Ibid., *United States*: Betcorp; ABC Learning Centres Limited 728 F.3d 301, 309–310 (3d Cir. 2013), CLOUT 1338.

[14] *United States*: Gold & Honey, Ltd. 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009), CLOUT 1008.

[15] *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 903 (Bankr. S.D.Fla. 2010), CLOUT 1005 – the focus of the case was insurance policyholders which had priority over unsecured creditors under the applicable law, but the court noted that unsecured creditors were considered and had a right to be heard in the proceedings; Ashapura Minechem Ltd. 480 B.R. 129, 137 (S.D.N.Y. 2012), CLOUT 1313 – court said that to be for the general benefit of creditors, a proceeding need not ensure that all creditors received a share of the distribution.

[16] *United States*: Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009), CLOUT 1008.

[17] *United States*: ABC Learning Centres Limited 728 F.3d 301, 308, 310 (3d Cir. 2013), CLOUT 1338 – court said there was no exception to recognition based on the debt to value ratio at the time of insolvency.

[18] *England*: Larsen v Navios International Inc. [2011] EWHC 878 (Ch) [para. 23 *(j)*], CLOUT 1273.

[19] *England*: Stanford International Bank Limited [2010] EWCA 137 (Civ), CLOUT 1003. *United States*: British-American Insurance Co. Ltd. 425 B.R. 884, 902 (Bankr. S.D.Fla. 2010) – the proceeding was found to be "collective", even though creditor participation was limited and subordinated to the interests of policyholders. In deciding whether a proceeding was collective, the court said it was appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding. Review of the relevant provisions of the Bahamian law relating to judicial management referred to the interests of creditors other than insurance policyholders; British American Isle of Venice, Ltd., 441 B.R. 713, 718–719 (Bankr. S.D. Fla. 2010); ABC Learning Centres Limited 728 F.3d 301 (3d Cir. 2013), CLOUT 1338.

[20] *United States*: Ashapura Minechem Ltd. 480 B.R. 129, 140 (S.D.N.Y. 2012), CLOUT 1313.

[21] Ibid., 141–142.

[22] *United States*: British American Isle of Venice, Ltd. 441 B.R. 713, 719 (Bankr. S.D. Fla. 2010); British-American Insurance Co., Ltd. 425 B.R. 884, 903 (Bankr. S.D.Fla. 2010), CLOUT 1005 – court considered the issue of notice and found that notwithstanding the relevant law had no requirement for notice to be given to general unsecured creditors of the appointment of the foreign representative or of actions brought before the court, they would receive notice of the commencement of the winding up phase and could be heard.

[23] *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 20], CLOUT 1003 – court of appeal said that what was important were the powers and duties that had been conferred on the receiver pursuant to their appointment.

[24] *United States*: Gold & Honey, Ltd. 410 B.R. 357, 370 (Bankr. E.D.N.Y. 2009), CLOUT 1008; Betcorp Limited 400 B.R. 266, 281 (Bankr. D. Nev. 2009), CLOUT 927; ABC Learning Centres Limited 728 F.3d 301, 308 (3d Cir. 2013), CLOUT 1338 – court held that a liquidation, operating in parallel to a receivership that only represented secured creditors' interests, was a collective proceeding because the liquidator must distribute assets on a pro-rata basis to creditors of the same priority, even though the receivership that had control of substantially all of the debtor's assets was not itself a collective proceeding.

[25] *England*: Stanford International Bank Limited [2010] EWCA 137 (Civ) [paras. 25–29], CLOUT 1003.

[26] *United States*: Stanford International Bank Limited, Civil Action No. 3:09-CV-0721-N (N.D. Tex., July 30, 2012), p. 17, footnote 20.

[27] *United States*: Innua Can., Ltd., case No. 09-16362 (Bankr. D.N.J. Apr. 15, 2009), p. 4.

[28] The United States equivalent of art. 2, subpara. *(a)* (United States Bankruptcy Code (11 U.S.C. sect. 101 (23)), adds the words "or adjustment of debt", making clear that the United States does not require insolvency as a prerequisite. This makes Ch. 15 available to debtors who are in financial distress and may need to reorganize: Millard 501 BR 644, 648–650 (Bankr. S.D.N.Y. 2013) – debtor in a foreign insolvency proceeding need not be insolvent in order to take advantage of Ch. 15 recognition. The court said that it would be inappropriate for it to look behind the judgment of the foreign court to assess the debtors' insolvency and whether they qualified for relief under the foreign law.

[29] E.g., *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 24], CLOUT 1003 – court of appeal observed that the law did not have to be statutory nor did it have to relate exclusively to insolvency. The court said that it was necessary to first identify the law under or pursuant to which the foreign proceeding was brought and was being pursued, then to consider whether that law related to insolvency and whether the other factors to which the definition in art. 2, subpara. *(a)*, referred could be regarded as being brought about "pursuant" to that law.

[30] E.g., *United States*: Betcorp Limited 400 B.R. 266, 282 (Bankr. D. Nev. 2009), CLOUT 927 – voluntary liquidation under law of Australia was held to be pursuant to a law relating to insolvency because the nature of the relevant legislation, when considered as a whole, was a law that regulated the whole life cycle of a corporation in Australia, including its insolvency. The court said this element of the definition required neither insolvency nor contemplation that the debts would be adjusted.

[31] *England*: Sturgeon Central Asia Balanced Fund [2019] EWHC 1215, CLOUT 1819 and [2020] EWHC 123. The court first granted and then rescinded recognition of a "just and equitable" winding up of a solvent company under the Bermuda Companies Act 1981.

[32] *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [paras. 25–26], CLOUT 1003.

[33] *Canada*: Syncreon Group B.V., 2019 ONSC 5774 [para. 28]. This is the first decision in Canada recognizing a scheme of arrangement under Part 26 of the United Kingdom Companies Act 2006 c.46 as a foreign proceeding under sect. 45 of the Companies' Creditors Arrangement Act 1985, enacting the MLCBI in Canada.

[34] *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 15], CLOUT 1003 – appeal court noted that one of the reasons for the foreign court's decision was an important piece of the evidence that the debtor was insolvent and could not be reorganized via the receivership.

[35] Australia: Chow Cho Poon (Private) Limited [2011] NSWSC 300 [para. 51], CLOUT 1218; Raithatha v Ariel Industries PLC [2012] FCA 1526 [para. 41].

[36] *England*: Sturgeon Central Asia Balanced Fund Ltd (in liq) [2019] EWHC 1215 (Ch) [paras. 54–55], CLOUT 1819.

[37] *England*: Agrokor DD [2017] EWHC 2791 (Ch) [para. 73], CLOUT 1798 – court went on to say that it was in fact insolvency, actual or threatened, of one company that triggered the proceeding and the law under which the proceeding was brought was, accordingly, in principle a law relating to insolvency for that purpose.

[38] *United States*: Betcorp Limited 400 B.R. 266, 283–284 (Bankr. D.Nev. 2009), CLOUT 927 – court supervision of the liquidators was found to be sufficient to qualify as a foreign court supervising or controlling the proceeding, even though the control was indirect.

[39] *United States*: Oversight & Control Commission of Avanzit, S.A. 385 B.R. 525, 531 (Bankr. S.D.N.Y. 2008), CLOUT 925; Ashapura Minechem Ltd. 480 B.R. 129, 143 (S.D.N.Y. 2012), CLOUT 1313.

[40] *United States*: Betcorp Limited 400 B.R. 266, 283–284 (Bankr. D. Nev. 2009), CLOUT 927 – a voluntary liquidation proceeding in Australia was found to be subject to supervision by a judicial authority 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 courts in Australia or regulatory authorities over the actions of liquidators; and (c) the ability of any person "aggrieved by any act, omission or decision" of a liquidator to appeal to a court in Australia, which could "confirm, reverse or modify the act or decision or remedy the omission, as the case may be".

[41] Ibid., *United States*: Betcorp, 279 – the court cited the example of a company initiating a voluntary winding up during which it is found to be insolvent, requiring the liquidator to convert to another type of administration that would likely lead to court involvement.

[42] GE [para. 24], GEI [para. 71]; United States: Ashapura Minechem Ltd. 480 B.R. 129, 138 (S.D.N.Y. 2012), CLOUT 1313 – leaving the foreign representative and the board of directors in control of its business and operations was found not to be inconsistent with supervision by a foreign court; see also Oversight & Control Commission of Avanzit, S.A. 385 B.R. 525, 533–534 (Bankr. S.D.N.Y. 2008), CLOUT 925; OAS S.A. 533 B.R. 83, 96–98 (Bankr. S.D.N.Y. 2015), CLOUT 1629.

[43] *Australia*: Chow Cho Poon (Private) Limited [2011] NSWSC 300 [para. 40], CLOUT 1218.

[44] *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 905 (Bankr. S.D.Fla. 2010), CLOUT 1005 – judicial management imposed by a Bahamian court pursuant to that nation's insurance regulations was found to qualify as "supervision" by a court or administrative body.

[45] *England*: Agrokor DD [2017] EWHC 2791 (Ch) [para. 92], CLOUT 1798 – where the proceedings ("extraordinary administration proceedings") were brought under special legislation passed to address the insolvency of a group of companies that was one of the largest privately owned businesses in Croatia.

[46] *United States*: ENNIA Caribe Holdings N.V., 594 B.R. 631, 639–640 (Bankr. S.D.N.Y. 2018).

[47] *United States*: Gold & Honey, Ltd. 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009), CLOUT 1008; Ashapura Minechem Ltd. 480 B.R. 129, 143 (S.D.N.Y. 2012), CLOUT 1313 – control of assets and affairs was evidenced by the fact that the Indian authority in question could suspend operation of contracts, settlements and awards and impose a set of guidelines on conduct that regulated against fraudulent and preferential transfers; Oversight & Control Commission of Avanzit, S.A. 385 B.R. 525, 534 (Bankr. S.D.N.Y. 2008), CLOUT 925 – court said the mere fact that a commission was granted authority from a court in Spain to recover a set-off from an arbitration proceeding for distribution to creditors "plainly demonstrate[d] that the [court] maintains control of [both the debtor's] assets and affairs".

[48] Ibid., *United States*: Oversight 535 – court said it may be that the court's level of control or supervision is reduced, but does not entirely cease.

[49] *England*: Stanford International Bank Limited [2010] EWCA 137 (Civ) [paras. 25–29], CLOUT 1003.

[50] Ibid., *quoting* first instance judge [2009] EWHC 1441 (Ch) [para. 84] – appeal court said the question to be considered was what powers and duties had been conferred or imposed on the receiver by the order commencing the receivership in question.

[51] *United States*: Gold & Honey, Ltd. 410 B.R. 357, 370 (Bankr. E.D.N.Y. 2009), CLOUT 1008.

[52] *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 906 (Bankr. S.D.Fla. 2010), CLOUT 1005 – at the time of the application, no order directing reorganization or liquidation had been made, pending a report by the person appointed as judicial manager. At that stage, the court said, the proceeding would not have been a foreign proceeding. Following provision of the report, the foreign court ordered reorganization. The recognizing court said taking those additional facts into account was consistent with the nature of the recognition process contemplated in arts. 18, subpara. *(a)*, and 17, para. 4, which allowed the court to adjust its ruling based on circumstances arising after recognition.

[53] *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 908 (Bankr. S.D.Fla. 2010), CLOUT 1005 – court said Ch. 15 of the United States Bankruptcy Code (11 U.S.C.) envisaged a combination of a main proceeding and any number of non-main. To require each of those proceedings, main and non-main, to be able to result in a global reorganization or liquidation of the debtor, was not consistent with the structure of the legislation.

[54] GE [paras. 72, 75].

[55] See above, Introduction, para. 4.

[56] *United States*: Oversight & Control Commission of Avanzit, S.A. 385 B.R. 525, 535–538 (Bankr. S.D.N.Y. 2008), CLOUT 925 – court noted that while the word "pending" was used in the United States legislation rather than the words "taking place", presumably the same meaning as "taking place" was intended; a proceeding would be pending until the court issued an order dismissing or closing it. Where the foreign court had already approved a reorganization plan, the court found that the proceeding was still "pending" for the purposes of the MLCBI, observing that the goals of the MLCBI "would be frustrated if 'foreign proceeding' was interpreted in a manner that cut off assistance at a time when cooperation, certainty, fairness, asset values and financial relief were most needed, simply because the debtor successfully prosecuted its reorganization case."

[57] It might be noted that sect. 45 (1) of the Companies' Creditors Arrangement Act 1985 of Canada defines a "foreign non-main proceeding" as a foreign proceeding, other than a foreign main proceeding.

[58] *United States*: SphinX, Ltd. 351 B.R. 103 (Bankr. S.D.N.Y. 2006), CLOUT 768 – the non-main determination was not appealed and although the appeal court concluded that recognition of a non-main proceeding was a pragmatic choice, it did not consider the statutory requirements for recognition of such proceedings. The case was discussed and distinguished in Bear Stearns 374 B.R. 122, 126–127 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794.

[59] See discussion below under art. 17 on the absence of objection to recognition.

[60] E.g., *United States*: Bear Stearns 374 B.R. 122, 126–127 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794; compare Schefenacker plc. case No. 07-11482 (June 14, 2007), unreported, CLOUT 767, in which the United States court granted recognition without deciding whether the foreign proceeding was a main or non-main proceeding because the foreign proceeding clearly qualified as one or the other and the relief sought would be granted in both a main and a non-main proceeding. See also the discussion below under art. 17, para. 2.

[61] Ibid., *United States*: Bear Stearns, referencing Daniel M. Glosband, "SPhinX Chapter 15 Opinion Misses the Mark", 25 AM. BANKR. INST. J. 44 (Dec./Jan.2007) at 45 "foreign proceedings are eligible for recognition only if they meet the definitional requirements of either a foreign main proceeding or a non-main proceeding" and at 85 "If the foreign proceeding is not pending in a country where the debtor has its [centre of main interests] or where it has an establishment, then the foreign proceeding is simply not eligible for recognition under Chapter 15" – the court in Bear Stearns said recognition must be coded as either main or non-main. See also *New Zealand*: Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] NZLR 380 (12 October 2010) [para. 26], CLOUT 1220 – if the requirements are not met and the foreign proceeding is neither main nor non-main, there is no jurisdiction to grant recognition under article 17.

[62] GE [para. 73].

[63] EIR recast, art. 2 (10) provides: " 'Establishment' means 'any place of operations where a debtor carries out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.' "

[64] *EIR*: Interedil, Srl v Fallimento Interedil, Srl [2011] EUECJ C-396/09 [2012] Bus LR 1582.

[65] *England*: Videology Limited [2018] EWHC 2186 (Ch) [para. 79], CLOUT 1823.

[66] GEI [para. 89].

[67] *EIR*: Office Metro Limited [2012] EWHC 1191 (Ch) [para. 16].

[68] *England*: Videology Limited [2018] EWHC 2186 (Ch) [para. 79], CLOUT 1823.

[69] *EIR*: Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA [2012] EWHC 1413 (Ch) [paras. 22–23].

[70] *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 915 (Bankr. S.D.Fla. 2010), CLOUT 1005 – court went on to say that that showing requires "more than mere incorporation and record keeping and more than just the maintenance of property", *cited* in Creative Finance Ltd. 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

[71] Several enactments of the MLCBI incorporate changes to the definition of "establishment", for example, the United States definition of "establishment" does not expressly require the non-transitory activity to be carried on with human means or goods and services as it omits the words "with human means and goods or services": Bankruptcy Code 11 U.S.C. sect. 1502 (2); Romania defines establishment to mean "any place of operations where the debtor carries out a non-transitory economic activity or an independent profession with human means and goods": Law No. 637 of 7 December 2002 on regulating private international law relations in the field of insolvency, art. 3 *(p)* (unofficial English translation on file with the UNCITRAL secretariat); Uganda defines establishment to mean "any place of operations where the debtor carries out a permanent economic activity": Insolvency Act, 2011, sect. 226 (1).

[72] *EIR*: Interedil, Srl v Fallimento Interedil, Srl [2011] EUECJ C-396/09 [2012] Bus LR 1582 [para. 62].

[73] *EIR*: BenQ Mobile GmbH & Co, Docket No. 1503 IE 4371/06 Munich (Feb. 5, 2007); Office Metro Limited [2012] EWHC 1191 (Ch) [para. 18].

[74] *EIR*: Office Metro Limited [2012] EWHC 1191 (Ch) [para. 18].

[75] Ibid.

[76] Ibid. [para. 19].

[77] *United States*: Bear Stearns 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794 – court referred to the origin of this definition in the EIR, which rejected the presence of assets as a sufficient basis for taking local jurisdiction; in the case in question, the purely administrative functions of a hedge fund that took place in the State in which the proceedings had commenced were insufficient to constitute an establishment; British-American Insurance Co., Ltd. 425 B.R. 884, 914 (Bankr. S.D.Fla. 2010), CLOUT 1005.

[78] *England*: Videology Limited [2018] EWHC 2186 (Ch) [para. 79], CLOUT 1823.

[79] *EIR*: Office Metro Limited [2012] EWHC 1191 (Ch) [para. 33].

[80] *United States*: Bear Stearns 389 B.R. 325, 338–339 (S.D.N.Y. 2008), CLOUT 794; Lavie v Ran 607 F.3d 1017, 1027 (5th Cir. 2010) and British-American Insurance Co., Ltd. 425 B.R. 884, 915 (Bankr. S.D.Fla. 2010), CLOUT 1005 – courts in these cases said that bankruptcy proceedings are intentionally temporary and transitory, they could not be viewed as an industrial or professional activity and while they did pertain to economic matters, they did not comport with the traditional notion of economic activity in the marketplace; followed in Creative Finance Ltd. 543 B.R. 498, 521 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

[81] GE [para. 66].

[82] See exclusions made under art. 1, para. 2, above.

[83] *New Zealand*: Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] NZLR 380 [para. 61], (12 October 2010), CLOUT 1220.

[84] *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [56–57], CLOUT 1475 – court said that the debtor was a transnational insolvent with multifarious litigation and entrepreneurial activities spread over numerous jurisdictions and that his ambulatory behaviour made it difficult to identify his habitual residence, if he had one. His COMI was found to be in Australia, but the court said that his recent business dealings in the United States were sufficient, at least, to constitute an establishment and the proceedings were recognized as foreign non-main proceedings. *United States*: Lavie v Ran (*In re* Ran) 607 F.3d 1017, 1027 (5th Cir. 2010) [para. 12]; Kemsley 489 B.R. 346 (Bankr. S.D.N.Y. 2013), CLOUT 1274 – court said the debtor's employment was far too loose an arrangement to meet the statutory requirement – he did not have an employment agreement or a regular schedule for using an office in London; it was more in the nature of an informal arrangement between friends and the money received was in the form of an advance rather than compensation for actual work performed; see also Pirogova, 593 B.R. 402 (Bankr. S.D.N.Y. 2018).

[85] *New Zealand*: Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] NZLR 380 [para. 65] (12 October 2010), CLOUT 1220.

[86] In drafting the definition, the Working Group expressly rejected the requirement that a foreign representative be "[specifically] authorized by statute or other order of court (administrative body) to act in connection with a foreign proceeding." Report of UNCITRAL Working Group V (Insolvency Law) on the work of its eighteenth session (A/CN.9/419), para. 111. That definition was rejected because of concerns that "the expressions would be unfamiliar and might have the unintended effect of being unduly restrictive, since the list would inevitably be incomplete." Ibid., para. 112. The Working Group also declined to include the word "specifically" because "it would be unusual for a State to appoint an insolvency representative specifically to act abroad." Ibid., para. 113.

[87] GE [para. 24].

[88] *United States*: Vitro S.A.B. de C.V. 701 F.3d 1031, 1047 (5th Cir. 2013), CLOUT 1310 – 5th Circuit said that while "authorized in a foreign proceeding" was compatible with appointment by a foreign court, it was hardly necessary. The court went on to say that it was equally compatible with being appointed "in the context of" or "during" or "in the course of" a foreign proceeding. Courts have looked at what the foreign representative is authorized to do under the foreign law: the trustee in proceedings in Japan who assumes control over the relevant debtor and has the authority and power to give instructions on behalf of the debtor and to administer the reorganization of the debtor's assets: *Australia*: Katayama v Japan Airlines Corporation [2010] FCA 794 [para. 23]; an administrator in a sauvegarde proceeding in France: *United States*: SNP Boat Service S.A. v Hotel Le St. James 483 B.R. 776, 779 (S.D. Fla. 2012), CLOUT 1314; an "oversight commissioner" appointed by the supervising court in a proceeding in Spain to represent and protect the interests of creditors and assure the debtor's compliance with its payments obligations under a plan, where that person was also authorized by the court to pursue and recover certain funds for the benefit of the debtor's creditors and distribution under law of Spain and to be the foreign representative of the debtor and pursue foreign recognition of those proceedings: *United States*: Oversight & Control Commission of Avanzit, S.A. 385 B.R. 525, 540 (Bankr. S.D.N.Y. 2008), CLOUT 925; an administration in England where the foreign representatives were appointed by the court: *Australia*: Tucker, in the matter of Aero Inventory (United Kingdom) Limited v Aero Inventory (United Kingdom) Limited (No. 2) [2009] FCA 1481 [paras. 15–19, 23], CLOUT 922; and a *concurso* in Mexico where the debtor is allowed to appoint its own foreign representative: *United States*: Compania Mexicana de Aviacion S.A. de C.V., case No. 10-14182 (Bankr. S.D.N.Y. 8 November 2010) – court ruled that the debtor company from Mexico could authorize a person to act as its foreign representative because under the law of Mexico the debtor essentially acted as a debtor-in-possession and managed its own affairs; and Cozumel Caribe, S.A. de C.V. 482 B.R. 96 (Bankr. S.D.N.Y. 2012), CLOUT 1311.

[89] *United States*: OAS S.A. 533 B.R. 83, 93, 98 (Bankr. S.D.N.Y. 2015), CLOUT 1629 – court noted that "debtor-in-possession" was not defined in the MLCBI, but the GEI suggested it included a debtor that retains "some measure of control over its assets" although under court supervision, and was further explained in the Practice Guide, Terms and Explanations, para. 13 *(j)*.; Cell C Proprietary Ltd., 571 B.R. 542 (Bankr. S.D.N.Y. 2017) *quoting* Vitro S.A.B. de C.V. 701 F.3d 1031, 1046, 1049 (5th Cir. 2013), CLOUT 1310 – court said that because a debtor-in-possession was able to administer its own reorganization, it was thus able to appoint a foreign representative.

[90] Ibid., U*nited States*: OAS 98–99 – court observed that while those words were not explained in the MLCBI, the GEI [para. 86] provided more information. The court also noted that article 2, subpara. *(d)*, provided a disjunctive test – the foreign representative had to be authorized to administer the proceeding or to act as its representative; Grand Prix Associates, Inc. case No. 09-16545 (Bankr. D.N.J. June 26, 2009) – person was appointed as the foreign representative of the business entities in question; Innua Canada Ltd. case No. 09-16362 (Bankr. D.N.J. Apr 15, 2009) – receivership order stated the foreign representative had the capacity for cross-border recognition purposes.

[91] *United States*: Poymanov, 580 B.R. 55 (Bankr. S.D.N.Y. 2017) – court said applicant had not demonstrated foreign representative had acted in bad faith or had any conflict of interest; OAS S.A. 533 B.R. 83, 98 (Bankr. S.D.N.Y. 2015), CLOUT 1629.

[92] *United States*: Petition of Ernst & Young, Inc., 383 B.R. 773, 777 (Bankr. D.Colo. 2008), CLOUT 790; Grand Prix Assocs. case No. 09-16545 (Bankr. D.N.J. May 18, 2009), 6 – the United States Bankruptcy Code, 11 USC 101 (41), defines a "person" to include an "individual, partnership or corporation".

[93] *United States*: Oversight & Control Commission of Avanzit, S.A. 385 B.R. 525, 540 (Bankr. S.D.N.Y. 2008), CLOUT 925; Innua Can., Ltd., case No. 09-16362 (Bankr. D.N.J. Apr. 15, 2009); Grand Prix Assocs., case No. 09-16545 (Bankr. D.N.J. June 26, 2009), p. 6.

[94] *United States*: OAS S.A. 533 B.R. 83, 98 (Bankr. S.D.N.Y. 2015), CLOUT 1629; see above – art. 2, subpara. *(a)*, *For the purposes of liquidation or reorganization.*

[95] *England*: Stanford International Bank Limited [2010] EWCA Civ. 1441 [para. 29], CLOUT 1003; *United States*: Loy, 448 B.R. 420, 432–433 (Bankr. E.D. Va. 2011) – an order of the foreign court affirming that the foreign representative did have the power to dispose of property once held by the debtor was considered by the receiving court to clarify the grant of powers to the foreign representative and to delineate the starting point for recognition. Without that vesting of power, the court said, it was unclear whether the foreign representative would have been a foreign representative for the purposes of making an application for recognition.

[96] GE [para. 74].

[97] *United States*: Ashapura Minechem Ltd. 480 B.R. 129, 143 (S.D.N.Y. 2012), CLOUT 1313.

[98] *United States*: Tradex Swiss AG, 384 B.R. 34, 42 (Bankr. D. Mass. 2008), CLOUT 791.

[99] United States Bankruptcy Code, 11 U.S.C. sect. 1502 (1) defines "debtor" as "an entity that is the subject of a foreign proceeding". In Drawbridge Special Opportunities Fund LP v Barnet, 737 F.3d 238, CLOUT 1336, the appeal court (Second Circuit) said that the provision

defining eligibility for the purposes of the Bankruptcy Code must be satisfied before a court could grant recognition of a foreign proceeding under Ch. 15 and that under sect. 109 *(a)* of the Bankruptcy Code only a person that has a domicile, residence, place or business or property in the United States could be a debtor under the Code. In an oral ruling in Bemarmara Consulting A.S., case No. 13-13037 (KG) (Bankr. D.Del. Dec. 17, 2013) given shortly after appeal court's decision in Drawbridge, the court apparently disagreed with the appeal court's (Second Circuit) decision. On a subsequent second application for recognition of the same foreign proceeding in Drawbridge, the court held (Octaviar Administration Pty Ltd. 511 B.R. 361, 372–73 (Bankr. S.D.N.Y. 2014), CLOUT 1483) that the debtor satisfied those requirements, having demonstrated that it had property in the United States in the form of claims or causes of action and a retainer to secure representation by a United States law firm; see also Berau Capital Resources Pte. Ltd. 540 B.R. 80, 82 (Bankr. S.D.N.Y. 2015), CLOUT 1627 – attorney retainer satisfied the eligibility requirement, in addition debtor was an obligor on over $450 million of United States dollar-denominated debt, subject to New York choice of law and forum selection clauses, which was also held to satisfy the eligibility requirement established in Barnet. A number of subsequent United States cases have found that various forms of retainer paid by the debtor satisfied this requirement: B.C.I. Finances Pty Ltd. 583 B.R. 288 (Bankr. S.D.N.Y. 2018), Cell C Proprietary Ltd., 571 B.R. 542 (Bankr. S.D.N.Y. 2017), Mood Media Corp., 569 B.R. 556 (Bankr. S.D.N.Y. 2017). See also *Canada*: Syncreon Group B.V., Re, 2019 ONSC 5774 [para. 17] – court found debtor companies met the definition of "debtor company" under s. 2 of the Companies' Creditors Arrangement Act because, inter alia, a "company" included any incorporated company having assets in Canada and the companies had assets in Canada in the form of funds being held on retainer by their legal counsel, which satisfied the requirement of "having assets in Canada".

[100] *England*: Rubin v Eurofinance SA [2009] EWHC 2129 (Ch) [para. 39] affirmed by [2012] UKSC 46, CLOUT 1270 – rejecting the argument that the words used in the MLCBI should be given their ordinary domestic meanings, the lower court said, noting the importance of art. 8, that it would be perverse to give the word "debtor" in the context of the definition of "foreign proceeding" any other meaning than that given to it by the foreign court in the foreign proceeding. The court went on to consider [para. 41] how the MLCBI would work where the debtor was a legal entity not known under local law.

[101] *Australia*: Chow Cho Poon (Private) Limited [2011] NSWSC 300 [para. 40], CLOUT 1218.

[102] The UNCITRAL Model Law on Enterprise Group Insolvency and Guide to Enactment (2019) provides solutions for enterprise group insolvency, including a recognition regime for enterprise group insolvency that draws upon the MLCBI.

[103] *United States*: Agrokor d.d., 591 B.R. 163, 184 (Bankr. S.D.N.Y. 2018).

[104] *United States*: Mood Media Corp., 569 B.R. 556, 562–3 (Bankr. S.D.N.Y. 2017) – the evidence showed that the companies as a whole operated as an integrated enterprise to a degree, and that management, financial management, cash management, accounting, treasury, internal audit, legal, risk management, human resources and procurement functions were shared to some extent and that while the companies in the United States paid management fees to the parent company in Canada for services that were provided, transacted for the procurement of professional and administrative services in Canada, were subject to oversight by the directors of the parent company in Canada, were guarantors of debt obligations that were issued in Canada, paid intercompany obligations to the parent company in Canada, and that parent company could employ people who provided services of various kinds to the companies in the United States, the court found none of that sufficed to show that the United States companies maintained a place of operations in Canada from which market-facing activities were conducted; Suntech Power Holdings Co. Ltd., 520 B.R. 399, 415–416 (Bankr. S.D.N.Y. 2014) – court found that the place of business in the United States of the subsidiary of a debtor from China was not the debtor's place of business or assets.

[105] *Singapore*: Zetta Jet Pte Ltd and Others [2018] SGHC 16 at [para. 19], CLOUT 1815.

[106] *England*: Agrokor DD [2017] EWHC 2791 (Ch) [para. 54], CLOUT 1798.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 3 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 159–162]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [paras. 66–67]; A/CN.9/433 [paras. 42–43]; A/CN.9/435 [paras. 114–117];

(b) GE (1997): A/CN.9/436 [para. 46]; A/CN.9/442 [paras. 76–78];

(c) GEI (2013): A/CN.9/763 [para. 26]; A/CN.9/766 [para. 29].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 93].

INTRODUCTION

1. The GEI [paras. 91–93][1] explains the principle of supremacy of international obligations of the enacting State over internal law, a principle modelled on similar provisions of other texts prepared by UNCITRAL. The GEI suggests how this provision might be enacted to avoid the legislation implementing the MLCBI having an inadvertent and excessive effect.

CASE LAW ON ARTICLE 3

2. Reported cases have not dealt with issues of interpretation and application of article 3.

Notes

[1] GE [paras. 76–78].

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*].

[a] A State where certain functions relating to insolvency proceedings have been conferred upon Government-appointed officials or 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*].

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 4 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 163–166]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [para. 69]; A/CN.9/422 [paras. 68–69]; A/CN.9/433 [paras. 44–45]; A/CN.9/435 [paras. 118–122];

(b) GE (1997): A/CN.9/436 [paras. 47–50]; A/CN.9/442 [paras. 79–83].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 98].

INTRODUCTION

1. The GEI [paras. 94–98][1] notes the value of article 4 in increasing the transparency and ease of use of the insolvency legislation enacting the MLCBI for the benefit of, in particular, foreign representatives and foreign courts.

CASE LAW ON ARTICLE 4

2. Reported cases have not dealt with issues of interpretation of article 4.

Notes

[1] GE [paras. 79–83].

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 5 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 167–169]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 36–39]; A/CN.9/422 [paras. 70–74]; A/CN.9/433 [paras. 46–49]; A/CN.9/435 [paras. 123–124];

(b) GE (1997): A/CN.9/436 [paras. 51–52]; A/CN.9/442 [paras. 84–85];

(c) GEI (2013): A/CN.9/763 [para. 26]; A/CN.9/766 [para. 30].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 100].

INTRODUCTION[1]

1. The GEI [paras. 99–100][2] explains that the intent of article 5 is to equip insolvency representatives or other authorities appointed in insolvency proceedings commenced in the enacting State to act abroad as foreign representatives of those proceedings. The article makes it clear that the scope of the power exercised abroad by the insolvency representative would depend on the foreign law and courts.

CASE LAW ON ARTICLE 5

2. One case reported concerned authorization of the liquidator to search for assets abroad for the purposes of freezing and repatriation.[3] Authorization was provided by an instruction from the supervising administrative authority, delegating the ability to act abroad to the insolvency representative.

Notes

[1] United States Bankruptcy Code, 11 U.S.C. sect. 1505 (enacting art. 5 of the MLCBI), provides that the authorization to act in another State may be provided by the court.

[2] GE [paras. 84–85].

[3] *Chile*: Onix Capital SA *cited in Cross-Border Insolvency*: *A Commentary on the UNCITRAL Model Law on Cross-Border Insolvency,* Fourth Edition, vol. 1, Globe Law and Business, 2017, p. 136.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 6 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 170–173]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [para. 40]; A/CN.9/422 [paras. 84–85]; A/CN.9/433 [paras. 156–160]; A/CN.9/435 [paras. 125–128];

(b) GE (1997): A/CN.9/436 [para. 53]; A/CN.9/442 [paras. 86–89];

(c) GEI (2013): A/CN.9/715 [paras. 26–30]; A/CN.9/738 [para. 32].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 104].

INTRODUCTION

1. The GEI [paras. 101–104][1] notes that because the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 6. However, it goes on to note that the concept, which is standard in a number of UNCITRAL texts,[2] has been interpreted narrowly and applied only in exceptional circumstances on a consistent basis in courts around the world. The purpose of the word "manifestly",[3] used in many other international legal texts as a qualifier of the expression "public policy", is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State. The public policy exception is also discussed in the JP [paras. 48–54].

CASE LAW ON ARTICLE 6

2. Decisions in a number of cases reinforce the notion that the use of the word "manifestly" reflects the intent of the drafters of the MLCBI that article 6 should only be invoked in exceptional circumstances concerning matters of fundamental importance for the enacting State,[4] and that the public policy exception should be construed narrowly or restrictively,[5] consistent with international standards. It has been suggested that the word "manifestly" means something more than mere contrariness or incompatibility; where there is any doubt or confusion as to whether something is contrary to or incompatible with public policy, there cannot be anything "manifestly" contrary to that policy.

3. Article 26 of the EIR[6] also contains a public policy exception along the lines of article 6. Decisions interpreting article 26 also stress that the exception is only available in exceptional cases.[7] The ECJ has held that recognition of insolvency proceedings commenced in another European Union member State may only be refused where the decision to commence was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoyed.[8]

4. Since article 6 deals with all of the provisions of the MLCBI, not just with the question of recognition, any application to take action under a specific provision of the MLCBI may require the court to consider whether the action in question would be contrary to the public policy of the enacting State.[9] However, sparing application of article 6 suggests that the exception could be applied only if another specific provision of the MLCBI did not govern the dispute in question.[10] An example cited was that discretionary relief could only be granted under article 21 if the protections established under article 22 were met.

5. Courts have indicated that the parties objecting to an action to be taken under the MLCBI should identify the fundamental policies that would allegedly be violated by the action.[11]

6. Three principles have been identified in the case law of one State to guide courts in analysing whether an action taken in a recognition proceeding is manifestly contrary to the public policy of that State under the equivalent of article 6 of the MLCBI:[12]

(a) The mere fact of a conflict between foreign law and local law, absent other considerations, is insufficient to support the invocation of the public policy exception;

(b) Deference to a foreign proceeding should not be afforded in a recognition proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections;

(c) An action should not be taken in a recognition proceeding where taking that action would frustrate the ability of the courts to administer the recognition

proceeding and/or impinge severely on a local constitutional or statutory right, particularly if a party continues to enjoy the benefits of the recognition proceeding.

7. The public policy exception has been argued, almost as a matter of course, in many applications for recognition. However, it has been found to apply in very few situations, as indicated in the following examples:

(a) Recognition was denied on the basis of article 6 in a case where the foreign proceeding seeking recognition had been pursued by a creditor in violation of the automatic stay applicable in prior insolvency proceedings commenced in the receiving State, in spite of the creditor having been made aware of the possible consequences of pursuing the foreign proceeding;[13]

(b) Relief sought was denied on the public policy ground in several circumstances, including:

(i) Where the relief sought (ex parte) was contrary to the law of the receiving State – the request was to enforce a mail interception order issued in the foreign insolvency proceedings which would involve monitoring and intercepting the debtor's postal and electronic traffic on servers in the receiving State;[14]

(ii) Where the relief sought by the foreign representative (rejection of intellectual property licences in the receiving State under the applicable foreign law) would result in creditors in the receiving State being insufficiently protected as required by article 22, paragraph 1, because they would not have available to them the protections available to licensees under the law of the receiving State, thereby undermining the fundamental public policy of that State of promoting technological innovation.[15]

8. Application of the public policy exception has been rejected in a number of circumstances, including where:

(a) A party was deprived of a jury trial in the originating State (when they would be entitled to such a trial in the receiving State) in circumstances in which the procedures of the originating State were nevertheless found to afford substantive procedural and due process protections and were otherwise fair and impartial;[16]

(b) There was no unfettered access to court records in the originating State;[17]

(c) Creditors in the receiving State were required to share with creditors in the foreign proceeding when they would not have been required to so share in a proceeding in the receiving State;[18]

(d) The foreign proceeding was commenced on a basis that was not available under the law of the receiving State;[19]

(e) Review of a default judgment in the originating State could be sought without the posting of a bond;[20]

(f) The relief sought was different to that available or was not permissible in the receiving State;[21]

(g) The relief requested was to stay a creditor from proceeding against funds in the receiving State pending a determination, in the foreign court where insolvency proceedings were pending, of the debtor's and non-debtor affiliates' rights against those funds. The receiving court ordered the stay but conditioned it on the parties proceeding promptly to determine the issues in the foreign court;[22]

(h) The foreign representative had taken directly conflicting positions in the originating and receiving States, without disclosure. Continued recognition was found not to be contrary to the public policy of the receiving State;[23]

(i) There was an alleged conflict of interest (i.e., competing fiduciary roles) on the part of the foreign insolvency representative that could have been raised in the appointing State, but the objecting creditor had failed to do so;[24]

(j) The foreign insolvency prioritized secured creditors differently to the law of the receiving State, which was characterized by the receiving court as another way of achieving similar goals, rather than manifestly contravening public policy;[25]

(k) Various elements of the foreign insolvency law were argued to be manifestly contrary to public policy; for example, substantive consolidation was ordered ex parte in the foreign proceeding without procedural and substantive fairness to certain creditors or due process and judges were able to hold ex parte meetings with different parties to the proceedings;[26]

(l) If required by the terms of the MLCBI and the national enacting law, funds held in the receiving State could be remitted to the originating State, without payment of outstanding taxes in the receiving State;[27]

(m) It was argued that creditors had not received notice of the foreign proceeding, recognition would result in a stay that would permit the debtor to avoid complying with other court orders and prevent creditors from pursuing fraudulent transfer claims in the originating jurisdiction and the liquidators in the foreign proceeding were not independent as they were funded by creditors or insiders;[28]

(n) Because the receiving court limited questioning during the recognition hearing about an arbitration on the basis that it was not relevant to the question before the court, it was argued it had violated the public policy favouring openness and transparency in court.[29]

Public policy: full and frank disclosure and bad faith *(see also article 17)*

9. Application of the public policy exception has been argued in several cases involving bad faith or failure on the part of the foreign representative to fully and frankly disclose pertinent facts to the receiving court. It has been held that notwithstanding a finding of bad faith on the part of the debtors, it was inappropriate to invoke article 6 as there was no precedent for applying the exception on the sole ground of misbehaviour. The court in that case went on to say that although it was offended by the conduct of the debtors, the question of recognition, on the facts of the case before it, turned on compliance with the requirements of article 17.[30] In another case, the applicant for recognition did

not disclose facts relating to the decision by the Government of the receiving State not to assist in criminal proceedings in the originating State against certain parties on the basis that to do so would be likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the receiving State. The court found that it should have been told that public policy issues might be engaged as the result of the highly political nature of the case and dismissed the recognition order *ab initio*.[31]

Notes

[1] GE [paras. 86–89].

[2] E.g., the 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, article 36 (1) *(b)* (ii), pp. 183–185, available at https://uncitral.un.org.

[3] It might be noted that some jurisdictions, such as Chile, Serbia and Singapore, have omitted the word "manifestly" when enacting art. 6 of the MLCBI, leading to a potentially different standard of exclusion than that applicable under the MLCBI. With respect to Singapore, see Re: Zetta Jet Pte Ltd and Others [2018] SGHC 16 [paras. 22–23], 24 January 2018, CLOUT 1815; in Poland, the formulation of art. 6 provides that recognition of a ruling opening foreign proceedings cannot contravene basic principles of the legal order of Poland, although it is suggested the aim is the same as art. 6: Bankruptcy Law, 1 January 2016 (art. 392 (2)).

[4] *United States*: Millard 501 B.R. 644, 651–652 (Bankr. S.D.N.Y. 2013); Lavie v Ran 607 F.3d 1017, 1021 (5th Cir. 2010); Iida v Kitahara (*In re* Iida) 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007), CLOUT 761; Ephedra Prods. Liab. Litig. 349 B.R. 333, 336 (S.D.N.Y. 2006), CLOUT 765.

[5] *Canada*: Hartford Computer Hardware Inc. 2012 ONSC 964 [paras. 17–18], CLOUT 1205. *United States*: Legislative history to Bankruptcy Code (11 U.S.C.), Ch. 15 indicates this interpretation: H.R. Rep 109–31 pt. 1, 109th Cong. 1st Sess. at 109 (2005) reprinted in U.S.C.C.A.N. 88, 172; see also Ephedra Prods. Liab. Litig. 349 B.R. 333, 336 (S.D.N.Y. 2006), CLOUT 765; Tri-Continental Exchange, Ltd. 349 B.R. 627, 638–9 (Bankr. E.D. Cal. 2006), CLOUT 766; Iida v Kitahara (*In re* Iida) 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007), CLOUT 761; Metcalfe & Mansfield Alternative Invs. 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010), CLOUT 1007; Toft 453 B.R. 186, 193 (Bankr. S.D.N.Y. 2011), CLOUT 1209; Vitro S.A.B. de C.V. 701 F.3d 1031, 1069–70 (5th Cir. 2013), CLOUT 1310; Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 139 (2d Cir. Apr. 16, 2013), CLOUT 1339; Sino-Forest Corporation 510 BR 655, 665 (Bankr. S.D.N.Y., 2013) *following* Metcalfe & Mansfield Alternative Invs. 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010), CLOUT 1007 and *distinguishing* Vitro S.A.B. de C.V. 701 F.3d 1031, 1069–70 (5th Cir. 2013), CLOUT 1310 on protection of third-party releases.

[6] *England*: Agrokor DD [2017] EWHC 2791 (Ch) [para. 109], CLOUT 1798.

[7] Article 33 of the recast EIR, which provides "Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgement handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual."

[8] *EIR*: MG Probud Gdynia sp. z o. o., C-444/07 [2010] ECR 00.

[9] *EIR*: Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ) [paras. 61–67].

[10] *England*: Pan Ocean Co. Ltd [2014] EWHC 2124 (Ch) [para. 104], CLOUT 1482.

[11] *United States*: Toft 453 B.R. 186, 195–196 (Bankr. S.D.N.Y 2011), CLOUT 1209 – court indicated that it was not an issue of fashioning relief in a manner that sufficiently protected all interested parties, but rather one where the relief sought (a mail interception order) would directly contravene United States law and public policies.

[12] *United States*: Iida v Kitahara (*In re* Iida) 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007), CLOUT 761 – debtors failed to articulate any fundamental policy that would be offended by recognition.

[13] *United States*: Toft 453 B.R. 186, 195 (Bankr. S.D.N.Y 2011), CLOUT 1209; ABC Learning Centre Limited 728 F.3d 301, 309–311 (3d Cir. 2013), CLOUT 1338; Manley Toys Limited, 580 B.R. 632, 650 (Bankr. D. N. J 2018) (noting the laws of Hong Kong, China, on fraudulent transfers are not the same as those of the United States).

[14] *United States*: Gold & Honey, Ltd. 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009), CLOUT 1008 – debtor's assets were seized in proceedings in Israel, undermining the United States court's ability to conduct the earlier commenced United States insolvency proceedings, hindering that court's ability 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. See also *Singapore*: Re: Zetta Jet Pte Ltd and Others [2018] SGHC 16, CLOUT 1815 where a moratorium issued in Singapore enjoining further action in the United States Ch. 11 proceedings was not observed. The Singapore court said that at the very least it would interpret the public policy bar in Singapore (noting that the legislation enacting the MLCBI omits the word "manifestly") as requiring denial of an application for recognition by foreign insolvency representatives enjoined by a Singapore court. Although the court said it would be rare in such circumstances not to refuse recognition, it accorded recognition for the limited purpose of applying to set aside or appeal the Singapore injunction, characterizing that recognition as a form of modification under article 17 (4) or as a manner of relief under article 21 (1).

[15] *United States*: Toft 453 B.R. 186, 196 (Bankr. S.D.N.Y 2011), CLOUT 1209 – the court held that such powers would exceed the traditional limits on the powers of a trustee under United States law, constitute relief that was banned by statute in the United States and might subject anyone who carried it out to criminal prosecution. The mail interception order issued in the insolvency proceedings in Germany had been recognized and enforced in England on the basis that *(a)* the relief granted in Germany did not violate public policy of the United Kingdom because, under local law, the court could enter a mail redirection order similar to the one entered in Germany, and *(b)* there should be no concern about lack of procedural fairness in granting ex parte relief, because the debtor had been able to oppose the mail interception order in the proceeding in Germany, and his challenge had been rejected by the court in Germany [Order by the High Court of England and Wales, 16 February 2011].

[16] *United States*: Jaffé v Samsung Electronics Co., Ltd., 737 F.3d 14 (4th Cir. 2013), CLOUT 1337.

[17] *United States*: Ephedra Prods. Liab. Litig. 349 B.R. 333 (S.D.N.Y. 2006), CLOUT 765.

[18] *United States*: Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.) 714 F.3d 127, 140 (2d Cir. Apr. 16, 2013), CLOUT 1339 – the court found that the principle of public access to court documents, because it was not absolute and could easily give way to privacy interests or other considerations, was not so fundamental as to fall within the exception of art. 6.

[19] *United States*: Petition of Ernst & Young, Inc., 383 B.R. 773 (Bankr. D.Colo. 2008), CLOUT 790 – the court said all investor creditors should share in the assets accumulated in the foreign proceeding, regardless of nationality or locale; objecting parties also argued that the costs of the foreign proceeding would deplete the assets of the debtor to such an extent that distributions would be minimal and that that also was contrary to public policy. The court observed costs were a reality, whether the procedure was foreign or local.

[20] *United States*: Gerova Financial Group, Ltd. 482 B.R. 86, 95 (Bankr. S.D.N.Y. 2012), CLOUT 1275 – the foreign law allowed an application by a single creditor, whereas the law of the receiving State required the support of 3 or more creditors when there were more than 12 creditors in total.

[21] *United States*: Millard 501 BR 644, 650–51 (Bankr. S.D.N.Y. 2013) – it was argued that because the foreign proceeding had been commenced to insulate assets from legitimate claims (a foreign tax claim that was unenforceable in the originating State) and to obtain an unbonded stay, providing assistance to that proceeding was manifestly contrary to public policy.

[22] *Canada*: Hartford Computer Hardware (2012) ONSC 964, CLOUT 1205 – the debtor-in-possession facility order made in the originating State, part of which involved a partial "roll up", would not be permissible in primary proceedings in the receiving State. *United States*: Metcalfe & Mansfield Alternative Invs. 421 B.R. 685, 695–697 (Bankr. S.D.N.Y. 2010), CLOUT 1007 – the court said the relief granted in the foreign proceeding and the relief available in a United States proceeding need not be identical. If that were to be a requirement, the court said, the public policy exception in article 6 would be unnecessary. The issue was whether effect should be given in the United States to third-party releases confirmed in a plan implementation order in Canada. The court held that the order in Canada did not violate United States public policy and should be recognized, even if a similar release might arguably be unenforceable in a United States proceeding.

[23] *United States*: Cozumel Caribe, S.A. de C.V. 482 B.R. 96, 112–113 (Bankr. S.D.N.Y. 2012), CLOUT 1311.

[24] *United States*: Cozumel Caribe, S.A. de C.V. 508 B.R. 330, 337 (Bankr. S.D.N.Y. 2014) – receiving court said that serious questions had been raised about the conduct of the foreign representative and the principals of the debtor, but that it was not the court's role to sit in review of the rulings and conduct of the foreign court proceedings. The court noted that there may be extreme circumstances in which dismissal of a recognition case was justified as an appropriate sanction for misconduct.

[25] *United States*: British American Isle of Venice, Ltd. 441 B.R. 713, 718 (Bankr. S.D.Fla. 2010).

[26] *United States*: ABC Learning Centres Limited 728 F.3d 301, 310–311 (3d Cir. 2013), CLOUT 1338 – laws in Australia allowed secured creditors to realize the full value of their debts and tender any excess to the liquidators, as opposed to the position in the United States where secured creditors must generally turn over assets and seek distribution from the estate. The court said that rather than recognition being contrary to public policy, refusing recognition and allowing the objecting creditor to use courts in the United States to circumvent the liquidation proceedings in Australia would undermine the core bankruptcy policies of ordered proceedings and equal treatment; see also *England*: Agrokor DD [2017] EWHC 2791 (Ch) [para. 131], CLOUT 1798 where the court noted the priorities under the law of Croatia were different than those applicable under the law of England.

[27] *United States*: OAS S.A. 533 BR 83, 104–105 (Bankr. S.D.N.Y. 2015), CLOUT 1629 – court considered the issues in some detail in the light of the actual facts of the case and what had transpired in the foreign proceedings, as well as the provisions of United States law and applicable exceptions. It was satisfied that due process was met because the ex parte proceedings and orders (including the consolidation order) were subject to ex post review. The court quoted United States case law and the GEI [30] to the effect that "differences in insolvency schemes do not themselves justify a finding that enforcing one State's laws would violate the public policy of another State."; Irish Bank Resolution Corporation Limited 538 B.R. 692, 698 (D. Del 2015), CLOUT 1628 – court disagreed with the contention that the foreign proceeding was contrary to public policy because it discriminated against the United States creditors and deprived them of due process and other constitutional rights in favour of benefiting the Government of Ireland. Court found the provisions objected to were parallel to provisions adopted by the United States in response to the global financial crisis.

[28] *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 144–148], CLOUT 1332.

[29] *United States*: Manley Toys Limited, 580 B.R. 632 (Bankr. D. N. J 2018).

[30] *United States*: Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88, 95 (S.D.N.Y. 2012), CLOUT 1208.

[31] *United States*: Creative Finance Ltd., 543 B.R. 498, 515–516 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

[32] *England*: Ivan Cherkasov, William Browder, Paul Wrench v Nogotkov Kirill Olegovich, The Official Receiver of Dalnyaya Step LLC (in liq) [2017] EWHC 3153 (Ch) [para. 89], CLOUT 1797 – it might be noted that the parties had agreed the recognition order should no longer continue, but it was not agreed whether it should be terminated or declared to have never been valid. With respect to disclosure, the court said [para. 64] that when seeking recognition, full and frank disclosure must be made to the court in relation to the consequences of recognition on third parties who are not before the court, including from intended future applications enabled by recognition.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 7 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [para. 175]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

GE (1997): A/CN.9/442 [para. 90].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 105].

INTRODUCTION[1]

1. The GEI [para. 105][2] explains that it is not the purpose of the MLCBI to displace the provisions of national law to the extent they provide assistance additional to or different from the type of assistance dealt with in the MLCBI. Article 7 is intended to clarify that point. The discussion under article 21 addresses the relationship between the two articles.

CASE LAW ON ARTICLE 7

2. Courts have considered the types of relief available under the MLCBI and the differences between article 21 and article 7. It has been suggested that "additional relief" under article 7 must be read as being different from "any appropriate relief" available under article 21, paragraph 1: when the requested relief is available under article 21, either generally as "any appropriate relief" or under one of the specific heads listed in the subparagraphs of article 21, paragraph 1, the court does not need to look to article 7, but when the requested relief is not available under article 21, either specifically or generally, article 7 functions as a "catch all" that provides for forms of relief "more extraordinary" than those permitted under either the specific or the general provisions of article 21.[3] It is suggested that this framework would prevent courts from subjecting relief under article 7 to the same limitations as relief under article 21 and would avoid "all-encompassing applications" of article 7.[4] Article 7 has been relied upon in one State to support recognition and enforcement of plans approved by foreign courts.[5]

Notes

[1] The United States Bankruptcy Code, 11 U.S.C. sect. 1507, enacting art. 7 of the MLCBI, directs that additional assistance be consistent with principles of comity. United States cases focusing on comity are not reported here.

[2] GE [para. 90].

[3] *United States*: Atlas Shipping A/S 404 B.R. 726, 741 (Bankr. S.D.N.Y. 2009), CLOUT 1277; Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd.) 601 F.3d 319, 325 (5th Cir. 2010), CLOUT 1006; Vitro S.A.B. de C.V. 701 F.3d 1031, 1054-1057 (5th Cir. 2013), CLOUT 1310.

[4] *United States*: Vitro S.A.B. de C.V. 701 F.3d 1031, 1057 (5th Cir. 2013), CLOUT 1310 – applying this framework to the facts before it, the court affirmed the denial of the foreign representative's request to enforce an order confirming a reorganization plan from Mexico that novated and in effect released the obligations of subsidiaries of the debtor from Mexico that had guaranteed notes issued by the debtor but had not themselves filed in bankruptcy. The court first determined that art. 21 did not specifically provide for discharging the obligations of non-debtor guarantors. Next, it determined that the general grant of relief in art. 21, para. 1, also did not provide the requested relief because non-consensual, non-debtor releases through a bankruptcy proceeding were "generally not available" under United States law and were "explicitly prohibited" in the Fifth Circuit. Turning to art. 7, the court noted that non-consensual, non-debtor releases were sometimes available in Circuits other than the Fifth, and therefore held that such relief was not precluded under art. 7. The court found, however, that the debtor had failed to provide evidence of the existence of extraordinary circumstances sufficient to establish a case for non-debtor releases under the law of those Circuits that allowed such releases. The court concluded that the Bankruptcy Court had not abused its discretion in denying relief under art. 7. Compare recognition of third-party releases in Metcalfe & Mansfield Alternative Invs., 421 B.R. 685 (Bankr. S.D.N.Y. 2010), CLOUT 1007; Sino-Forest Corp. 501 B.R. 655 (Bankr. S.D.N.Y. 2013); and Avanti Communications Group PLC, 582 B.R. 603 (Bankr. S.D.N.Y. 2018) – these cases have relied upon the extended provisions of art. 7 of the United States Bankruptcy Code (11 U.S.C. sect. 1507).

[5] *United States*: Agrokor d.d., 591 B.R. 163 (Bankr. S.D.N.Y. 2018) referring to Rede Energia S.A., 515 B.R. 69, 90 (Bankr. S.D.N.Y. 2014), CLOUT 1630; see also CGG S.A., 579 B.R. 716 (Bankr. S.D.N.Y. 2017); Cell C Proprietary Ltd., 571 B.R. 542 (Bankr. S.D.N.Y. 2017).

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 8 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [para. 174]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) GE (1997): A/CN.9/442 [paras. 91–92];

(b) GEI (2013): A/CN.9/715 [paras. 23–25]; A/CN.9/742 [paras. 37–38]; A/CN.9/763 [para. 26]; A/CN.9/766 [para. 30].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 107].

INTRODUCTION

1. The GEI [paras. 106–107][1] notes that a provision such as article 8 has been included in several UNCITRAL texts[2] to promote the idea of harmonized interpretation. This is aided by the system of case law on UNCITRAL texts (CLOUT), a system for collecting and disseminating information on court decisions and arbitral awards relating to the conventions and model laws emanating from the work of the Commission. The purpose of the system is to promote international awareness of the legal texts formulated by the Commission and to facilitate their uniform interpretation and application. The system is available at https://uncitral.un.org/en/case_law.[3]

CASE LAW ON ARTICLE 8

2. Courts have noted that the international origins of the MLCBI and the concept of international cooperation and coordination on which it is based encourage courts to look beyond their own jurisdictions to foreign interpretations of the MLCBI and other extrinsic materials for interpretative guidance, especially where provisions of the MLCBI are unclear or ambiguous.[4] However, not all States enacting legislation based on the MLCBI have included article 8, as drafted in the MLCBI, in that legislation.[5]

3. In those States that have enacted article 8, the sources most commonly referred to by the courts are the guides to enactment of the MLCBI as tools for legislators, judges, practitioners, academics and other users of the MLCBI. Under some laws enacting the MLCBI, courts are obliged to treat the guides to enactment as persuasive;[6] in other States, courts are entitled to look to the guides and other extrinsic materials, but may not be obliged to do so, notwithstanding, as observed by one court, that the Commission and the General Assembly recommend that "it be given due consideration as appropriate by […] judges".[7] Some courts referring to the guides have noted the usefulness of the explanations provided and the recitation of the relevant history.[8]

4. Various courts have noted: the statutory intent to conform national law with international law that is explicit in article 8;[9] the importance of consulting international sources to the extent they help carry out the legislator's purpose of achieving international uniformity in cross-border insolvency proceedings;[10] and the need to consider the international origin of the legislation and to promote an application of that legislation that is consistent with the application of similar statutes adopted by foreign jurisdictions.[11]

5. In terms of the extrinsic sources that may be considered, courts have looked to:

(a) The GEI[12] and the GE;[13]

(b) The JP;[14]

(c) The Legislative Guide;[15]

(d) The Practice Guide;[16]

(e) Reports of the UNCITRAL/INSOL/World Bank Multinational Judicial Colloquiums;[17]

(f) The EIR, where it uses terms the same as used in the MLCBI e.g., "COMI" and "establishment";[18]

(g) The Virgos-Schmit Report, which although prepared for the purpose of the earlier European Convention, provides material relevant to interpretation of the EIR;[19]

(h) Foreign interpretations and judicial precedents on the MLCBI;[20]

(i) Documents relating to preparation of the MLCBI originating from UNCITRAL (e.g., Commission reports) or its Working Group (e.g., working papers and working group reports);[21]

(j) Working papers of UNCITRAL Working Group V (Insolvency Law);[22]

(k) Explanatory memorandums prepared by some enacting States for submission of draft legislation to legislative bodies;[23]

(l) Scholarly writing on the MLCBI.[24]

6. It has been suggested by several courts that the Vienna Convention on the Law of Treaties (1969) was an authoritative statement of customary international law for the purposes of construing the MLCBI and that article 32 of that Convention allowed recourse to supplementary means of interpretation, including preparatory work of the international instrument and the circumstances of its conclusion to confirm or determine meanings in cases of ambiguity, obscurity or unreasonableness.[25]

Notes

[1] GE [paras. 91–92].

[2] E.g., the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), art. 7 (1) – see the Digest of Case Law on the CISG for cases interpreting art. 7; the UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, art. 2A (adopted 2006) – see the 2012 Digest of Case Law on the Model Law on International Commercial Arbitration; and the UNCITRAL Model Law on Electronic Commerce (1996), art. 3 (1).

[3] The system is available in all six official languages of the United Nations and is explained in document A/CN.9/SER.C/GUIDE/1/Rev.3, which is also available at https://uncitral.un.org/en/case_law.

[4] The United States Bankruptcy Code, 11 U.S.C. sect. 1508, enacting art. 8 of the MLCBI, directs the bankruptcy court to "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": O'Sullivan v Loy 432 B.R. 551, 560 (E.D. Va. 2010); JSC BTA Bank 434 BR 334, 340 (Bankr S.D.N.Y. 2010), CLOUT 1211; Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd.) 601 F.3d 319, 321–322 (5th Cir. 2010), CLOUT 1006; Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.) 714 F.3d 127, 136 (2nd Cir. Apr. 16, 2013), CLOUT 1339; OAS S.A. 533 BR 83, 92 (Bankr. S.D.N.Y. 2015), CLOUT 1629; Elpida Memory, Inc., case No. 12-10947 (Bankr. D. Del. Nov. 16, 2012), p.5 – court suggested that despite local requirements to interpret statutes according to their plain meaning, in the case of legislation enacting the MLCBI, it was arguable that plain meaning should be subservient to legislative history or more general principles of comity.

[5] E.g., Canada, the Dominican Republic, Poland, the Philippines, the Republic of Korea and Uganda.

[6] *United States*: Ephedra Prods. Liab. Litig., 349 B.R. 333, 336 (S.D.N.Y. 2006), CLOUT 765; Lee, 472 B.R. 156, 180 (Bankr. D. Mass. 2012) *citing* Tri-Continental Exchange, Ltd., 349 B.R. 627, 633 (Bankr. E.D. Cal. 2006), CLOUT 766 – "Congress [...] focused the attention of United States courts to various international sources when construing Chapter 15, which sources Congress described as 'persuasive' " (*citing* H.R. Rep 109–31 pt. 1, 109th Cong. 1st Sess. at 109–110 (2005)). According to the court in Tri-Continental Exchange, Ltd., one of the sources that a United States court is obliged to treat as persuasive is the guide to enactment of the MLCBI; *compare* Basis Yield Alpha Fund (Master) 381 B.R. 37, 51, CLOUT 789, in which the court said that a United States court at least *may* look to, if it is not also *obliged* to treat as persuasive, the guides to enactment, *citing* Bear Stearns, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007), CLOUT 760, in which the court said a United States court "may look to" the guides as persuasive.

[7] *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 36], CLOUT 1475 referring to the decision of the Commission at its 973rd meeting, 18 July 2013, *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 17* (A/68/17) [para. 198].

[8] Ibid., *Australia*: Kapila.

[9] *United States*: Lavie v Ran (Ran), 607 F.3d 1017, 1020 (5th Cir. 2010); Betcorp Limited, 400 B.R. 266, 283 (FN23) (Bankr. D.Nev. 2009), CLOUT 927 – pointing to a problem with the use and interpretation of "foreign court" in the definitions applicable to Ch. 15, the court said that deviating from accepted methods of statutory interpretation was justified by the international context of the case and the directives of Congress to construe Ch. 15 so that it was consistent with international understandings – that an administrative authority should be considered a court.

[10] *Singapore*: Re: Zetta Jet Pte Ltd and Others [2018] SGHC 16 [para. 34], CLOUT 1815 – court said granting limited recognition to the foreign proceedings only for the purposes of enabling the foreign representative to apply to set aside or appeal an injunction granted in Singapore, or matters directly related to such applications, such as extensions of time, was consonant with the philosophy and objective of the Singapore statute and the Singapore Model Law, "including the need to have regard to the international basis of the MLCBl and the promotion of uniformity as required by art. 8." *United States*: Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 136 (2d Cir. Apr. 16, 2013), CLOUT 1339. See also *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 38], CLOUT 1475. *Japan*: Think3, case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 2 (1), CLOUT 1335 noting that diversity of outcomes with respect to the date at which COMI is determined does not promote uniformity of interpretation (see discussion on timing under art. 17, para. 2).

[11] *England*: Rubin & Anor v Eurofinance SA and 3 Ors [2009] EWHC 2129 [paras. 39–40], affirmed [2012] UKSC 46, CLOUT 1270 – lower court said it was unrealistic to give words used in the MLCBI their ordinary domestic meaning (in this case "debtor" in art. 2, subpara. *(a)*). Regard had to be had to its international origin and the word should have the meaning that is given to it by the foreign court in the foreign proceeding. *United States*: Oversight & Control Commission of Avanzit, S.A., 385 B.R. 525 (Bankr. S.D.N.Y. 2008), CLOUT 925; Betcorp Limited, 400 B.R. 266, 276 (Bankr. D. Nev. 2009), CLOUT 927; Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 321 (5th Cir. 2010), CLOUT 1006; AJW Offshore, Ltd., 488 B.R. 551 (Bankr. E.D.N.Y. 2013); OAS S.A. 533 BR 83, 91–92 (Bankr. S.D.N.Y. 2015), CLOUT 1629.

[12] E.g., *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 36], CLOUT 1475 referring to GEI [para. 159] on timing and [para. 69] referring to GEI [para. 181]; Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [para. 41], CLOUT 1332. *England*: Sturgeon Central Asia Balanced Fund Limited [2019] EWHC 1215 (Ch) [para. 15] CLOUT 1819. *United States*: OAS S.A., 533 B.R. 83 (Bankr. S.D.N.Y. 2015), CLOUT 1629 – 95 referring to GEI [para. 71], [para. 74], 98 referring to GEI [para. 86], 103 referring to GEI [para. 104].

[13] E.g., *Australia*: Bank of Western Australia v Henderson (No. 3) [2011] FMCA 840, CLOUT 1216 [para. 16] referring to GE [paras. 3, 20, 42]; Raithatha v Ariel Industries PLC [2012] FCA 1526 at [paras. 35–36] referring to GE [paras. 23–25] on "foreign proceeding"; Akers v Deputy Commissioner of Taxation [2014] FCAFC 57, CLOUT 1332 [para. 125], referring to GE [para. 157] on art. 22; *England*: Rubin v Eurofinance SA [2009] EWHC 2129 [para. 64] referring to GE [paras. 15, 16, 20, 28] on arts. 25–27 [2010] EWCA Civ 895 [para. 53] referring to the preamble [paras. 13–14, 19–20] and [2012] UKSC 46, CLOUT 1270 [para. 28] referring to GE [para. 20 *(b)*], [para. 138] referring to GE [paras. 154, 156]; Stanford International Bank [2010] EWCA Civ 137, CLOUT 1003 [para. 6] referring to GE [para. 71] on insolvency

proceedings [para. 9] referring to GE [para. 23] on foreign proceedings [para. 37] referring to GE [para. 31] on main proceedings and [para. 72] on the European Convention; Chesterfield United Inc. [2012] EWHC 244 (Ch), CLOUT 1271 [para. 11] referring to GE [para. 154] on art. 21, para. 1; Pan Ocean Co Ltd [2014] EWHC 2124 (Ch), CLOUT 1482 [para. 6] referring to GE [para. 24] on "foreign proceeding" [para. 67] referring to GE [paras. 145–146] and [para. 155] on arts. 20, 21, also [paras. 88, 90] – court noted that the 1999 published version was the one referred to in regulation 2 of the CBIR, but also that the relevant passages were essentially repeated in the version published in 2014; Agrokor DD [2017] EWHC 2791 (Ch) [paras. 44, 55, 79, 94, 110], CLOUT 1798; Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia [2018] EWCA Civ 2802 [paras. 34–37], CLOUT 1822; Sturgeon Central Asia Balanced Fund Ltd (in liq) [2019] EWHC 1215 (Ch) [paras. 15, 34], CLOUT 1819; *United States*: The House Report contemplates the courts looking to the GE and reports cited therein to aid the courts in achieving uniform interpretation of Ch. 15: H.R. Rep. No. 109–31, pt. 1 at 109–110 (2005) reprinted in 2005 USCCAN 88, 172–173. Cases include: Tri-Continental Exchange, Ltd., 349 B.R. 627, 638 (Bankr. E.D. Cal. 2006), CLOUT 766 referring to GE [para. 88] on art. 6, and [paras. 161–163] on art. 22; Ephedra Prods. Liab. Litig.) 349 B.R. 333, 336 (S.D.N.Y. 2006), CLOUT 765 referring to art. 6 on public policy; Bear Stearns, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007), CLOUT 760, affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794, on COMI; Basis Yield Alpha Fund (Master), 381 B.R. 37, 51 (Bankr. S.D.N.Y. 2008), CLOUT 789 referring to GE [para. 122] on art. 16; Oversight & Control Commission of Avanzit, S.A., 385 B.R. 525, 533 (Bankr. S.D.N.Y. 2008), CLOUT 925, referring to GE [para. 24] on proceedings eligible for recognition; Betcorp Limited, 400 B.R. 266 (Bankr. D. Nev. 2009) CLOUT 927, at 276, referring to GE [para. 23], 286 to GE [para. 31] and [para. 72] on the origin of COMI; British-American Insurance Co., Ltd., 425 B.R. 884 (Bankr. S.D.Fla. 2010), CLOUT 1005, 902 referring to GE [para. 23] on "foreign proceeding", 909 referring to GE [para. 31] on origin of COMI, 910 referring to GE [para. 130] on changed circumstances; Lee, 472 B.R. 156, 181 (Bankr. D. Mass. 2012) referring to GE [paras. 161–163] on art. 22; Elpida Memory, Inc., case No. 12-10947 (CSS). (Bankr. D. Del. Nov. 16, 2012), pp. 13, 16 referring to GE [para. 143] on art. 20; Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 109 (Bankr. S.D.N.Y. 2012), CLOUT 1311 referring to GE [para. 93] on art. 9; Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir. Apr. 16, 2013), CLOUT 1339, at 136 referring to GE [paras. 31, 72] on COMI (court concluded that international sources were of limited use in solving the question of whether a United States court should determine a debtor's COMI as of the time of the filing of the petition initiating the ancillary proceeding, or in some other way) and 139 referring to GE [para. 89] on art. 6.

[14] E.g., *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 36], CLOUT 1475; Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 41, 68], CLOUT 1332; King, in the matter of Zetta Jet Pte Ltd [2018] FCA 1932 [paras. 38–39], CLOUT 1817; *England*: Agrokor DD [2017] EWHC 2791 (Ch) [paras. 46–47], CLOUT 1798. *United States*: Ashapura Minechem Ltd., 480 B.R. 129, 137 (S.D.N.Y. 2012), CLOUT 1313; Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 110 (footnote 10) (Bankr. S.D.N.Y. 2012), CLOUT 1311.

[15] E.g., *England*: Rubin v Eurofinance SA [2012] UKSC 46, CLOUT 1270 [para. 96] quoting Legislative Guide part two, chap. II [paras. 150–151]; Agrokor DD [2017] EWHC 2791 (Ch) [paras. 45, 100], CLOUT 1798; *New Zealand*: Kim and Yu v STX Pan Ocean Co. Limited [2014] NZHC 845, CLOUT 1481 at [para. 17], referring to the Legislative Guide Glossary [para. 12 *(b)*] "assets of the debtor" for the purposes of art. 20, para. 1, of the MLCBI.

[16] E.g., *Australia*: Kapila, Re Edelsten (No. 2) [2016] FCA 1269 [para. 47]; *United States*: OAS S.A., 533 BR 83, 95 (Bankr. S.D.N.Y. 2015), CLOUT 1629, referring to terms and explanations: "debtor in possession" (reproducing the terms and explanations of the Legislative Guide Glossary).

[17] E.g., *England*: Rubin v Eurofinance SA [2009] EWHC 2129 [para. 70], affirmed by [2012] UKSC 46, CLOUT 1270 – referring to the importance of granting the courts flexibility and discretion in cooperating with foreign courts or foreign representatives as emphasized at the second such colloquium, New Orleans 1997 (the report is available at https://uncitral.un.org/en/colloquia/insolvency); Sturgeon Central Asia Balanced Fund Ltd (in liq) [2019] EWHC 1215 (Ch) [para. 28], CLOUT 1819 and [2020] EWHC 123 [paras. 59–89].

[18] E.g., *England*: Stanford International Bank Limited [2009] EWHC 1441 (Ch) [para. 46] (affirmed [2010] EWCA Civ 137, CLOUT 1003) – noting that framers of the MLCBI envisaged the interpretation of COMI in the EIR (which would necessarily take into account recital (13)) would be equally applicable to COMI in the MLCBI; *United States*: Betcorp Limited 400 B.R. 266 (Bankr. D. Nev. 2009), CLOUT 927, at 277 on "proceeding" as used in international insolvency law and at 286 on COMI.

[19] E.g., *New Zealand*: Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] NZLR 380 [para. 52], (12 October 2010), CLOUT 1220. *United States*: Jay Tien Chiang 437 B.R. 397, 403 (Bankr. C.D. Cal. 2010), CLOUT 1318; Betcorp Limited 400 B.R. 266, 286 (Bankr. D. Nev. 2009), CLOUT 927.

[20] E.g., *Australia*: Bank of Western Australia v Henderson (No. 3) [2011] FMCA 840 [paras. 25–32], CLOUT 1216; Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 36], CLOUT 1214 – court said that the Parliament had chosen to adopt for Australia a model developed under United Nations auspices for the purposes of multilateral adoption suggested, and regard to the Explanatory Memorandum confirmed, that Parliament's intention both with respect to the interpretation of the expression "COMI" and of the MLCBI generally was that they would be interpreted in harmony with international legal norms and with meanings given to that expression and that law in other adopting countries; Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [para. 69], CLOUT 1332 – in the lower courts (Ackers v Saad Investments Co Ltd. [2013] FCA 738 [paras. 34, 35], Ackers v Saad Investments Co Ltd [2010] FCA 1221 [para. 55]) reference was made to the fact that three courts in other jurisdictions (including England) had accepted the presumption in art. 16, para. 3, that the Cayman Islands proceedings were the main proceedings, which was "a factor that could also be taken into account in these proceedings", but was not relied upon to ground the courts' decisions.

England: Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) [paras. 72–74], [paras. 95–101], [paras. 106–107], CLOUT 1482; Stanford International Bank Limited [2010] EWCA Civ 137 [paras. 43–47], CLOUT 1003.

Japan: Think3, case No. (ra) 1757 of 2012 (appeal), Tokyo High Court (2 November 2012), CLOUT 1335 – court indicated that for interpretation of the law enacting the MLCBI in Japan, judicial precedents and interpretations of foreign countries and discussions in UNCTRAL should be used as references. The court also emphasized the desirability of avoiding inconsistent judgments in different countries.

New Zealand: Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] NZLR 380 (12 October 2010), CLOUT 1220 examining cases decided in the United Kingdom and the United States on "non-main" proceeding.

United States: O'Sullivan v Loy 432 BR 551, 560 (E.D. Va. 2010) – court said if a textual provision of Ch.15 was unclear or ambiguous, the court could then consider the MLCBI and foreign interpretations of it as part of its interpretive task. In doing so, the court could consider how foreign jurisdictions have interpreted language in the MLCBI that was similar to that of Ch.15; see also International Banking Corporation B.S.C. 439 B.R. 614, 624 (Bankr. S.D.N.Y. 2010), CLOUT 1317.

[21] E.g., *Australia*: Bank of Western Australia v Henderson (No. 3) [2011] FMCA 840 [para. 19], CLOUT 1216; Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 37], CLOUT 1214; Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [para. 48], CLOUT 1332 on access of foreign creditors and treatment of revenue creditors; Kapila, Re Edelsten (No. 2) [2016] FCA 1269 [para. 47].

England: Re: Pan Ocean Co Ltd [2014] EWHC 2124 (Ch), CLOUT 1482 [paras. 82–85] referring to A/CN/9/WG/V/WP.42 [para. 6], A/CN.9/419 [paras. 46–59], A/CN.9/433 and A/CN.9/435; Stanford International Bank Limited [2010] EWCA Civ 137, CLOUT 1003 [paras. 37, 53] referring to A/52/17 [para. 153]; Agrokor DD [2017] EWHC 2791 (Ch) [para. 46], CLOUT 1798; Sturgeon Central Asia Balanced Fund Ltd (in liq) [2019] EWHC 1215 (Ch) [paras. 29–33], CLOUT 1819.

New Zealand: Williams v Simpson (No. 1) [2011] NZHC 1631 (17 September 2010) [para. 35].

United States: Bear Stearns 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794; Betcorp Limited 400 B.R. 266 (Bankr. D. Nev. 2009), CLOUT 927 referring to A/CN.9/WG.V/WP.44 on the phrase "or other law relating to insolvency"; Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd.) 601 F.3d 319, 326 (5th Cir. 2010), CLOUT 1006, referring to A/CN.9/419 [paras. 50–53]; Vitro S.A.B. de C.V. 701 F.3d 1031, 1048 (5th Cir. 2013), CLOUT 1310 referring to A/CN.9/419 [paras. 112–113] on appointment of the foreign representative, also cited in OAS S.A. 533 BR 83, 94–95 (Bankr. S.D.N.Y. 2015), CLOUT 1629.

[22] E.g., *England*: Stanford International Bank Limited [2009] EWHC 1441 (Ch) affirmed [2010] EWCA Civ 137, CLOUT 1003; *Japan*: Think3 Inc., case Nos. (shou) 3 and 5 of 2011, Tokyo District Court (31 July 2012); case No. (ra) 1757 of 2012 (appeal), Tokyo High Court (2 November 2012), CLOUT 1335; *United States*: Gerova Financial Group, Ltd. 482 B.R. 86, 92 (Bankr. S.D.N.Y. 2012), CLOUT 1275, which refers to amendments to the Guide to Enactment being prepared (at that time) by UNCITRAL Working Group V, citing United Nations document A/CN.9/742 Report of Working Group V (Insolvency) on the Work of its forty-first session (New York, 30 April–4 May 2012), at [para. 60], wherein "a proposed change to the Model Law to clarify that the COMI determination be made as of the date of the commencement of the foreign insolvency proceeding 'received wide support.'"; Oi Brasil Holdings Cooperatief U.A., 578 B.R. 169, 242 (Bankr. S.D.N.Y. 2017) referring to the goals of the work being undertaken by UNCITRAL on enterprise group insolvency.

[23] *Australia*: Raithatha v Ariel Industries PLC [2012] FCA 1526 [paras. 38–39]; Tucker, in the matter of Aero Inventory (United Kingdom) Limited v Aero Inventory (United Kingdom) Limited (No. 2) [2009] 181 FCR 374 [para. 22], CLOUT 922; Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [para. 41], CLOUT 1332. See also *United States*: Betcorp Limited 400 B.R. 266, 282–283 (Bankr. D. Nev. 2009), CLOUT 927 referring to the explanatory memorandum prepared for the Parliament of Australia that serves as an aid to understanding the purpose and structure of the legislation and that courts in Australia may use the memorandums to interpret legislation that has been enacted. *United States*: the House Report contemplates the courts looking to the Guide to Enactment and reports cited therein to aid the courts in achieving uniform interpretation of Ch. 15: H.R. Rep. No. 109–31, pt. 1 at 109–110 (2005) reprinted in 2005 USCCAN 88, 172–173.

[24] E.g., *England*: Rubin v Eurofinance SA [2012] UKSC 46 [paras. 167–168], CLOUT 1270; Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) [para. 92], CLOUT 1482; Sturgeon Central Asia Balanced Fund Ltd (in liq) [2019] EWHC 1215 (Ch) [paras. 47–48], CLOUT 1819. *Canada*: Probe Resources Ltd. (2011), 2011 CarswellBC 1043, 79 C.B.R. (5th) 148 (B.C. S.C.) [paras. 21–22]. *United States*: Basis Yield Alpha Fund (Master) 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789; Betcorp Limited 400 B.R. 266, 277, 286–287 (Bankr. D. Nev. 2009), CLOUT 927; Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd.) 601 F.3d 319 (5th Cir. 2010), CLOUT 1006, at 321, 324 and 326; Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.) 714 F.3d 127, 135 (2d Cir. Apr. 16, 2013), CLOUT 1339; Lavie v Ran (*In re* Ran) 607 F.3d 1017, 1025 (5th Cir. 2010).

[25] *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 37], CLOUT 1214 – court said that via principles of statutory construction applicable in Australia it would be permissible to have regard to general principles of interpretation of such international instruments set out in the Vienna Convention and, via art. 32 of that Convention, to the preparatory work of UNCITRAL on the MLCBI; also Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 45–49], CLOUT 1332 – court said MLCBI must be interpreted having regard to its character as an international convention, as required by art. 8, which imports the rules of interpretation of arts. 31 and 32 of the Vienna Convention. See also *England*: Sturgeon Central Asia Balanced Fund Ltd (in liq) [2019] EWHC 1215 (Ch) [paras. 45–46], CLOUT 1819.

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

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 9 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 176–178]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 77–79 and 172–173]; A/CN.9/422 [paras. 144–151]; A/CN.9/433 [paras. 50–58]; A/CN.9/435 [paras. 129–133];

(b) GE (1997): A/CN.9/436 [para. 54]; A/CN.9/442 [para. 93];

(c) GEI (2013): A/CN.9/766 [para. 31].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 108].

INTRODUCTION

1. The GEI [para. 108][1] notes that article 9 is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State. The foreign representative is thus freed from having to meet formal requirements such as licences or consular action.

CASE LAW ON ARTICLE 9

2. One case reported confirms that, following recognition under article 17 (a requirement included in the enacting legislation in that State), the foreign representative has the capacity to sue and be sued under article 9.[2] Another court has noted that the principle of direct access in article 9 did not dictate that relief must be given to the foreign representative, as relief was specifically addressed under other articles.[3]

Notes

[1] GE [para. 93].

[2] *United States*: Massa Falida Do Ban Cruzeiro Do Sul S.A., 567 B.R. 212 (Bankr. S.D.Fla. 2018). United States Bankruptcy Code, 11 U.S.C. sect. 1509, enacting art. 9 of the MLCBI, includes a requirement for recognition and otherwise extends art. 9; cases reported are largely unrelated to the bare right of access in art. 9 of the MLCBI as drafted.

[3] *United States*: Cozumel Caribe, S.A., de C.V. 482 B.R. 96, 109–110 (Bankr. S.D.N.Y. 2012), CLOUT 1311.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 10 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 179–182]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [paras. 160–166]; A/CN.9/433 [paras. 68–70]; A/CN.9/435 [paras. 134–136];

(b) GE (1997): A/CN.9/436 [paras. 55–56]; A/CN.9/442 [paras. 94–96];

(c) GEI (2013): A/CN.9/763 [para. 27]; A/CN.9/766 [para. 31].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 111].

INTRODUCTION

1. The GEI [paras. 109–111][1] notes that article 10 constitutes a "safe conduct" rule aimed at ensuring that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground that the foreign representative has made an application for recognition of a foreign proceeding. The limitation is not, however, absolute and is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. Other possible grounds for jurisdiction over the foreign representative or the assets and affairs of the debtor under the laws of the enacting State are not affected; a tort committed by, or misconduct on the part of, the foreign representative may provide grounds for dealing with the consequences of that tort or misconduct.

CASE LAW ON ARTICLE 10

2. The immunity afforded by this article has been reiterated in the orders issued by some courts.[2]

Notes

[1] GE [paras. 94–96].

[2] *United States*: *In re* Lloyd (Les Mutuelles du Mans Assurances IARD, United Kingdom Branch) case No. 05-60100 (Bankr. S.D.N.Y. Dec. 7, 2005), CLOUT 788 – upon granting recognition, the court included in its order the following language: "that no action taken by the Petitioner, the Scheme Advisers, the Scheme, MMA, or each of their successors, agents, representatives, advisers or counsel, in preparing, disseminating, applying for, implementing or otherwise acting in furtherance of or in connection with the Foreign Proceeding, the scheme of arrangement, this Order, or this Ch. 15 case, or any adversary proceeding herein, or further proceeding commenced hereunder, shall be deemed to constitute a waiver of the immunity afforded to such persons under 11 U.S.C. sects. 306 and 1510." See also CSL Australia v Britannia Bulkers A/S, case No. 08-15187 (S.D.N.Y. Sept. 8, 2009) – United States Bankruptcy Code, 11 U.S.C. sect. 1509 *(e)*, provides that subject to art. 10, a foreign representative is subject to applicable non-bankruptcy law and must therefore comply with court orders; SNP Boat Service SA, 453 B.R. 446 (Bankr. S.D. Fla. 2011), CLOUT 1314 – court threatened to revoke recognition of a foreign main proceeding because the foreign representative was not complying with the discovery process.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 11 are contained in the following documents :

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 183–187]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [paras. 170–177]; A/CN.9/433 [paras. 71–75]; A/CN.9/435 [paras. 137–146];

(b) GE (1997): A/CN.9/436 [para. 57]; A/CN.9/442 [paras. 97–99];

(c) GEI (2013): A/CN.9/763 [para. 27]; A/CN.9/766 [para. 31].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 114].

INTRODUCTION

1. The GEI [paras. 112–114][1] indicates that article 11 is designed to ensure that it is clear under the law of the enacting State that the foreign representative has standing to request the commencement of an insolvency proceeding in that State, subject to the commencement conditions applicable under that law being satisfied. Recognition is not a precondition to that commencement on the basis that the proceeding may be crucial in cases of an urgent need to preserve the assets of the debtor. The article makes no distinction between the foreign representative of a foreign main or non-main proceeding.

CASE LAW ON ARTICLE 11

2. Reported cases have not dealt with issues of interpretation of article 11.[2]

Notes

[1] GE [paras. 97–99].

[2] United States Bankruptcy Code, 11 U.S.C. sect. 1511, enacting art. 11 of the MLCBI, provides that the right to commence a voluntary proceeding in the United States requires recognition under Ch. 15.

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*].

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 12 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17) [paras. 188–189]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [paras. 114–115, 147 and 149]; A/CN.9/433 [para. 58]; A/CN.9/435 [paras. 147–150];

(b) GEI (1997): A/CN.9/436 [paras. 58–59]; A/CN.9/442 [paras. 100–102];

(c) GEI (2013): A/CN.9/763 [para. 27]; A/CN.9/766 [para. 31].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 117].

INTRODUCTION

1. The GEI [paras. 115–117][1] indicates that purpose of the article is to ensure that when an insolvency proceeding concerning a debtor is taking place in the enacting State, the foreign representative of a foreign proceeding concerning that debtor will have standing to participate in the proceeding in the enacting State. The article does not specify what participation should mean, but the GEI suggests it may include, for example, making petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding.

CASE LAW ON ARTICLE 12

2. Reported cases have not dealt with issues of interpretation of article 12.[2]

Notes

[1] GE [paras. 100–102].

[2] *United States*: Reserve Int'l. Liquidity Fund, Ltd. v Caxton Int'l Ltd., 09 Civ. 9021 (S.D.N.Y. April 29, 2010) – court made no reference to art. 12, but confirmed that recognition was required before a foreign representative could appear in an interpleader action relating to the distribution of funds of the debtor. Allowing them to do so without recognition would constitute, the court said, tacit recognition that the foreign proceedings were valid and that the liquidators were in control of the debtor fund, both of which were matters that should be determined in an application under Ch. 15.

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*].[a]

[a] 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*].

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 13 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 190–192]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [paras. 179–187]; A/CN.9/433 [paras. 77–85]; A/CN.9/435 [paras. 151–156];

(b) GE (1997): A/CN.9/436 [paras. 60–61]; A/CN.9/442 [paras. 103–105].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 120].

INTRODUCTION

1. The GEI [paras. 118–120][1] explains that article 13 embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such a proceeding, should not be treated worse than local creditors. Paragraph 2 makes it clear that the principle of non-discrimination embodied in paragraph 1 leaves intact the provisions on the ranking of claims in insolvency proceedings, including any provisions that might assign a special ranking to claims of foreign creditors. However, in order to avoid emptying the principle of non-discrimination of its meaning, paragraph 2 establishes the minimum ranking for foreign creditor claims: the rank of general unsecured claims, except in those cases where an equivalent domestic claim would be ranked lower under the law of the enacting State than general unsecured claims (such as claims for financial penalties or fines, claims whose payment is deferred because of a special relationship between the debtor and the creditor or claims that have been filed after the expiry of the time period for doing so). The alternative provision in the footnote differs from the provision in the text only to the extent that it provides wording that permits States that deny recognition to foreign tax and social security claims to continue to discriminate against those claims.

CASE LAW ON ARTICLE 13

2. One court has said the MLCBI expressly recognized the possibility (in the footnote to article 13, paragraph 2), but did not expressly provide, for the local forum to exclude taxation and social security claims by foreign sovereigns from participating in the local distribution of the insolvent's estate. Moreover, the court noted that, in the reports of the UNCITRAL Working Group V (Insolvency Law) on the work of its nineteenth, twentieth and twenty-first sessions, in April 1996, October 1996 and January 1997 respectively, there was no discussion of the MLCBI operating in a manner by which, through recognition of a foreign proceeding, local revenue debts were to be destroyed or made locally unenforceable or irrecoverable.[2]

Notes

[1] GE [paras. 103–105].

[2] *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 46, 48], CLOUT 1332.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 14 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 193–198]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 84–87]; A/CN.9/422 [paras. 188–191]; A/CN.9/433 [paras. 86–98]; A/CN.9/435 [paras. 157–164];

(b) GE (1997): A/CN.9/436 [paras. 63–65 and 84]; A/CN.9/442 [paras. 106–111, 120–121].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 126].

INTRODUCTION

1. The GEI [paras. 121–126][1] explains that paragraph 1 is intended to reflect the principle of equal treatment of creditors, ensuring that foreign creditors will be notified whenever notification is required for creditors in the enacting State. Individual notification for foreign creditors is required, but courts are left with the discretion to decide otherwise in a particular case (e.g., if individual notice would entail excessive cost or would not seem feasible under the circumstances). Where notice is to be given, it is to be effected by whatever expeditious means the court considers appropriate, but letters rogatory or other formalities are not required. The GEI raises the relevance to cross-border insolvency cases of treaties dealing with judicial cooperation and procedures for communicating judicial or extrajudicial documents to addresses abroad and suggests that generally paragraph 2 would not be inconsistent with obligations under those treaties; to the extent that that there might be conflict, article 3 provides the solution. The content of the notice is specified, while other matters that might need to be included are referred to in the GEI [para. 126].

CASE LAW ON ARTICLE 14

2. Reported cases have not dealt with issues of interpretation of article 14.

Notes

[1] GE [paras. 106–111].

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 he 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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 15 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 199–209]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 62–69, 178–189]; A/CN.9/422 [paras. 76–93, 152–159]; A/CN.9/433 [paras. 59–67, 99–104]; A/CN.9/435 [paras. 165–173];

(b) GE (1997): A/CN.9/436 [paras. 66–69]; A/CN.9/442 [paras. 112–121];

(c) GEI (2013): A/CN.9/742 [para. 40].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 136].

INTRODUCTION

1. The GEI [paras. 127–136][1] explains that article 15, in conjunction with article 16, defines the core procedural requirements for an application by a foreign representative for recognition, focusing on simplicity and speed. Paragraph 2 takes a flexible approach to the evidence that is required in support of the application, so that if the applicant is unable to submit documents that in all details meet the requirements of subparagraphs *(a)* or *(b)*, subparagraph *(c)* enables the court to consider other evidence acceptable to it. The information required under paragraph 3 is intended to assist the court in appropriately tailoring relief in support of the foreign proceeding to ensure consistency with other proceedings concerning the same debtor. Paragraph 4 entitles, but does not compel, the court to require a translation of some or all of the documents accompanying the application for recognition. If it is compatible with the procedures of the court for it to proceed without translation, that may facilitate a decision being made on the application at the earliest possible time. The JP [para. 41] notes that the MLCBI makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the foreign proceeding satisfies the requirements of article 15, recognition should follow in accordance with article 17.[2]

CASE LAW ON ARTICLE 15

ARTICLE 15, PARAGRAPH 1

2. No reported cases have referred to issues arising under paragraph 1.

ARTICLE 15, PARAGRAPHS 2 AND 3

3. Courts have indicated that the first requirement for recognition is that the procedural elements of article 15, which are to be strictly construed,[3] be satisfied.[4] The foreign representative bears the burden of proof of those elements (see discussion on burden of proof under article 16, paragraph 3).[5] In a case in which recognition of multiple proceedings was sought in a single petition, it was held that a separate petition was required for each foreign proceeding for which recognition was sought.[6] Similarly, where the proceeding for which recognition had been sought (and granted) had terminated and a further proceeding commenced (without the recognizing court being advised), the court held a new application for recognition was required as it was not possible to amend the existing proceeding to cover recognition of the wholly new proceeding.[7]

Interpretation of words and phrases

"Appointing" and "appointment" (subparagraphs 2 (a)–(c)) (see also article 2, subparagraph (d))

4. As to the meaning of the words "appointing" and "appointment" as used in article 15, subparagraphs 2 *(a)–(c)*, one court suggested it suffered from the same ambiguity as the word "authorized" in article 2, subparagraph *(d)*.[8] At best, the court suggested, the foreign representative must be appointed in the context or in the course of a foreign proceeding,[9] but by whom was not specified. In many reported cases, the foreign representative was appointed by the foreign court, as generally evidenced by the information provided to comply with article 15, subparagraph 2 *(b)*.[10] In some cases, the foreign court has also specified that the foreign representative has the power to commence recognition proceedings in another jurisdiction and to act as foreign representative in those proceedings.[11]

"Other evidence" (subparagraph 2 (c))

5. With respect to the evidence required under paragraph 2, in a case where no certified documents were available as required under subparagraphs 2 *(a)* and *(b)*,[12] other evidence was held to be sufficient to satisfy the requirement, including: *(a)* verified copies of minutes, court orders, reports to creditors and company searches in relation to the appointment and activities of the foreign representative of the debtor; *(b)* relevant correspondence with the registrar of companies and the relevant court registry and company searches in relation to a change in the status of the foreign proceeding, verified copies of the notices relating to that change; and *(c)* registration of the foreign representative as the liquidator of the debtor. A document from the foreign corporate regulator showing that liquidators had been appointed to the debtor pursuant to the applicable legislation has also been relied upon under article 15, paragraph 2,[13] on the basis that the regulator was an "authority" within the meaning of article 2, subparagraph *(c)*, of the MLCBI. In a case where the applicant did not comply with the requirements of article 15, paragraphs 2 *(a)* or *(b)*, providing only copies of various court documents, counsel referred the court to subparagraph 2 *(c)*. While the court was satisfied that the necessary evidentiary basis for the application to go forward had been established, it pointed out that there must be some basis upon which the court could resort to subparagraph 2 *(c)*, for example, some reasonable explanation from the applicant as to why the documents referred to in subparagraphs 2 *(a)* or *(b)* were not available and why the alternate form of proof should be accepted.[14] Presentation of additional information relating to the nature of the foreign proceedings has been permitted after the recognition application was made and the recognition proceedings commenced.[15]

ARTICLE 15, PARAGRAPH 4

6. Reported cases have not referred to issues arising under paragraph 4.

Notes

[1] GE [paras. 112–121].

[2] See also discussion on full and frank disclosure under art. 6 above.

[3] *United States*: Vitro S.A.B. de C.V. 701 F.3d 1031, 1046 (5th Cir. 2013), CLOUT 1310 – court said "these requirements are to be strictly construed in line with our holding that the requisite analysis is not a 'rubber stamp' exercise and that even in the absence of an objection, courts must undertake their own jurisdictional analysis and grant or deny recognition under Chapter 15 as the facts of each case warrant", *quoting* Lavie v Ran (*In re* Ran) 607 F.3d 1017, 1021 (5th Cir. 2010), Bear Stearns, 374 B.R. 122, 126, 130 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794; see also art. 17, para. 1.

[4] *United States*: Lavie v Ran (*In re* Ran), 607 F.3d 1017, 1021 (5th Cir. Tex. 2010).

[5] *United States*: Basis Yield Alpha Fund (Master), 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789.

[6] *United States*: British-American Insurance Co., Ltd., 425 B.R. 884, 889 (Bankr. S.D. Fla. 2010), CLOUT 1005.

[7] *Australia*: Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA [2017] FCA 331, CLOUT 1799.

[8] See above chap. 1, art. 2 *(d)*; Vitro S.A.B. de C.V. 701 F.3d 1031, 1047 (5th Cir. 2013), CLOUT 1310.

[9] *United States*: Vitro S.A.B. de C.V. 701 F.3d 1031, 1047 (5th Cir. 2013), CLOUT 1310.

[10] E.g., *United States*: Grand Prix Associates, Inc., Bankr. D.N.J. May 18, 2009) – purported foreign representative presented an order by the foreign court appointing it as the foreign representative of the business entities in question.

[11] E.g., *Canada*: Probe Resources Ltd. (2011), 2011 CarswellBC 1043, 79 C.B.R. (5th) 148 (B.C. S.C.) – a United States court had authorized the applicant to act as the foreign representative of itself and its subsidiaries. *United States*: Oversight & Control Commission of Avanzit, S.A. 385 B.R. 525, 534 (Bankr. S.D.N.Y. 2008), CLOUT 925 – insolvency court in Spain had power to appoint foreign representative for recognition purposes; Basis Yield Alpha Fund (Master), 381 B.R. 37, 46 (Bankr. S.D.N.Y. 2008), CLOUT 789; Innua Canada, Ltd., case No. 09-16362 (Bankr. D.N.J. April 15, 2009) p. 4 – receivership order entered by court in Canada stated foreign representative had capacity to commence recognition proceeding in the United States.

[12] *Australia*: Raithatha v Ariel Industries PLC [2012] FCA 1526 [paras. 47–48].

[13] *United States*: Betcorp Limited 400 B.R. 266, 294–295 (Bankr. D. Nev. 2009), CLOUT 927.

[14] *Canada*: Probe Resources Ltd. (2011), 2011 CarswellBC 1043, 79 C.B.R. (5th) 148 (B.C. S.C.) [paras. 14–16].

[15] *United States*: British-American Insurance Co., Ltd.425 B.R. 884, 907 (Bankr. D.Fla. 2010), CLOUT 1005 – at the time the application was made, there was a question as to whether the foreign proceeding was for reorganization or liquidation; subsequent orders of the foreign court clarified that issue: see above art. 2, subpara. *(a)*.

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

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 16 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 204–206] and on the work of its forty-sixth session (*Official Records of the General Assembly, Sixth-eighth session, Supplement No. 17* (A/68/17) [para. 197]. See also summary records of the thirtieth session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/52/17 [paras. 204–206]; A/CN.9/435 [paras. 170–172];

(b) GE (1997): A/CN.9/442 [paras. 122–123];

(c) GEI (2013): A/CN.9/715 [paras. 14–15, 38–41, 44–45]; A/CN.9/738 [paras. 22–30]; A/CN.9/742 [paras. 41–56]; A/CN.9/763 [paras. 29–48]; and A/CN.9/766 [paras. 33–40].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 149].

INTRODUCTION[1]

1. The GEI [paras. 137–149][2] explains that article 16 establishes presumptions that allow the court to expedite the evidentiary process, while not preventing the court from calling for or assessing other evidence if the conclusion suggested by the presumption is called into question. Paragraph 1 creates presumptions with respect to the definitions in article 2 of "foreign proceeding" and "foreign representative", enabling the court to rely upon the information contained in the foreign decision (or certificate) referred to in article 15 when it is relevant to the satisfaction of those requirements. Paragraph 2 dispenses with the requirements for legalization of documents, but the court retains the discretion to decline to rely on the presumption of authenticity or to conclude that contrary evidence prevails (see also GEI [paras. 128–130]; [para. 130][3] addresses the relationship between the MLCBI and relevant treaties on mutual recognition and legalization of documents).

2. The concept used in the presumption in paragraph 3, "centre of main interests", or COMI, is fundamental to the operation of the MLCBI, but is not defined in article 2. What constitutes a debtor's COMI has given rise to considerable discussion, particularly with respect to the proof required for the presumption in article 16, paragraph 3, to be rebutted. The GEI [paras. 143–149] and the JP [paras. 93–125] give considerable space to discussing the interpretation of this paragraph. They indicate that, as a general statement, when the debtor's COMI is at the same location as its place of registration, no issue concerning rebuttal of the presumption is likely to arise. However, when there appears to be a separation between the debtor's registered office and its alleged COMI, the party alleging the COMI is not located at the place of registration will be required to satisfy the court as to its location. In the latter situation, the GEI suggests, a debtor's COMI will be identified by factors that are both objective and ascertainable by third parties,[4] i.e., factors indicating to those who deal with the debtor, especially creditors, where the COMI is located. The evolution of courts' consideration of which factors are relevant to this analysis is discussed below.

3. The GEI [para. 145] proposes that in most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the foreign proceeding has commenced is the debtor's COMI. The factors are the location: (a) where the central administration of the debtor takes place; and (b) which is readily ascertainable by creditors. Several courts, in analysing the factors relevant to rebuttal of the presumption, have responded to the discussion that took place in UNCITRAL in the course of revising the GEI.

4. When the principal factors noted above do not yield a ready answer regarding the debtor's COMI, the GEI suggests several additional factors concerning the debtor's business that may be considered. Those factors are set out in the GEI at [para. 147].[5] They might be relevant in specific cases, but it is suggested that they should be considered of secondary importance and only to the extent they relate to

the two key factors. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. Not all factors will necessarily be ascertainable by third parties (e.g., the details of income disclosed in tax returns). In all cases, however, the endeavour is a holistic one, having regard to the totality of the evidence, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's COMI, as readily ascertainable by creditors.

CASE LAW ON ARTICLE 16

ARTICLE 16, PARAGRAPH 1

5. Courts typically cite the evidence provided in support of the article 15 requirements and note that they are entitled to rely on the presumption in paragraph 1 with respect to the facts evidenced, including where the evidence relied upon is statements by the foreign court as to the status of the proceeding and the foreign representative.[6]

6. Courts have confirmed that the presumption in paragraph 1 does not prevent the court from examining the facts and that it always has the power to make its own determination on qualification under article 17, notwithstanding the presumption in paragraph 1 and the absence of actual objection.[7]

ARTICLE 16, PARAGRAPH 2[8]

7. Courts have cited the documents that have been submitted in support of the application for recognition and stated their reliance on the presumption on the question of authenticity.[9] A debtor's claim not to have been officially told of the appointment of the foreign representative was held not to constitute a rebuttal of the presumption in paragraph 2.[10] Reliance on the presumption has also been held not to violate the right of interested parties to be heard and to present evidence challenging reliance on the basis that the documents were false.[11]

ARTICLE 16, PARAGRAPH 3

Purpose of the presumption

8. The GEI [para. 137][12] explains that the purpose of the presumption in paragraph 3 is to provide a convenient means of dispensing with formal proof, but leaving the way open for the court to find, on the evidence, that the contrary is the case. As noted above in the introduction to this article, the presumption has given rise to considerable discussion, under both the MLCBI and the EIR, most commonly in the context of corporate rather than individual debtors (although there are several cases addressing individual debtors – see below), with the focus of that discussion being upon the factors relevant to rebuttal of the presumption – the determination of COMI is necessarily fact driven in each particular case.

Meaning of "centre of main interests" (COMI)

9. Cases note that the term COMI is not defined in the MLCBI. Reference has been made, in seeking to establish the meaning of the term, to the GEI (and the material cited above in the Introduction to this article) and the EIR and its relevant interpretative documents (e.g., Virgos-Schmit Report), as well as to the JP [para. 93–104] (see article 8 above). Courts have noted the derivation of the concept and that the various guides to interpretation of COMI show it was intended that it should bear a similar meaning in both the MLCBI and the EIR.[13] In some jurisdictions, COMI has been described as being similar to the concept of principal place of business.[14]

10. Each debtor, it is suggested, has only one location in which it has its COMI and, as there is only one COMI, it follows that there can only be one main proceeding. In a case where a creditor objected to the recognition of foreign proceedings on the basis that the debtor had no COMI and no establishment in the foreign State, the court held that a debtor must have a COMI and that it must be in a specific country.[15] Where the debtor had registered offices in two States, the court concluded that it was possible to have more than one registered office and that the MLCBI did not define registered office as being the one in the State of the debtor's initial incorporation. Thus, the presumption in article 16, paragraph 3, did not apply to presume COMI to be in one State or the other.[16]

Cases decided under the EIR

11. In early cases decided under the EIR, courts took the view that the decisive question in determining COMI was where the company's head office functions were carried out.[17] The presumption in favour of the place of the company's registered office was not a particularly strong one, just one of the factors to be taken into account with the whole of the evidence in reaching a conclusion as to the location of the COMI.[18] In making its decision, one court said it must have regard to the need for the COMI to be ascertainable by third parties; in particular, creditors and potential creditors (see further discussion on ascertainability below). It is important, the court said, to have regard not only to what the debtor is doing, but also to what the debtor would be perceived to be doing by an objective observer.[19]

12. The key decision under the EIR is that in Eurofood,[20] in which the ECJ held that "in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community Legislature in favour of the registered office [...] can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect."[21] The ECJ suggested the presumption could be rebutted in the case of a "letterbox company", which did not carry out any business in the territory of the State in which its registered office was situated. It also 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 its subsidiary might be situated would not be enough to rebut the presumption.[22] The decision places significant weight on the need for predictability.

13. In the subsequent case of Interedil,[23] the ECJ held that the second sentence of article 3 of the EIR[24] must be interpreted to mean that "a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties." The court went on to say that when management, including the making of management decisions, and supervision of a company take place in the same location as the registered office, in a manner that is ascertainable by third parties, the presumption cannot be rebutted. However, where a company's central administration is not in the same place as its registered office, a comprehensive assessment of all the relevant factors must be undertaken to establish, in a manner that is ascertainable by third parties, the location of the company's actual centre of management and supervision and of the management of its interests. In that case, the court held that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a European Union member State other than the one in which the registered office is situated could not be regarded as sufficient factors to rebut the presumption, unless the comprehensive assessment of all relevant factors pointed to that other member State. Article 3, paragraph 1, of the EIR recast now provides greater definition of the concept of COMI.[25]

Operation of the presumption under the MLCBI

14. As indicated in paragraph 2 above, when the debtor's COMI is alleged to be at the same location as its place of registration, no issue concerning rebuttal of the presumption will generally arise.[26] Where there is no serious controversy, the presumption provides convenience of proof, permitting and encouraging fast action in cases where speed may be essential,[27] linking the presumption to the imperative under article 17, paragraph 3, that an application for recognition is to be decided upon at the earliest possible time.[28]

15. However, some courts have said that they are not bound to "blindly follow" the article 16 presumption,[29] and it is the task of the receiving court to review each petition to determine whether all requisites for recognition are met,[30] to consider independently where the debtor's COMI is located[31] and to analyse the relevant factors.[32] In a case where the applicants for recognition relied upon the presumption and the absence of any objection, electing not to address or establish facts supporting the existence of a "main" proceeding, the court said there was evidence to the contrary and the court's power to examine the facts underlying article 17 could not be sidestepped or eliminated by election not to plead or introduce relevant facts.[33] In another case, the fact that three courts in other jurisdictions acting under the MLCBI had accepted the application of the presumption in article 16, paragraph 3 in relation to the particular debtor was said by the receiving court to be a factor that could also be taken into account in the recognition proceedings.[34]

Burden of proof

16. As indicated above, in the introduction, the GEI [para. 143] notes that when a foreign representative seeks recognition of a foreign proceeding as a main proceeding and there appears to be a separation between the place of the debtor's registered office and its alleged COMI, the party alleging the debtor's COMI is not at its place of registration will be required to satisfy the court as to its location.[35] In one State, a different approach applies and the ultimate burden lies upon the person asserting that the particular proceedings are main proceedings, usually the foreign representative, not upon the party opposing that contention.[36] The opposing party may be a creditor or an interested party or the issue may be raised by the court itself. When the court itself calls the article 16 presumption into question, on the basis that it regards the issues to be sufficiently material to warrant further inquiry,[37] it may call for and assess information in accordance with procedural law.[38] Where there is a substantial dispute, the presumption is of less weight[39] and reliance upon it would be inappropriate.[40] In a case involving disputed facts, where there was no cross-examination, the court has said that in applying article 16, paragraph 3, the court must be satisfied, or as satisfied as it can be, having regard to the limitations that an interlocutory process imposes,[41] that the COMI is not in the State of the registered office.

Ascertainability

17. As noted above, in the introduction to this article, the factors relevant to rebuttal of the presumption in article 16, paragraph 3, should be both objective and ascertainable by third parties.[42] Although not a specific requirement of the MLCBI, it has been suggested that that absence does not alter the position as the framers of the MLCBI envisaged the interpretation of COMI under the EIR (which would necessarily take into account recital 13)[43] would be equally applicable to the MLCBI. Courts in different jurisdictions have adopted that approach.[44]

18. The cases analysing COMI typically demonstrate that courts do not apply any rigid formula or consistently find one factor dispositive; instead they have tended to analyse a variety of factors to discern, objectively, where a particular debtor has its COMI. It is important, courts have suggested, to consider not just what the debtor was doing, but also what the objective observer perceived the debtor was doing.[45] That inquiry examines the debtor's administration, management and operations together with the expectations of third parties[46] and in particular, whether reasonable and ordinary third parties (including creditors and potential creditors,[47] and investors)[48] can discern or perceive where the debtor is conducting those various functions.[49] Whether there is an element of permanence in the conduct of these functions is also a consideration.[50]

19. What is ascertainable by a third party is said to be what is in the public domain and what a typical third party would learn as a result of dealing with the debtor in the ordinary course of business.[51] That information may be obtained from a variety of sources, including documents to be filed with corporate regulators;[52] press releases, presentations and prospectuses;[53] address information on the business cards of key executives; the address given on insurance, fundraising and guarantee documents;[54] or from a company's website.[55] One court has suggested that factors ascertainable only on enquiry would be excluded, as they would introduce an element of uncertainty to the analysis.[56] Where the debtor's activities cease on or before commencement of the foreign insolvency proceeding, courts have suggested it may be appropriate to consider, in the COMI analysis, the location in which any relevant activities, including the debtor's liquidation activities and administrative functions, are carried out.[57] However, as noted below, the determination of the habitual residence of a natural person for the purposes of article 16, paragraph 3, may involve reception by the court of facts not readily ascertainable to third parties.

COMI with respect to corporate debtors: relevant factors

20. Courts have held a wide range of factors to be relevant to rebutting the presumption in article 16, paragraph 3, as it relates to both corporate and individual debtors. As the JP [para. 99] notes, several subtle differences in approach have emerged and it might be that courts in some jurisdictions seek evidence of a greater quality or quantity to rebut the presumption than is the case in other States determining the location of the debtor's COMI. Early cases decided under the MLCBI identified several factors that have been added to, refined and reduced over time.

21. The following five factors have been identified by courts as being among the most important with respect to corporate debtors, with courts giving one or other factor more weight depending on the facts of the specific case. Some courts have indicated these factors are not exclusive and do not all have to be met in each case:[58]

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

(b) The location of those who actually manage the debtor (which could conceivably be the headquarters of a holding company);

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

(d) The location of the majority of the debtor's creditors or of a majority of creditors who would be affected by the case;

(e) The jurisdiction whose law would apply to most disputes.[59]

22. These factors have been refined, so that subparagraph *(a)* can be characterized as the location of the debtor's head office functions[60] or "nerve centre";[61] subparagraph *(b)* includes those who direct the debtor;[62] and subparagraph *(c)* includes the location of the debtor's operations.[63] An additional key factor, as noted above, is the expectations or perceptions of third parties about the location of the debtor's COMI and that it be ascertainable by those third parties. It has also been recognized that where the debtor's activities have been conducted for an extended period of time in connection with winding up the debtor's business, the activities of the liquidator may be both relevant and important to the COMI determination.[64]

23. Other factors referred to by courts have included:

(a) The location of the debtor's books and records;[65]

(b) The location where financing was organized or authorized;[66]

(c) The location from where the cash management system was run;[67]

(d) The location of the debtor's primary bank or other principal lender;[68]

(e) The location of employees[69] or employee administration, including human resource functions;[70]

(f) The location in which commercial policy was determined;[71]

(g) The site of the controlling law[72] or the law governing the main contracts of the company;[73]

(h) The location from which decisions on purchasing and sales policy, marketing, staff, treasury management functions, including accounts payable, were directed;[74]

(i) The location from which communication functions/computer systems were managed;[75]

(j) The location from which contracts (for supply) were organized;[76]

(k) The location from which reorganization of the debtor is being conducted;[77]

(l) The location in which the debtor is subject to supervision or regulation;[78]

(m) The location whose law governed the preparation and audit of accounts and the location in which they were prepared and audited;[79]

(n) The location from which claims processing and investment, actuarial and legal functions were managed;[80]

(o) The location to which invoices from financial advisors were sent;[81]

(p) The location in which pricing decisions and new business development initiatives were created;[82]

(q) The location at which technical evaluation, engineering design, operational and logistical preparation and execution were conducted;[83]

(r) The location in which tax returns indicated income from trade and business was derived.[84]

24. In the context of enterprise groups (i.e., where the debtor seeking recognition is a member of an enterprise group), some courts have examined additional factors including:[85]

(a) Whether the enterprise is managed on a consolidated basis;

(b) Where other members of the corporate group are incorporated;

(c) The extent of integration of the enterprise's international operations, including corporate, strategic, financial and management perspectives, such as the existence of shared management between the entities and within the organization.

25. Since adoption of the GEI in 2013 to provide more information on the factors relevant to determination of COMI,[86] case law has confirmed the principal factors as being (a) where the central administration of the debtor takes place,[87] and (b) which is readily ascertainable by creditors. Several courts, in analysing the factors relevant to rebuttal of the presumption, have responded to the discussion that took place in UNCITRAL in the course of revising the GEI.[88]

26. With respect to the factors noted in the GEI as being additional to the two key factors,[89] it has been suggested that while they might be relevant in specific cases, they should be considered of secondary importance and only to the extent they relate to the two key factors[90] and that the court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case.[91] It has also been noted that not all of those factors will necessarily be ascertainable by third parties (e.g., the details of income disclosed in tax returns).[92] In all cases, however, it is suggested that the endeavour is a holistic one, having regard to the totality of the evidence, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's COMI, as readily ascertainable by creditors.[93]

COMI with respect to individuals: habitual residence

27. While the concept of "habitual residence" is not defined in the MLCBI, it has a long history of usage in many international conventions and instruments and a settled body of law concerning its meaning has developed. In considering what constitutes the habitual residence of a particular debtor, some courts have looked to those international sources and indicated that they can see no reason why, in respect of individual debtors, the determination of "habitual residence" should not be conducted in the same way it is approached in their particular jurisdiction with respect to other international instruments in which the expression is used, such as the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.[94] Some courts have suggested that habitual residence can be interpreted as what is regarded as a customary or usual residence.[95] Courts have also noted that ascertainment of "habitual residence" may entail the reception of facts which, though relevant, are not readily ascertainable by third parties.[96]

28. Some courts have held that a wide variety of circumstances can bear upon the question,[97] but the weight given to any one of the factors will likely vary depending on the relative importance of the factor to the debtor and the debtor's personal circumstances.[98] Factors considered have included:

(a) The debtor's settled purpose;[99]

(b) The actual and intended length of stay in a State,[100] interpreted in some States as being an intention to remain for an indefinite period of time[101] or for the foreseeable future unless and until something might occur to prompt or compel a change (e.g., loss of employment, family needs, illness, job opportunities, retirement);[102]

(c) The purpose of the stay;

(d) The strength of ties to the State and to any other State (both in the past and currently), requiring a meaningful connection and an element of permanence and stability;[103]

(e) The degree of assimilation into the State (including living and schooling arrangements);

(f) Cultural, social and economic integration,[104] including location of the individual's regular activities, such as possible club memberships or affiliations with religious organizations, and other recognized ties to the community that are indicative of residential status and community involvement.[105]

29. Reference to an individual debtor's historical position may be critical in determining whether the present residential position is "habitual". Courts have suggested that the scope for factual inquiry is broad and, though a debtor's subjective intention is not irrelevant, the conclusion as to habitual residence must be reached after an objective examination of the whole of the evidence.[106] Intention is not to be given controlling weight[107] as an insolvent's intentions may be ambiguous.[108] In one case it was suggested that a transnational insolvent may lead such a nomadic life as not to have a habitual residence.[109]

30. Referring to the types of factor found to be relevant to determining the COMI of a corporation, one court found the ones that might be useful in instances where the debtor was an individual included:

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

(b) The location of the majority of the debtor's creditors or a majority of the creditors that would be affected by the case;

(c) The jurisdiction whose law would apply to most disputes.[110]

31. Another court indicated that some of the additional factors listed in the GEI [para. 147] in relation to a corporate debtor might also be relevant for a natural person and included, in addition to those cited in the previous paragraph, the location of:

(a) The debtor's books and records;

(b) The debtor's principal bank or other principal lender;

(c) The debtor's administration, payroll, accounts payable or cash management activity relating to the debtor's business;

(d) The tax authority relevant to the debtor's income from personal exertion and taxation thereon.[111]

Notes

[1] Poland has deleted from its Bankruptcy and Recovery Law 2003 article 391, which gave effect to art. 16 of the MLCBI; the cross-border part of the Polish law no longer allows reliance on presumption.

[2] GE [paras. 113–115, 122–123].

[3] GE [para. 115].

[4] GEI [para. 145].

[5] Those additional factors, listed in no particular order or priority, may include the following: the location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor w as subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

[6] *United States*: Grand Prix Assocs., case No. 09-16545 (Bankr. D.N.J. June 26, 2009), p. 5 – court confirmed that art. 16, para. 1, allowed the court to presume that the foreign proceeding was such if the foreign court's order stated that it was a foreign proceeding and that the appointed person or entity was a foreign representative; Innua Can., Ltd., case No. 09-16362 (Bankr. D.N.J. Apr. 15, 2009), p. 4 – court recognized a receivership from Canada as amounting to as foreign proceeding relying, under art. 16, para. 1, on the foreign court's declaration that the receiver was the foreign representative of a foreign proceeding and was specifically authorized to seek recognition in the United States under the relevant legislation (see above art. 2, subpara. *(a)*, for cases in which a receivership was found not to be a foreign proceeding). See also *England*: Worldspreads Limited [2012] EWHC 1263 (Ch) [para. 38] – to facilitate recognition in certain foreign States, the English court commencing the special administration proceeding included in its orders confirmation that the proceeding qualified as a foreign proceeding under art. 2, subpara. *(a)*, of the MLCBI and as a foreign main proceeding under art. 2, subpara. *(b)*, of the MLCBI, and the appointed special administrators qualified as foreign representatives under art. 2, subpara. *(d)*, of the MLCBI.

[7] *United States*: Basis Yield Alpha Fund (Master), 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789; Oversight & Control Commission of Avanzit, S.A., 385 B.R. 525, 532 (Bankr. S.D.N.Y. 2008), CLOUT 925.

[8] Some States provide that the court "may" require legalization of documents supporting the application for recognition under art. 15, e.g., Chile (art. 314, 20.720 Law of 2014) and Colombia (art. 100, Law 1116, 2006).

[9] E.g., *United States*: SPhinX, Ltd. 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), CLOUT 768.

[10] *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 27], CLOUT 1214.

[11] *Mexico*: case No. 2006429, Commercial Insolvency Act. Conditions for Recognition of Foreign Proceedings in Mexico. Ninth Epoch. First Chamber, Weekly Federal Court Report, Book 6, May 2014, vol. 1, p. 551 (Court precedent: 1st CLXXXII/2014 (10th)).

[12] GE [para. 122].

[13] *England*: Stanford International Bank Limited [2010] EWCA Civ 137, CLOUT 1003 [53] referring to the report of the Commission on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17)) [153] and the GE; see also cases under ascertainability below.

[14] *Australia*: Katayama v Japan Airlines Corporation [2010] FCA 794 [25]. *Japan*: Think3, case Nos. (shou) 3 and 5 of 2011, Tokyo District Court, ch. 3, issue 2-2, (2), CLOUT 1335 – court said that the Insolvency Law Group Meeting of the Legislative Council of the Ministry of Justice in Japan explained that the "principal place of business" is used in the Act because the notion of COMI in the MLCBI is almost consistent with the "principal place of business" in the Code of Civil Procedure of Japan. In addition, in the writing by the person in charge of this legislative work, it is explained that the notion of COMI is not different in essence from the "principal place of business". Therefore, the court said, the "principal place of business" in the Act is considered to have, substantively, the same meaning with COMI in the MLCBI. *United States*: Tri-Continental Exchange, Ltd., 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006), CLOUT 766; Basis Yield Alpha Fund (Master), 381 B.R. 37, 48 (Bankr. S.D.N.Y. 2008), CLOUT 789; Tradex Swiss AG, 384 B.R. 34, 43 (Bankr. D. Mass. 2008), CLOUT 791; Bear Stearns, 389 B.R. 325, 336 (S.D.N.Y. 2008), CLOUT 794 – appellate court noted the early decision in Tri-Continental Exchange, Ltd. properly equated COMI with the United States concept of "principal place of business"; Betcorp Limited, 400 B.R. 266, 287, 289–290 (Bankr. D. Nev. 2009), CLOUT 927; British American Isle of Venice, Ltd., 441 B.R. 713, 720 (Bankr. S.D. Fla. 2010); RHTC Liquidating Co., 424 B.R. 714, 723 (Bankr. W.D. Pa. 2010); *compare* Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 135–136, 138 (2d Cir. Apr. 16, 2013), CLOUT 1339 – in footnote 10, the appellate court reiterated that since Congress chose the term "COMI" rather than "principal place of business", the later concept did not control the analysis. But to the extent that the concepts were similar, it said, a court may certainly consider a debtor's "nerve centre", *citing* Hertz Corporation v Friend, 559 U.S. 77, 130 S. Ct 1181, 1192 (2010).

[15] *United States*: Jay Tien Chiang 437 B.R. 397, 399 (Bankr. C.D. Cal. 2010), CLOUT 1318 – If a debtor has no COMI, there is no legal regime governing its commercial activities, it could be unregulated and operating outside the law (403–404).

[16] *Australia*: Legend International Holdings Inc. [2016] VSC 308 [para. 123], CLOUT 1619 – apart from complying with the regulatory requirements of Delaware and the original incorporation in Delaware, the court determined the location of the COMI to be in Australia by reference to a number of factors indicating that the preponderance of the debtor's activities was conducted in Australia.

[17] *EIR*: Collins v Aikman [2006] B.C.C. 606.

[18] *EIR*: Ci4net.com Inc. [2005] B.C.C. 277.

[19] *EIR*: Shierson v Vlieland-Boddy [2005] 1 WLR 3966 [para. 55].

[20] *EIR*: Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ). The case is discussed in the JP [paras. 100–104].

[21] Ibid., *EIR*: Eurofood [para. 34].

[22] Ibid., *EIR*: Eurofood [para. 36].

[23] *EIR*: Interedil, Srl. [2011] EUECJ C-396/09.

[24] *EIR* art. 3, para. 1, second sentence provides: "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."

[25] *EIR* recast art. 3, para. 1: "The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings."

[26] *United States*: Gerova Financial Group, Ltd. 482 B.R. 86, 91 (Bankr. S.D.N.Y. 2012), CLOUT 1275 – virtually no evidence was provided to the contrary.

[27] *United States*: SPhinX, Ltd. 371 B.R. 10, 18 (S.D.N.Y. 2007), CLOUT 768 *citing* the legislative history to the United States Bankruptcy Code (11 U.S.C.) Ch. 15 (H.R.Rep 109–31 pt. 1, 109th Cong. 1st Sess. at 112–113 (2005)).

[28] *Australia*: Akers v Saad Investments [2010] FCA 1221 [para. 46] (appeal on other grounds), CLOUT 1219.

[29] *United States*: Basis Yield Alpha Fund (Master 381 B.R. 37, 51 (Bankr. S.D.N.Y. 2008), CLOUT 789.

[30] *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 900 (Bankr. S.D.Fla. 2010), CLOUT 1005.

[31] *United States*: Bear Stearns 389 B.R. 325, 335–336 (S.D.N.Y. 2008), CLOUT 794.

[32] *Canada*: Cinram International Inc. [2012] ONSC 3767, CLOUT 1269 – the (originating) court in Canada listed in its decision factors that might be considered relevant to a determination of the debtor's COMI, but noted that that discussion was provided for information purposes only, recognizing that it was the function of the recognizing court to determine the location of the COMI and whether in this case the proceeding in Canada was the foreign main proceeding;
United States: Gerova Financial Group, Ltd. 482 B.R. 86, 91 (Bankr. S.D.N.Y. 2012), CLOUT 1275; Betcorp Limited 400 B.R. 266, 285–286 (Bankr. D. Nev. 2009), CLOUT 927; Bear Stearns 389 B.R. 325, 335 (S.D.N.Y. 2008), CLOUT 794; Basis Yield Alpha Fund (Master) 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008), CLOUT 789 – when joint provisional liquidators sought summary judgment relying on the presumption only, the court held they could not rely on the presumption as a substitute for real evidence.

[33] *United States*: Basis Yield Alpha Fund (Master) 381 B.R. 37, 47–48 (Bankr. S.D.N.Y. 2008), CLOUT 789; see also Bear Stearns 389 B.R. 325, 335 (S.D.N.Y. 2008), CLOUT 794 – court confirmed the lower court's rejection of the appellants' position that "this Court should accept the proposition that the Foreign Proceedings are main proceedings because the Petitioners say so and because no [one] else says they aren't": 374 B.R. 122,129.

[34] *Australia*: Akers v Saad Investments [2010] FCA 1221 [para. 55] (appeal addresses other issues), CLOUT 1219 – see above, art. 8 – use of foreign interpretations and judicial precedents.

[35] Ibid., *Australia*: Akers [para. 54] (appeal addresses other issues), CLOUT 1219; Young v Buccaneer Energy [2014] FCA 711 [paras. 7–14], CLOUT 1476. *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 33], CLOUT 1003. *United States*: Tri-Continental Exchange, Ltd., 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006), CLOUT 766; Bear Stearns, 389 B.R. 325, 335–336 (S.D.N.Y. 2008), CLOUT 794.

[36] The legislative history of the United States Bankruptcy Code, 11 U.S.C. sect. 1516 *(c)* (enacting art. 16 (3) MLCBI), explains that the word "proof" was changed to "evidence" to make it clearer, using United States terminology, that the ultimate burden is on the foreign representative (H.R. REP. No. 109–31, 112–13 (2005)); see the JP (2013) [para. 99]. Tri-Continental Exchange, Ltd., 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006), CLOUT 766 – court confirmed United States jurisprudence holds that the burden of proof lies on the person who is asserting that the particular proceedings are "main" proceedings and that it is never on the party opposing that contention. That party has only a burden of adducing some evidence inconsistent with the COMI being located at the registered office: Tradex Swiss AG, 384 B.R. 34, 43 (Bankr. D. Mass. 2008), CLOUT 791: Tradex's registered office was in Switzerland, but the court said that did not end the inquiry. If contrary evidence was submitted, the burden of establishing the COMI shifted to the foreign representatives to demonstrate that Tradex's COMI was in Switzerland. The petitioning creditors had met the burden with respect to contrary evidence by introducing critical information such as the location of the trading platform in the United States, the fax confirmation of trades from the United States, the location of assets and a significant number of creditors in the United States, and the fact that signatory authority was designated to the manager of the office in the United States. The burden then rested upon the foreign representatives to show that, by a preponderance of the evidence, the COMI was in Switzerland. Although there was evidence of some presence in Switzerland – the location in Switzerland was larger than the office in the United States, although with far fewer employees in Switzerland; the individual who may have benefited financially from the alleged fraudulent scheme was registered as a resident of Switzerland; there were plans to have visas issued to bring individual customers to Switzerland and there were wholly unfulfilled expectations of setting up offices worldwide – it was not enough to show that the principal place of business was in Switzerland. While acknowledging the difficulty in the instant case of providing appropriate evidence, the court said the foreign representatives still must establish the COMI by a preponderance of the evidence and had failed to discharge that burden.

[37] *United States*: Creative Finance Ltd., 543 B.R. 498, 517 (Bankr. S.D.N.Y. 2016), CLOUT 1624 *citing* Basis Yield Alpha Fund (Master), 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789.

[38] *United States*: Innua Can., Ltd., case No. 09-16362 (Bankr. D.N.J. Apr. 15, 2009), pp. 5–6 – no objections to the location of COMI were made, but the court elected to examine the factors relevant to determining COMI; Basis Yield Alpha Fund (Master), 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789 – the court said it always had the power to make its own determination on qualification under [article 17], notwithstanding the presence of [article 16] and the absence of actual objection.

[39] *United States*: SPhinX, Ltd., 371 B.R. 10, 18 (S.D.N.Y. 2007), CLOUT 768.

[40] *Australia*: Akers v Saad Investments [2010] FCA 1221 [para. 31] (appeal addresses other grounds), CLOUT 1219. *United States*: SPhinX, Ltd., 371 B.R. 10, 18 (S.D.N.Y. 2007), CLOUT 768; Creative Finance Ltd., 543 B.R. 498, 517 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

[41] *Gibraltar*: Peabody Holdings (Gibraltar) Ltd, Claim No. 2016-Comp-008, 31 May 2016; *England*: Stanford International Bank Limited [2010] EWCA Civ 136 [para. 30], CLOUT 1003.

[42] GEI [para. 145].

[43] Report of the Commission on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17)) [para. 153]; GE [para. 72], GEI [paras. 81–84]; recital 13 of the EIR provides: 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. This is now covered by recital 28 of the EIR recast.

[44] E.g., *Gibraltar*: Peabody Holdings (Gibraltar) Ltd, Claim No. 2016-Comp-008, 31 May 2016. *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 53]. *EIR*: The rationale is that potential creditors should be able to ascertain in advance the legal system that would resolve any insolvency affecting their interests: Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ) [para. 33]. *United States*: SPhinX, Ltd., 371 B.R. 10, 19 (S.D.N.Y. 2007), CLOUT 768; Bear Stearns, 389 B.R. 325, 337 (S.D.N.Y. 2008), CLOUT 794; British-American Insurance Co., Ltd., 425 B.R. 884, 909 (Bankr. S.D.Fla. 2010), CLOUT 1005 – these cases recognized that the Eurofood decision (Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ)) was not inconsistent with United States courts' reading of the COMI presumption.

[45] *Australia*: Moore v Australian Equity Investors [2012] FCA 1002 [para. 19], CLOUT 1477; Kapila, Re Edelsten [2014] FCA 1112 [para. 53], CLOUT 1475. *England*: Stanford International Bank Ltd [2010] EWCA Civ 137 [paras. 48–49], CLOUT 1003. *United States*: Tri-Continental Exchange, Ltd. 349 B.R. 627, 633–634 (Bankr. E.D. Cal. 2006), CLOUT 766; Betcorp Limited, 400 B.R. 266, 291 (Bankr. D. Nev. 2009), CLOUT 927; Lavie v Ran (*In re* Ran), 607 F.3d 1017, 1026 (5th Cir. 2010), CLOUT 1276.

[46] *Gibraltar*: Peabody Holdings (Gibraltar) Ltd, Claim No. 2016-Comp-008, 31 May 2016 [para. 27]; *United States*: British-American Insurance Co., Ltd., 425 B.R. 884, 909 (Bankr. S.D.Fla. 2010), CLOUT 1005.

[47] *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 53], CLOUT 1475.

[48] *United States*: Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88, 93 (S.D.N.Y. 2012), CLOUT 1208.

[49] *Australia*: Akers v Saad Investments [2010] FCA 1221 [para. 49] (appeal addresses other issues), CLOUT 1219 *following* Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ), Stanford International Bank [2010] EWCA Civ 137, CLOUT 1003 and Betcorp Limited, 400 B.R. 266, 290–291 (Bankr. D. Nev. 2009), CLOUT 927; *followed* in Young v Buccaneer Energy [2014] FCA 711 [para. 7], CLOUT 1476. *Canada*: Massachusetts Elephant & Castle Group Inc. [2011] ONSC 4201 [paras. 30–31], CLOUT 1206. *England*: Stanford International Bank Ltd [2010] EWCA Civ 137 [paras. 55–56], CLOUT 1003. *United States*: Betcorp Limited 400 B.R. 266, 290–291 (Bankr. D. Nev. 2009), CLOUT 927; Lavie v Ran (*In re* Ran) 607 F.3d 1017, 1025–6 (5th Cir. 2010), CLOUT 1276.
EIR: Shierson v Vlieland-Boddy [2005] 1 WLR 3966 [para. 55]; recital 28 of the EIR recast provides some further explanation: "When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means"; see also Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ) [para. 33].

[50] *Australia*: Moore v Australian Equity Investors [2012] FCA 1002 [para. 19], CLOUT 1477; Kapila, Re Edelsten [2014] FCA 1112 [para. 53], CLOUT 1475.

[51] *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 56.3], CLOUT 1003.

[52] *United States*: Collins v Oilsands Quest, Inc., 484 B.R. 593, 596 (S.D.N.Y. 2012).

[53] Ibid.

[54] *Australia*: Young v Buccaneer Energy [2014] FCA 711 [para. 12], CLOUT 1476.

[55] *United States*: British-American Insurance Co., Ltd., 425 B.R. 884, 912–913 (Bankr. S.D.Fla. 2010), CLOUT 1005.

[56] *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 56], CLOUT 1003.

[57] *United States*: Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 137 (2d Cir. Apr. 16, 2013), CLOUT 1339 – in this case those activities related to the fact that more than 18 months before the application for recognition and more than seven months before the foreign proceeding commenced the debtor had effectively ceased business, severed its relations with its investment manager in New York, and had begun a winding up process. The court concluded that it was appropriate to consider those liquidation activities in connection with a determination as to COMI. The court also suggested [footnote 10] that a court may consider a debtor's "nerve center", including from where the debtor's activities are directed and controlled, in determining COMI (*citing* Hertz Corp. v Friend, 130 S.Ct. 1181, 1193–94 (2010)); see also Betcorp Limited, 400 B.R. 266, 292–293 (Bankr. D. Nev. 2009), CLOUT 927; British-American Insurance Co., Ltd. 425 B.R. 884, 914 (Bankr. S.D.Fla. 2010), CLOUT 1005; British American Isle of Venice, Ltd., 441 B.R. 713, 720–724 (Bankr. S.D. Fla. 2010); Bear Stearns 389 B.R. 325, 338–339 (S.D.N.Y. 2008), CLOUT 794; Lavie v Ran 607 F.3d 1017, 1027 (5th Cir. 2010) – courts in these cases said that bankruptcy proceedings are intentionally temporary and transitory, they could not be viewed as an industrial or professional activity; Creative Finance Ltd. 543 B.R. 498, 521 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

[58] *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 909 (Bankr. S.D.Fla. 2010), CLOUT 1005; British American Isle of Venice, Ltd., 441 B.R. 713, 720 (Bankr. S.D. Fla. 2010) – court noted that in the case before it, several of the important factors were not helpful in assisting it to determine the debtor's COMI, which was ultimately found to be located at the foreign representative's offices.

[59] *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 54], CLOUT 1475 – with respect to *(d)*, and in the context of COMI of a natural person, the court said that the relative significance of each creditor could have to be evaluated, as well as variables such as number, value, whether secured or not, and whether present, future, certain or contingent in comparing relative differences in two or more jurisdictions; Katayama v Japan Airlines Corporation [2010] FCA 794 [para. 25]. *Canada*: Gyro-Trac (United States) Inc. [2010] QCCA 800. *Japan*: Think3, case No. (ra) 1757 of 2012, Tokyo High Court (2 November 2012) ch. 3, 2 (2). *United States*: SPhinX, Ltd. 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768 *followed* in Bear Stearns, 389 B.R. 325, 336–337 (S.D.N.Y. 2008), CLOUT 794; Tradex Swiss AG, 384 B.R. 34, 42–43 (Bankr. D. Mass. 2008), CLOUT 791; Petition of Ernst & Young, Inc., 383 B.R. 773, 779–780 (Bankr. D. Colo. 2008), CLOUT 790; Basis Yield Alpha Fund (Master), 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008), CLOUT 789; Betcorp Limited, 400 B.R. 266, 292–293 (Bankr. D. Nev. 2009), CLOUT 927; Collins v Oilsands Quest, Inc., 484 B.R. 593, 596 (S.D.N.Y. 2012).

[60] *United States*: OAS S.A., 533 B.R 83, 101–102 (Bankr. S.D.N.Y. 2015), CLOUT 1629; Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88, 92 (S.D.N.Y. 2012), CLOUT 1208; Collins v Oilsands Quest, Inc., 484 B.R. 593, 596 (S.D.N.Y. 2012) – location of strategic decision making and corporate functions; British-American Insurance Co., Ltd., 425 B.R. 884, 911–12 (Bankr. S.D.Fla. 2010), CLOUT 1005 – the court said the headquarters of a corporate entity is more than the location of the board of directors. The term headquarters or head office contemplates the place where the primary management of the entity's business is undertaken. That includes all relevant business functions, such as financial, administrative, marketing, information technology, investment and legal functions. Other functions may be relevant depending on the nature of the debtor's

business; Tradex Swiss AG, 384 B.R. 34, 47 (Bankr. D. Mass. 2008), CLOUT 791; Basis Yield Alpha Fund (Master), 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008), CLOUT 789; Bear Stearns, 389 B.R. 325, 336–337 (S.D.N.Y. 2008), CLOUT 794; SPhinX, Ltd. 371 B.R. 10, 19 (S.D.N.Y. 2007), CLOUT 768.

EIR: Collins & Aikman Corporation Group [2005] EWHC 1754 (Ch) [para. 19].

[61] *United States*: OAS S.A. 533 B.R 83, 101–102 (Bankr. S.D.N.Y. 2015), CLOUT 1629; Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 138 n. 10 (2d Cir. Apr. 16, 2013), CLOUT 1339.

[62] *England*: Stanford International Bank Limited [2010] EWCA Civ 137, CLOUT 1003.

[63] *Canada*: Digital Domain Media Group Inc. [2012] BCSC 1565 [para. 28], CLOUT 1334; Massachusetts Elephant and Castle Group Inc. [2011] ONSC 4201 [paras. 30–31], CLOUT 1206. *United States*: Collins v Oilsands Quest, Inc., 484 B.R. 593, 596 (S.D.N.Y. 2012).

[64] *United States*: British American Isle of Venice, 441 B.R. 713, 723 (Bankr. S.D. Fla. 2010) – debtor's liquidation proceedings in the British Virgin Islands was a foreign main proceeding – *citing* British-American Insurance Co., Ltd. 425 B.R. 884, 914 (Bankr. S.D.Fla. 2010), CLOUT 1005, in which the court did not conclude that the actions of a foreign representative, such as the judicial manager here, could never be considered evidence in support of a finding of COMI, but said "There may be instances where a foreign representative remains in place for an extended period, and relocates all of the primary business activities of the debtor to his location (or brings business to a halt), thereby causing creditors and other parties to look to the judicial manager as the location of a debtor's business. This could lead to the conclusion that the center of its main interest has become lodged with the foreign representative." and Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir. Apr. 16, 2013), CLOUT 1339; Creative Finance Ltd., 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016), CLOUT 1624 – recognizing that the liquidator's efforts in pursuing its obligations could cause a COMI shift, but finding that in the instant case the liquidator's efforts in the British Virgin Islands were so minimal as to be insufficient to establish that the COMI had moved from Spain, Dubai or possibly England, where the sole shareholder of the debtor did business. The court said that Fairfield Sentry provided a means for United States recognition of letterbox jurisdiction insolvency proceedings, provided the estate fiduciaries did enough work in those jurisdictions; see also below on movement of COMI.

[65] *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 913 (Bankr. S.D. Flor. 2010), CLOUT 1005.

[66] *EIR*: MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre)); Daisy Tek-ISA Ltd [2003] B.C.C. 562 (Ch D) (Leeds District Registry).

[67] *Australia*: Katayama v Japan Airlines Corporation [2010] FCA 794 [25]. *Canada*: Angiotech Pharmaceuticals Ltd. [2011] BCSC 115 [para. 7], CLOUT 1207. *United States*: Petition of Ernst & Young, Inc., 383 B.R. 773, 780–781 (Bankr. D. Colo. 2008), CLOUT 790.

[68] *EIR*: MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre)); Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch).

[69] *Australia*: Katayama v Japan Airlines Corporation [2010] FCA 794 [para. 25]. *Canada*: Gyro-Trac (United States) Inc. [2010] QCCA 800; *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 31], CLOUT 1003. *United States*: Tradex Swiss AG, 384 B.R. 34 (Bankr. D. Mass 2008), CLOUT 791; Gold & Honey, Ltd. 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009), CLOUT 1008; British-American Insurance Co., Ltd. 425 B.R. 884 (Bankr. S.D. Flor. 2010), CLOUT 1005; Collins v Oilsands Quest, Inc. 484 B.R. 593, 596 (S.D.N.Y. 2012). *EIR*: Eurotunnel Finance, Ltd., Paris Commercial Court, 2 August 2006.

[70] *Canada*: Angiotech Pharmaceuticals Ltd. [2011] BCSC 115 [7], CLOUT 1207.

[71] *EIR*: MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre)).

[72] *United States*: Tradex Swiss AG, 384 B.R. 34 (Bankr. D. Mass 2008), CLOUT 791.

[73] *EIR*: MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre)).

[74] *Canada*: Angiotech Pharmaceuticals Ltd. [2011] BCSC 115 [para. 7], CLOUT 1207.

[75] Ibid., *Canada*: Angiotech. *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 911 (Bankr. S.D.Fla. 2010), CLOUT 1005.

[76] *EIR*: Daisy Tek-ISA Ltd [2003] B.C.C. 562 (Ch D) (Leeds District Registry); MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre)).

[77] *EIR*: Eurotunnel Finance, Ltd Paris Commercial Court, 2 August 2006; Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch).

[78] *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [31], CLOUT 1003. *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 914 (Bankr. S.D.Fla. 2010), CLOUT 1005. *EIR*: Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ).

[79] *EIR*: Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ).

[80] *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 911 (Bankr. S.D.Fla. 2010), CLOUT 1005.

[81] *Australia*: Young v Buccaneer Energy [2014] FCA 711 [para. 12], CLOUT 1476.

[82] *Canada*: Angiotech Pharmaceuticals Ltd. [2011] BCSC 115, CLOUT 1207.

[83] *Australia*: Young v Buccaneer Energy [2014] FCA 711 [para. 12], CLOUT 1476.

[84] Ibid.

[85] *Canada*: Fraser Papers Inc. 56 CBR (5th) 194 [paras. 37–42], 2009 OJ 2648 (SCJ); Xerium Technologies Inc. 2010 ONSC 3974 [para. 27]; Caesars Entertainment Operating Co., 2015 CarswellOnt 3284, 23 C.B.R. (6th) 154, 2015 ONSC 712 [para. 35], [2015] O.J. No. 1201 (Ont. S.C.J.) – in addition to the principal factors noted in the GEI, the court noted that the group was functionally integrated from a corporate, strategic, financial and management perspective and that apart from the entity incorporated in Canada, the other 172 debtors in the group had their head office or headquarters in the United States; Colt Holding Company LLC, 2015 ONSC 3928 [paras. 25–26]; Horsehead Holding Corp and Zochem Inc (2016), 2016 ONSC 958 [para. 25], or 2016 CarswellOnt 1748 (Ont. S.C.J. [Commercial List]); Payless Holdings Inc. LLC (2017), 2017 CarswellOnt 5926, 2017 ONSC 2242 [para. 29] (Ont. S.C.J.); Angiotech Pharmaceuticals Ltd. [2011] BCSC 115 [para. 7], CLOUT 1207; *United States*: Collins v Oilsands Quest, Inc. 484 B.R. 593 (S.D.N.Y. 2012).

[86] See GEI [para. 18].

[87] *Canada*: Massachusetts Elephant & Castle Group Inc. [2011] ONSC 4201 [paras. 30–31], CLOUT 1206; Digital Domain Media Group Inc. [2012] BCSC 1565, CLOUT 1334. *England*: Videology Limited [2018] EWHC 2186 (Ch) [paras. 47–73], CLOUT 1823. *United States*:

SPhinX, Ltd, 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768; Bear Stearns, 389 B.R. 325, 336–337 (S.D.N.Y. 2008), CLOUT 794; Betcorp Limited 400 B.R. 266, 290 (Bankr. D. Nev. 2009), CLOUT 927; Collins v Oilsands Quest, Inc., 484 B.R. 593 (S.D.N.Y. 2012); Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88 (S.D.N.Y. 2012), CLOUT 1208.

[88] E.g., *Canada*: Caesars Entertainment Operating Co., 2015 CarswellOnt 3284, 23 C.B.R. (6th) 154, 2015 ONSC 712 [2015] O.J. No. 1201 (Ont. S.C.J.); Massachusetts Elephant and Castle Group Inc., 2011 ONSC 4201 [para. 30], CLOUT 1206; Lightsquared LP [2012] ONSC 2994 [para. 28], CLOUT 1204. *Japan*: Think3, Tokyo High Court, case No. (ra) 1757 of 2012 (2 November 2012) (appeal).

[89] GEI [para. 147], see above, footnote to para. 4 of the introduction to article 16.

[90] *Canada*: Massachusetts Elephant & Castle Group Inc. [2011] ONSC 4201, CLOUT 1206.

[91] *Canada*: Lightsquared LP [2012] ONSC 2994 [paras. 25–26], CLOUT 1204.

[92] *Australia*: Young v Buccaneer Energy [2014] FCA 711, CLOUT 1476.

[93] *Canada*: Massachusetts Elephant and Castle Group Inc., 2011 ONSC 4201 [30], CLOUT 1206; Lightsquared LP [2012] ONSC 2994 [paras. 25–26, 28, 31], CLOUT 1204.

[94] *New Zealand*: Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] 2 NZLR 380 (12 October 2010) [para. 42], CLOUT 1220; Australia: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 41], CLOUT 1214.

[95] *United States*: Loy, 380 BR 154, 162 (Bankr. E.D. Va. 2007), CLOUT 924.

[96] *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 46], CLOUT 1214.

[97] *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 46], CLOUT 1475.

[98] *United States*: Kemsley, 489 B.R. 346, 360 (Bankr. S.D.N.Y. 2013), CLOUT 1274.

[99] *United States*: Pirogova, 593 B.R. 402, 409 (Bankr. S.D.N.Y. 2018) – the debtor's stated intention was to leave the Russian Federation permanently and never reside there again and she had obtained permanent residence status in the United States.

[100] Ibid. citing Ran, 607 F.3d 1017, 1022–1023 (5th Cir. 2010).

[101] *United States*: Kemsley, 489 B.R. 346, 352 (Bankr. S.D.N.Y. 2013), CLOUT 1274 *citing* Ran, 607 F.3d 1017 (5th Cir. 2010).

[102] Ibid. *United States*: Kemsley.

[103] Ibid. *United States*: Kemsley.

[104] *New Zealand*: Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] NZLR 380 [para. 42] (12 October 2010), CLOUT 1220 *quoting* Basingstoke v Groot [2007] NZFLR 363 (CA).

[105] *United States*: Kemsley, 489 B.R. 346, 360 (Bankr. S.D.N.Y. 2013), CLOUT 1274.

[106] *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 44], CLOUT 1214.

[107] *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 46], CLOUT 1475.

[108] Ibid.

[109] Ibid. *Australia*: Kapila [para. 47].

[110] *United States*: Kemsley, 489 B.R. 346, 360 (Bankr. S.D.N.Y. 2013), CLOUT 1274 *citing* Loy, 380 B.R. 154, 162 (Bankr. E.D. Va. 2007), CLOUT 924 and SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y 2006), CLOUT 768.

[111] *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 54], CLOUT 1475.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 17 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 29–33, 201–202]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) The MLCBI: A/CN.9/419 [paras. 62–69]; A/CN.9/422 [paras. 76–93]; A/CN.9/433 [paras. 99–104]; A/CN.9/435 [paras. 167, 173];

(b) The GE (1997): A/CN.9/436 [paras. 68–69]; A/CN.9/442 [paras. 124–131];

(c) The GEI (2013): A/CN.9/715 [paras. 14–15, 32–35]; A/CN.9/738 [paras. 33–35]; A/CN.9/742 [paras. 57–62]; A/CN.9/763 [paras. 49–55]; A/CN.9/766 [paras. 41–44].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 167].

INTRODUCTION

1. The GEI [paras. 150–167][1] explains article 17 establishes that recognition should be granted to the foreign proceeding as a matter of course provided recognition is not contrary to the public policy of the State under article 6 and provided the application meets the requirements set out in paragraph 1. In making its recognition decision, the receiving court is limited to the preconditions set out in paragraph 1; in particular, it might be noted that no provision is made for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under the applicable law (see the JP [para. 41]).[2] In making its decision, the court may rely on the presumptions in article 16.

2. Paragraph 2 requires the court to decide between recognizing the proceeding as a main or a non-main proceeding; recognition of proceedings commenced in a foreign State in which the debtor has assets, but no establishment as defined in article 2, is not envisaged (see the JP [paras. 44–46]). The use of the present tense in article 17, subparagraph 2 *(b)*, i.e., "if it is taking place […]." requires the foreign proceeding to be current or pending at the time of the recognition decision; if the proceeding for which recognition is sought is no longer current or pending in the originating State at that time (i.e., it is no longer "taking place", having been terminated or closed), there is no proceeding that would be eligible for recognition under the MLCBI. This issue is also discussed in the JP [paras. 129–134].

3. The GEI [paras. 157–160] discusses the date by reference to which the debtor's COMI (or establishment) is to be determined, an issue not specifically addressed by the MLCBI. The GEI suggests that the appropriate date is the date of commencement of the foreign proceeding. The GEI [para. 159] notes that, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded to the decision commencing the foreign proceeding and appointing the

foreign representative, the date of commencement of that proceeding is the appropriate date for determining COMI. Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's COMI is the foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the debtor's COMI by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganization where, under some laws, it is not the debtor that continues to have a COMI, but rather the reorganizing entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 *(a)*, is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine COMI provides a test that can be applied with certainty to all insolvency proceedings.

4. Paragraph 3 emphasizes the importance of recognition being obtained speedily; it may be noted that interim relief should be available under article 19 while the recognition application is pending.

5. Paragraph 4 clarifies that the decision on recognition may be revisited if the grounds for granting it were fully or partially lacking or have ceased to exist. The court's ability to review its decision is assisted by the obligation imposed on the foreign representative under article 18 to inform the court of changed circumstances. The JP [paras. 56–58] also discusses this point.

CASE LAW ON ARTICLE 17

ARTICLE 17, PARAGRAPH 1

6. Article 17, paragraph 1, makes provision for recognition of a foreign proceeding; it does not address recognition per se of a foreign representative. However, recognition of the foreign proceeding does require the court to be satisfied under article 17, subparagraph 1 *(b)*, that the foreign representative applying for recognition is a person within the meaning of article 2, subparagraph *(d)*.[3] It has been noted in one case that while recognition of a foreign proceeding entitles the foreign representative to, among other things, seek relief from the recognizing court, it does not make that person an officer of that court, and the court cannot therefore exercise punitive or disciplinary powers against that person.[4]

7. Courts have emphasized that the requirements of articles 15[5] and 17[6] are to be strictly construed: the court must make an independent analysis of whether the proceedings meet the definitional requirements listed in articles 2 and 17 and, if satisfied, recognition should follow. This outcome is underlined by the words used in article 17, paragraph 1, that specify the one qualification to recognition – "subject to […]", which sends a clear message to the judiciary that it is not subject to other things that are not so included.[7] The court, it has been indicated, has no discretion in that regard and it would be improper to disregard the nature of the foreign proceeding or to look behind the judgment of the foreign court.[8] Further, the court's power to examine facts underlying a request for recognition under article 17 cannot be sidestepped or eliminated by elections to not plead or introduce relevant facts or by a party's failure to object to recognition; the court may consider any and all relevant facts (including facts not yet presented).[9] In a case that has been much cited,[10] the court said that the analysis to be made was not a "rubber stamp exercise" that would enable recognition to be granted on the basis that there was no objection to recognition and because no proceedings had been commenced elsewhere.

ARTICLE 17, PARAGRAPH 2
(see also article 2, paragraph (f))

8. Once the requirements for recognition of article 17, paragraph 1, are met, the court must decide whether the foreign proceeding is to be recognized as a main or non-main proceeding under article 17, paragraph 2.[11] Although there are cases in which the court recognized the proceedings as "foreign proceedings" without determining whether they were main or non-main,[12] subsequent cases have emphasized the need to make the distinction as specified in article 17 and because of the different consequences flowing from recognition of the two types of proceeding.[13] There are no exceptions to recognition other than those provided in the MLCBI. For example, in a case where the debtor's assets were entirely leveraged, the court found that there was no exception to recognition based on the debtor's debt to value ratio at the time of its insolvency.[14]

9. Where a non-main proceeding is taking place, it can be recognized as such without the need for a main proceeding to be taking place; one court said that it would run contrary to logic as well as the statute's plain language and purpose to force the court to recognize a foreign proceeding as a "main" proceeding simply because it was the only proceeding currently taking place.[15]

Timing with respect to the consideration of COMI and habitual residence

10. In considering the debtor's COMI, courts have made reference to several possible dates as being the most relevant to that determination,[16] including:

(a) The date of commencement of the foreign proceeding for which recognition is sought;

(b) The date of the application for recognition;

(c) The date the court is called upon to decide the application;

(d) A date determined by reference to the operational history of the debtor.

(a) The date of commencement[17] of the foreign proceeding for which recognition is sought[18]

11. One view is that because the date of application for recognition is an arbitrary or random matter[19] and the proceeding for recognition is ancillary or secondary to the foreign proceeding, an interpretation by reference to the date in *(a)* is to be preferred.[20] It has also been suggested that the use of the present tense in article 17, paragraph 2 (i.e., use of the words "is taking place"), may be seen as a requirement that the foreign proceeding is to be current at the time of the recognition proceeding, but that one should not read too much into what might merely be seen as a neutral verb tense.[21] Choosing the date of commencement of the foreign proceeding, it is suggested, will avoid different outcomes in different jurisdictions where applications for recognition are made at different times and the debtor may have moved around between those times (particularly in the case of a natural person debtor).[22] It is also suggested that diversity of outcomes does not promote the goals of the preamble to the MLCBI or the need to promote uniformity of interpretation under article 8.[23] Another court noted that the date of commencement of the foreign proceeding is fixed and readily verifiable, while in contrast, the date for filing an application for recognition can vary greatly depending on the circumstances and the diligence of the foreign representative.[24]

(b) The date of the application for recognition[24]

12. Courts supporting the time referred to in *(b)* have focused on the use of the present tense ("has" its COMI) in paragraph 2 to conclude that a plain meaning interpretation would lead to the conclusion that the COMI is to be determined by reference to the facts as at the date of filing of the recognition application.[25] It is also suggested that that approach allows for the harmonization of transnational insolvency proceedings on the basis that limiting the inquiry to the time of filing avoids a detailed examination of the operational history of the applicant, which may entail conflicting COMI determinations by different courts.[26] A further argument in favour of this approach is that it allows the court to account for shifts in the debtor's COMI in the period between the commencement of the foreign insolvency proceeding and the date of the application for recognition, which may be unobjectionable on the basis that it grants companies the discretion to select the jurisdiction that will offer the best prospects for achieving an effective restructuring solution and may be of particular relevance where all of the necessary measures are not in place by the time of commencement of the proceedings, the relevant date for COMI determination in some States.[27] One court has suggested that considering the period between the commencement of the foreign insolvency proceeding and the application for recognition may offset a debtor's ability to manipulate COMI.[28]

(c) The date the court is called upon to make a decision on the application[29]

13. In support of this date, reliance has been placed upon the provision in the MLCBI for notifying changes of status under article 18 and for modifying or terminating recognition based on changed circumstances.[30] It has been suggested that those provisions exhibit a policy that the recognition process should be flexible and consider the actual facts relevant to the court's decision rather than setting an arbitrary determination point. In the light of these provisions, it is suggested, if the location of a debtor's COMI changed between the date the recognition application was filed and the date a court made a determination on recognition, the court could look to the facts on the latter date for the purposes of COMI.

(d) The operational history of the debtor

14. While this approach has been argued in several cases,[31] it has been rejected on the basis that it would increase the likelihood of conflicting COMI determinations and competing main proceedings, undermining uniformity and harmonization. If followed, those cases suggest, courts may tend to attach greater importance to activities in their own countries, or may simply weigh or analyse the evidence differently. The approach may also have an impact upon the question of whether the COMI was ascertainable by third parties. One court has suggested that the COMI was to be decided in the light of the facts as at the relevant time for determination, but that those facts could include historical facts that have led to the position as it is at the time for determination.[32]

Movement of COMI and the date for determination of COMI
(see also below, abuse of process)

15. The JP [paras. 126–128] notes that a debtor's COMI may move prior to commencement of insolvency proceedings, in some instances in close proximity to commencement and even between the time of the application for commencement and the actual commencement of those proceedings. Whenever there is evidence of such a move in close proximity to the commencement of the foreign proceeding, the JP [paras. 119–121] suggests it may be desirable for the receiving court, in determining whether to recognize those proceedings, to consider the additional factors identified in the GEI [para. 147] (see introduction to article 16) more carefully and to take account of the debtor's circumstances more broadly. In particular, the test that the COMI is readily ascertainable to third parties may be harder to meet if the move of the COMI occurs in close proximity to the commencement of proceedings. Put another way, a COMI that is regular and ascertainable by third parties is not easily subject to tactical removal.[33]

16. The time at which COMI is to be determined may also have an impact upon the location of COMI where it has moved after the commencement of insolvency proceedings.

As noted above,[34] determination of COMI by reference to the date of the application for recognition, for example, may grant a debtor the discretion to take advantage of a jurisdiction that will offer the best prospects for achieving an effective restructuring solution, and may be particularly relevant where all of the necessary measures are not in place by the time of commencement of the proceedings, the relevant date for COMI determination in some States.[35]

17. Under the EIR, it has been suggested that a court should be slow to accept that an established COMI had been changed by activities that could turn out to be temporary or transitory.[36] In a later case, the ECJ held that where a debtor's registered office was transferred before a request to commence insolvency proceedings was made, the debtor's COMI was presumed to be the place of the new registered office.[37] The EIR recast provides the presumption that the debtor's registered office is its COMI only applies if the registered office has not been moved to another European Union member State within the three-month period prior to the request for commencement of insolvency proceedings. In the case of habitual residence, the time period is six months.[38]

Timing with respect to establishment

18. The GEI [para. 160] and the JP [para. 143] suggest that the same considerations apply to the date at which any determination with respect to the existence of an establishment of the debtor should be made. Accordingly, the date of commencement of the foreign proceeding is the relevant date to be considered in making that determination.

ARTICLE 17, PARAGRAPH 3

19. As indicated above,[39] courts have noted that the goal of paragraph 3 is served by the presumptions provided in article 16.[40] Not all enacting States have adopted article 17, paragraph 3; some States have specified a period of time in which the recognition decision should be made.[41]

ARTICLE 17, PARAGRAPH 4

20. The court can revisit matters as provided in article 17, paragraph 4, when the original grounds for granting recognition were fully or partially lacking or had ceased to exist. Courts have characterized the recognition ruling as merely a "summary determination" that is not full and final and thus available for review,[42] although revisiting recognition is not mandatory, but within the court's discretion.[43] The JP [para. 57] indicates some examples of circumstances where review might be appropriate, including where: the order commencing the foreign proceeding has been reversed on appeal; the recognized foreign proceeding has been terminated;[44] the nature of the recognized proceeding has changed; or new facts have emerged that require or justify a change in the court's decision.

21. It has been suggested that the factors relevant to determining whether to terminate recognition are the same factors as those relating to granting recognition,[45] noting that either arm of the test in article 17, paragraph 4, is sufficient to enable the court to modify or terminate recognition. It has also been suggested that the court evaluating the presence or absence of either one of those conditions is not limited to considering only the evidence that was or ought to have been available at the time the court granted recognition, but may consider new evidence.[46] So, for example, if later investigation and collection of evidence were to show that where a court had applied the presumption of COMI in article 16, paragraph 3, and the actual COMI was elsewhere, that court could revisit the earlier order for recognition under article 17, paragraph 4.[47]

22. In a case where statements made by the debtor relating to his COMI were found to be not entirely accurate in the light of subsequent developments, the court said revisiting the recognition order that was over two years old would not only essentially abrogate the meticulously reasoned decision of the court, but also potentially frustrate the ruling of a judge in the originating jurisdiction and undermine one of the purposes of the MLCBI – cooperation. The court concluded that it would revisit recognition only upon a full and complete record that was accurate and transparent in all material respects.[48]

23. Where it was argued that recognition should not be granted or should be conditional because the decision commencing the foreign proceeding was subject to appeal, the court observed that there was nothing in articles 15 or 17 that required the foreign decision to be final or non-appealable.[49] The court went on to say that the order of the foreign court was sufficient to permit the foreign representatives to take up their duties and, if the order were to be reversed on appeal, article 18 would require the representatives to advise the court accordingly.[50]

OTHER ISSUES APPLICABLE TO RECOGNITION

Abuse of process, bad faith, fraud, improper purpose (see also article 6)

24. Several reported cases have involved different aspects of bad faith or abuse of process relating, for example, to the commencement of the foreign proceeding, the motivation behind the application for recognition, or the location of the debtor's COMI.

25. With respect to commencement of the foreign proceeding, it has been suggested that a court could refuse to grant recognition if it was convinced a foreign decision was the result of corruption.[51]

26. Where the concern related to the motivation behind the application for recognition, it was suggested that recognition should not be used by a debtor attempting to evade its legitimate foreign creditors[52] and, where improper forum shopping and frustration of an existing judgment were the only apparent reasons for the recognition application, those

circumstances supported denial of recognition as foreign main proceedings on the ground that recognition was being sought for an improper purpose.[53] Another view is that where bad faith is alleged to exist it is not a legal basis for disregarding the statutory requirements for recognition under article 17.[54]

27. As to bad faith or abuse of process relating to COMI, courts have said that the payment of bribes in the place where the debtor was audited or regulated may affect the accuracy of the audit or the effectiveness of the regulation, but did not establish that the debtor was audited or regulated elsewhere for the purposes of determining COMI. Moreover, since the existence of such bribes was secret, it was not ascertainable by third parties.[55] In another case concerning the time at which COMI should be determined (see movement of COMI above), a court said that in view of the EIR and other international interpretations, which focused on the regularity and ascertainability of a debtor's COMI, a court could consider the period between the commencement of the foreign insolvency proceeding and the filing of the recognition application to ensure that a debtor had not manipulated its COMI in bad faith.[56] In a further case concerning COMI, a court said that in some cases the location of the debtor may not be critical, for example, where no real business activity was conducted at that location and the debtor was a vehicle for fraud.[57] It has also been suggested that a COMI manipulated in bad faith would not be a valid COMI on which to rely.[58]

28. It has been noted that facts which come to light or are uncovered at a later date, such as the existence of a Ponzi scheme, may not have been in the public domain or apparent to a typical third party doing business with the debtor at any relevant time and thus may not be relevant to the rebuttal of the presumption in article 16, paragraph 3.[59] The argument that COMI could be determined by reference to an entity comprising all those involved in a fraudulent Ponzi scheme on the basis that it was not possible to have a COMI of some loose aggregation of companies and individuals has been rejected.[60]

Notes

[1] GE [paras. 124–132].

[2] *United States*: Creative Finance Ltd., 543 B.R. 498, 515 (Bankr. S.D.N.Y. 2016), CLOUT 1624 – court said that recognition turns on compliance with the requirements of art. 17 alone, notwithstanding findings of bad faith; Millard 501 B.R. 644, 650 (Bankr. S.D.N.Y. 2013); see comments below on art. 17, para. 4, with respect to the impact of bad faith on recognition, as well as discussion under art. 6.

[3] *Australia*: Pink v MF Global UK Limited [2012] FCA 260 [para. 16] – applicant sought recognition of the foreign proceeding and of the foreign representative. Court indicated that recognition of the latter was not contemplated by the MLCBI and was beyond the court's powers; court was, however, satisfied that the administrators were the foreign representatives and that they had standing to bring the application for recognition.

[4] *England*: Brian Glasgow (the Bankruptcy Trustee of Harlequin Property (SVG) Ltd.) v ELS Law Ltd. [2017] EWHC 3004 (Ch) [para. 85]; see also Candey Ltd v Crumpler [2020] EWHC Civ 26 [paras. 18, 29] – court said recognition order did not have the effect that the foreign representative was thereafter treated as either acting as, or acting in the capacity of, an English liquidator.

[5] See case law on article 15, para. 3.

[6] *New Zealand*: Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] NZLR 380 (12 October 2010) [para. 26], CLOUT 1220 – if the requirements are not met and the foreign proceeding is neither main nor non-main, there is no jurisdiction to grant recognition under article 17. *United States*: Bear Stearns, 389 B.R. 325, 333 (S.D.N.Y. 2008), CLOUT 794 – explaining that recognition "turns on the strict application of objective criteria"; Basis Yield Alpha Fund (Master), 381 B.R. 37, 45 (Bankr. S.D.N.Y. 2008), CLOUT 789; Atlas Shipping A/S, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009), CLOUT 1277; British-American Insurance Co., Ltd., 425 B.R. 884, 900 (Bankr. S.D.Fla. 2010), CLOUT 1005; Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010), CLOUT 1007; Ashapura Minechem Ltd., 480 B.R. 129, 136 (S.D.N.Y. 2012), CLOUT 1313.

[7] *United States*: Millard 501 BR 644, 654 (Bankr. S.D.N.Y. 2013); Loy, 380 B.R. 154, 168 (Bankr. E.D.Va. 2007), CLOUT 924 – court said that Congress did not include language in Ch. 15, sects. 1509, 1515, or 1517, which suggested a court was permitted to include equitable considerations in its determination of whether the prerequisites for foreign proceeding recognition had been met, *cited* in Ran, 406 B.R. 277, 288 (S.D.Tex.2009), CLOUT 929, affirmed on other grounds, 607 F.3d 1017 (5th Cir.2010), CLOUT 1276; in Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63, 78 (Bankr. S.D.N.Y. 2011) affirmed 474 B.R 88 (S.D.N.Y. 2012), CLOUT 1208, the Bankruptcy Court took a different view to the court in Loy, observing that although there were decisions that rigidly asserted equitable factors should play no role at the recognition phase of an application for recognition under Ch. 15 of the United States Bankruptcy Code, a determination relative to recognition and to the COMI of an enterprise should take into account the existence of a fair and impartial judicial system and a sophisticated body of law, as aspects of the bona fides of the proceedings.

[8] Ibid. *United States*: Millard 650.

[9] *United States*: Basis Yield Alpha Fund (Master), 381 B.R. 37, 47–48, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789; see also Bear Stearns 389 B.R. 325, 335 (S.D.N.Y. 2008), CLOUT 794 – court confirmed the lower court's rejection of the appellants' position that "this Court should accept the proposition that the Foreign Proceedings are main proceedings because the Petitioners say so and because no [one] else says they aren't": 374 B.R. 122, 129.

[10] *United States*: Bear Stearns 374 B.R. 122, 130 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794, departing from the decision in SPhinX Ltd 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) affirmed 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768; *cited* in Basis Yield Alpha Fund (Master), 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789; Gold & Honey, Ltd., 410 B.R. 357, 366 (Bankr. E.D.N.Y. 2009), CLOUT 1008; Lavie v Ran, 607 F.3d 1017, 1021 (5th Cir. 2010).

[11] *Republic of Korea*: legislation enacting the MLCBI in the Republic of Korea (Debtor Rehabilitation and Bankruptcy Act 2005) makes no distinction between main and non-main proceedings, referring only to "foreign bankruptcy proceedings" (DRB A, sect. 632).

[12] In several early cases decided under legislation enacting the MLCBI in the United States, recognition was granted to a "foreign proceeding" without the court determining whether it was main or non-main: Spencer Partners Limited, case No. 07-02356, Bankr. D.S.C. May 29, 2007, CLOUT 759 – court deferred that decision to a later time, but held that the foreign representative was entitled to the relief set forth in 11 U.S.C. § 1521 [art. 21 of the MLCBI]; Schefenacker Plc, case No. 07-11482, order dated 14 June, 2007, unreported, CLOUT 767 – court granted recognition to a foreign proceeding without specifying whether main or non-main proceeding, because the foreign debtor clearly qualified as one or the other and the relief sought could be appropriately granted in either type of proceeding. The court was particularly reluctant to undertake the task on the basis that it would have put it in the position of reviewing the determination of a foreign court with respect to that issue; SPhinX, Ltd., 351 B.R. 103 (Bankr. S.D.N.Y. 2006), CLOUT 768 – court had suggested that there was a separation under Ch. 15 between the concept of recognition under art. 17, para. 1, and the requirement to determine whether the proceeding was main or non-main under art. 17, para. 2. Although going on to suggest that in some cases it might be appropriate to defer consideration of the characterization as main or non-main, since no negative consequence flowed from that distinction in terms of the relief available in the case in question, the court found the proceedings to be non-main proceedings, that finding affirmed on appeal 371 B.R. (S.D.N.Y. 2007).

[13] E.g., *United States*: Loy 380 B.R. 154, 162 (Bankr. E.D.Va. 2007), CLOUT 924 – court said a simple recognition of a foreign proceeding as "a foreign proceeding without specifying more (i.e., with no declaration as to either 'main or non-main') was insufficient as there were substantial eligibility distinctions and consequences" *quoting* Bear Stearns, 374 B.R. 122, 125 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794. *New Zealand*: Batty (as trustee in bankruptcy of Reeves) v Reeves [2015] NZHC 908, CLOUT 1801; Leeds v Richards [2016] NZHC 2314, CLOUT 1800.

[14] *United States*: ABC Learning Centres Ltd., 728 F.3d 301 (3d Cir. 2013), CLOUT 1338 – such an exception, the court said, could contravene the stated purposes of Ch. 15 and the mandatory language of Ch. 15 recognition.

[15] *United States*: SPhinX, Ltd. 351 B.R. 103, 122 (Bankr. S.D.N.Y. 2006) affirmed 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768; the United States Bankruptcy Code, 11 U.S.C. sect. 1517 *(b)*, enacting art. 17, subpara. 2 *(a)*, of the MLCBI, replaces the words "taking place" with the word "pending"; the same usage occurs in sect.1502 (4) and 1502 (5) enacting art. 2, subparas. *(d)* and *(e)*, of the MLCBI (see notes on art. 2, subpara. *(b)*, above).

[16] A summary of the different approaches and an analysis of their relative merits is provided in *Singapore*: Re: Zetta Jet Pte Ltd and Others (Asia Aviation Holdings Pte Ltd, intervener) [2019] SGHC 53 [39–61], CLOUT 1816.

[17] It might be noted that in some States the date of the application for commencement and commencement can be the same, hence cases might refer to the date of the filing of the proceeding rather than the date of commencement of the proceeding – e.g., *United States*: Kemsley, 489 B.R. 346, 359–360 (Bankr. S.D.N.Y. 2013), CLOUT 1274. Where the dates are different, the focus should be upon the date of commencement, in view of the words in art. 17, subpara. 2 *(a)*, "if it is taking place" – prior to actual commencement it cannot be taking place see *United States*: Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 134 (2d Cir. Apr. 16, 2013), CLOUT 1339.

[18] *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [paras. 35–39], CLOUT 1475; King, in the matter of Zetta Jet Pte Ltd [2018] FCA 1932, CLOUT 1817 – court said the case showed that if alternative approaches were followed, the debtor might not have been engaged in any activities at all, compare Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 44], CLOUT 1214 and Moore v Australian Equity Investors [2012] FCA 1002 [para. 18], CLOUT 1477. *Japan*: Think3, case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 1 (2), based on the reasoning in the District Court case Nos. (shou) 3 and 5 of 2011, CLOUT 1335. The High Court also suggested that when a significant period of time elapses between the filing of the petition to commence and the application for recognition, or when the principal place of business is transferred just before the application for commencement, special circumstances may need to be considered: ch. 3, 2 (5). *United States*: Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011) (decision not appealed on that point), CLOUT 1208 – court said the date of the petition for recognition was a matter of happenstance; in the case in question, the application for recognition was made three years after the filing of the liquidation in Bermuda, apparently occasioned by the possible passage of one or more statutes of limitation on causes of action of the estates; Gerova Financial Group, Ltd., 482 B.R. 86, 92–93 (Bankr. S.D.N.Y. 2013), CLOUT 1275; Kemsley, 489 B.R. 346, 354, 359–360 (Bankr. S.D.N.Y. 2013), CLOUT 1274 – court agreed with the approach in Gerova Financial Group, Ltd., 482 B.R. 86, 92–93 (Bankr. S.D.N.Y. 2013), CLOUT 1275 and Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011), CLOUT 1208, that the date of application for commencement of the foreign proceeding is the first date when the opportunity for cross-border cooperation first came into being, it is a fixed and readily verifiable date, in contrast to the date of the petition for recognition which can vary greatly depending on circumstances and the diligence of the foreign representatives.

[19] *Japan*: Think3, District Court, case Nos. (shou) 3 and 5 of 2011 at ch. 3, 2 (3), CLOUT 1335.

[20] *United States*: Kemsley, 489 B.R. 346, 359–360 (Bankr. S.D.N.Y. 2013), CLOUT 1274 *citing* Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011) affirmed 474 B.R. 88 (S.D.N.Y. 2012), CLOUT 1208.

[21] GEI [158]; *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 35], CLOUT 1475. *United States*: Kemsley, 489 B.R. 346, 359–360 (Bankr. S.D.N.Y. 2013), CLOUT 1274.

[22] Ibid. *Australia*: Kapila [para. 37]. *Japan*: Think3, case Nos. (shou) 3 and 5 of 2011 Tokyo District Court, ch. 3, issue 2–1, (1)–(5) *affirmed* case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 2 (3), (5), CLOUT 1335.

[23] Ibid. *Australia*: Kapila [para. 38]. *Japan*: Think3, case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 2 (1), CLOUT 1335.

[24] *United States*: Kemsley, 489 B.R. 346, 354 (Bankr. S.D.N.Y. 2013), CLOUT 1274.

[25] *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 44], CLOUT 1214.
United States: Betcorp Limited 400 B.R. 266, 290–291 (Bankr. D. Nev. 2009), CLOUT 927 *citing* Ran, 607 F.3d 1017, 1025 (5th Cir. 2010); British American Isle of Venice (BVI), Ltd., 441 B.R. 713, 720–21 (Bankr. S.D. Fla. 2010); British-American Insurance Co., Ltd. 425 B.R. 884, 909–10 (Bankr. S.D. Fla. 2010), CLOUT 1005; Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 133 (2d Cir. Apr. 16, 2013), CLOUT 1339.

[26] *United States*: Lavie v Ran (*In re* Ran), 607 F.3d 1017, 1025 (5th Cir. 2010); Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 133 (2d Cir. Apr. 16, 2013), CLOUT 1339 – court examined both the EIR and the UNCITRAL Guide to Enactment of the MLCBI, but found that overall, international sources are of limited use in resolving whether United States courts should determine COMI at the time of the Ch. 15 petition or in some other way.

[27] *United States*: Lavie v Ran (*In re* Ran), 607 F.3d 1017, 1025–1026 (5th Cir, 2010); Ocean Rig UDW Inc., 570 BR 687, 704 (Bankr. S.D.N.Y. 2017) followed in *Singapore*: Re: Zetta Jet Pte Ltd and Others (Asia Aviation Holdings Pte Ltd, intervener) [2019] SGHC 53 [paras. 53, 61], CLOUT 1816.

[28] *Singapore*: Re: Zetta Jet Pte Ltd and Others (Asia Aviation Holdings Pte Ltd, intervener) [2019] SGHC 53 [para. 57], CLOUT 1816.

[29] *United States*: Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 133 (2d Cir. Apr. 16, 2013), CLOUT 1339.

[30] *Australia*: Moore v Australian Equity Investors [2012] FCA 1002 [para. 18], CLOUT 1477; *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 910 (Bankr. S.D.Fla. 2010), CLOUT 1005.

[31] *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 910 (Bankr. S.D.Fla. 2010), CLOUT 1005.

[32] *United States*: Betcorp Limited 400 B.R. 266, 291 (Bankr. D. Nev. 2009), CLOUT 927 *citing* Lavie v Ran, 390 B.R. 257, 300 (Bankr. S.D.Tex. 2008) in which the court rejected this approach on the basis that it increased the likelihood of conflicting COMI determinations and competing main proceedings, as courts may tend to attach greater importance to activities in their own countries, or may simply weigh the evidence differently. Further, it may affect the issue of ascertainability of COMI by third parties; this issue was also raised, but rejected by the court, in British-American Insurance Co., Ltd. 425 B.R. 884, 909–910 (Bankr. S.D.Fla. 2010), CLOUT 1005 and Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 133 (2d Cir. Apr. 16, 2013), CLOUT 1339.

[33] *Australia*: Moore v Australian Equity Investors [2012] FCA 1002 [para. 19], CLOUT 1477.

[34] *United States*: Creative Finance Ltd., 543 B.R. 498, 517 (Bankr. S.D.N.Y. 2016), CLOUT 1624 – court said that while COMI can change from the jurisdiction in which a foreign debtor actually did business to a "letterbox" jurisdiction, it can only do so where material activities had been undertaken in the jurisdiction in which the foreign proceeding was filed, thus providing a meaningful basis for the expectation of third parties. The court found (at 501), consistent with the principles articulated in Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir. Apr. 16, 2013), CLOUT 1339, that the minimal activities undertaken by the liquidator were insufficient to change the COMI and he never developed a COMI in the jurisdiction in which he was appointed. The court (at 511) described the actions of the liquidator as falling far short of anything that could legitimately be characterized as "material efforts".

[35] See timing with respect to the consideration of COMI and habitual residence, section *(b)*.

[36] See also *United States*: Ocean Rig UDW Inc., 570 B.R. 687 (Bankr. S.D.N.Y. 2017).

[37] *EIR/England*: Shierson v Vlieland-Boddy [2005] EWCA CiV 974 [2005] 1 WLR 3966 [para. 55] *cited* in *Australia*: Moore v Australian Equity Investors [2012] FCA 1002 [para. 20], CLOUT 1477.

[38] *EIR*: Interedil, Srl v Fallimento Interedil, Srl [2011] EUECJ C-396/09 [para. 59], [2012] Bus LR 1582.

[39] *EIR recast*, art. 3, para. 1.

[40] Introduction to article 16, para.1, and operation of the presumption under the MLCBI.

[41] *Australia*: Akers v Saad Investments [2010] FCA 1221 [para. 46] (appeal on other grounds), CLOUT 1219.

[42] E.g., Canada, Colombia, Poland and Uganda have not enacted this provision; the Dominican Republic specifies 15 days, the Philippines 30 days and the Republic of Korea one month.

[43] *United States*: Petition of Ernst & Young, Inc., 383 B.R. 773, 781 (Bankr. D. Colo. 2008), CLOUT 790; British American Insurance Co., Ltd. 425 BR 884, 901 (Bankr. D.Fla.2010), CLOUT 1005.

[44] *England*: Sturgeon Central Asia Balanced Fund [2020] EWHC at [paras. 34–47] where the court considered both MLCBI and local procedural rules in undertaking a review of a previous decision. *United States*: Oi Brasil Holdings Cooperatief U.A., 578 B.R. 169 (Bankr. S.D.N.Y. 2017) *citing* Loy 448 BR 420, 439 (Bankr. E.D.Va. 2011), which confirmed the discretionary nature of art. 17, para. 4.

[45] *England*: Sanko Steamship Co. Ltd. [2015] EWHC 1031 (Ch): the foreign proceedings terminated when a certain percentage of distributions had been reached.

[46] *United States*: Cozumel Caribe, S.A. de C.V., 508 B.R. 330, 335 (Bankr. S.D.N.Y. 2014), see also Cozumel Caribe, S.A., de C.V.), 482 B.R. 96 (Bankr. S.D.N.Y. 2012), CLOUT 1311, a related case.

[47] *Australia*: Akers v Saad Investments [2010] FCA 1221 [para. 53], CLOUT 1219 (appeal on other grounds). *United States*: Oi Brasil Holdings Cooperatief U.A., 578 B.R. 169, 225–235 (Bankr. S.D.N.Y. 2017).

[48] Ibid.

[49] *United States*: Loy 448 B.R. 420, 443 (Bankr. E.D.Va. 2011).

[50] *United States*: Gerova Financial Group, Ltd., 482 B.R. 86, 94 (Bankr. S.D.N.Y. 2013), CLOUT 1275; JP [para. 57].

[51] Ibid.

[52] *United States*: Perry H. Koplik & Sons, Inc, 357 BR 213 (Bankr. S.D.N.Y. 2006); on the question of equitable factors to be considered in recognition, see discussion above, case law on art. 17, para. 1, footnote to the third sentence.

[53] *United States*: Octaviar Administration Pty Ltd, 511 B.R. 361, 374 (Bankr. S.D.N.Y. 2014), CLOUT 1483 – *citing* Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 132 (2d Cir. Apr. 16, 2013), CLOUT 1339.

[54] *United States*: SPhinX, Ltd., 371 B.R. 10, 19 (S.D.N.Y. 2007), CLOUT 768. *England*: OGX Petroleo E Gas S.A. [2016] EWHC 25 (Ch) [para. 60], CLOUT 1622 – court said it was strongly arguable that, notwithstanding art. 6 was to be given a restrictive interpretation, the court must have the discretion to refuse recognition if satisfied that the applicant was abusing that process for an illegitimate purpose. The applicant failed to disclose the material fact that the arbitration which it sought to suspend through the recognition application was not covered by the foreign proceeding and could not therefore be subject to the automatic stay under art. 20; see also cases relating to full and frank disclosure discussed under art. 6 above.

[55] *United States*: Millard 501 BR 644, 647 (Bankr. S.D.N.Y. 2013) – court went on to say that such behaviour might later provide a basis for subsequent relief under other sections of the United States Bankruptcy Code (including relief from the stay), which could cause recognition to be vacated; Creative Finance Ltd., 543 B.R. 498, 515–516, 522–23 (Bankr. S.D.N.Y. 2016), CLOUT 1624 – court held that although it was offended by the conduct of the debtors, the question of recognition, on the facts of the case before it, turned on compliance with the requirements of art. 17, not on application of art. 6.

[56] *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 61], CLOUT 1003.

[57] *United States*: Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 138 (2d Cir. Apr. 16, 2013), CLOUT 1339 *cited* in Creative Finance Ltd., 543 B.R. 498, 522–23 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

[58] *United States*: Petition of Ernst & Young, Inc., 383 B.R. 773, 780 (Bankr. D. Colo 2008), CLOUT 790.

[59] *United States*: Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 138 (2d Cir. Apr. 16, 2013), CLOUT 1339; Creative Finance Ltd., 543 B.R. 498, 524 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

[60] *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [paras. 56, 60], CLOUT 1003.

[61] Ibid. *England*: Stanford [para. 56]. *United States*: Petition of Ernst & Young, Inc., 383 B.R. 773 (Bankr. D. Colo. 2008), CLOUT 790.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 18 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 113–116, 201–202, 207]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) GE (1997): A/CN.9/442 [paras. 133–134];

(b) GEI (2013): A/CN.9/742 [para. 63]; A/CN.9/763 [para. 56]; A/CN.9/766 [para. 45].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 169].

INTRODUCTION

1. The GEI [paras. 168–169][1] notes it is possible that, after the application for recognition or the decision on recognition has been made, changes may occur in the foreign proceeding that would have affected a decision on relief or recognition had those facts been known at the time the application or decision was made. To ensure the court is kept fully informed of such changes when they are of a substantial nature, article 18 imposes a duty on the foreign representative to advise of those changes, including to the status of the proceeding or the foreign representative's appointment, and of any additional proceedings concerning the debtor that may become known to the foreign representative subsequent to the statement concerning the foreign proceedings concerning the debtor known to the foreign representative that is required to be made to the court under article 15, paragraph 3. The obligation under paragraph *(b)* would allow the court to consider whether relief already granted should be coordinated with any insolvency proceedings commenced after the decision on recognition is made (see article 30) and would facilitate cooperation under chapter IV.

CASE LAW ON ARTICLE 18

2. Where a change occurs in the foreign proceeding, for example it is suspended, and it is unclear what the precise effect of that change might be and whether a change in recognition is warranted as a result of the change, a court has indicated it can order a status report to be filed in accordance with the obligation under article 18.[2] Where a proceeding is terminated following recognition, the obligation under article 18 requires the court to be informed because there is thus no foreign proceeding that could continue to be recognized, that could sustain continued operation of the article 20 stay or applications for further relief.[3] In that situation, however, it has been noted that a difficulty arises because the obligation to inform under article 18 falls upon the foreign representative, who is no longer in office.[4] In one case it was found that in such a circumstance, the obligation to inform the court might appropriately fall upon the debtor.[5]

3. Approval of a reorganization plan and the return of management and daily control to the debtor was held in one case as not necessarily producing a substantial change in status that would mean the proceeding ceased to be a foreign proceeding as contemplated under article 18.[6] In reaching its decision, the court noted that the debtor was obligated to continue making payments under the plan for two years and that the foreign court retained oversight of those payments, as well as authority to resolve any disputes relating to the plan. In another case in which the reorganization plan had been accepted by the foreign court so that it became binding on creditors and as a consequence of which the foreign representative had retired from office, the recognizing court said that retirement was the kind of substantial change to which article 18 was directed. The court observed that subparagraph *(a)* took into account that technical modifications in the status of the proceedings or the foreign representative's appointment were frequent, but that only some of those modifications would affect the decision granting relief or the decision recognizing the proceeding.[7] The court also said it was particularly important that the court be informed of modifications when its decision on recognition concerned a foreign "interim" proceeding.

Notes

[1] GE [paras. 133–134].

[2] *United States*: Cozumel Caribe, S.A., de C.V., 482 B.R. 96, 107–108 (Bankr. S.D.N.Y. 2012), CLOUT 1311; on the duty to file under art. 18 see also Daewoo Logistics Corp., 461 B.R. 175, 179–180 (Bankr. S.D.N.Y. 2011), CLOUT 1315.

[3] *England*: Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia [2018] EWCA Civ 2802 [para. 97], CLOUT 1822 – court noted that the duty to inform the court under art. 18 fell upon the foreign representative and it could only be performed while the foreign proceeding was still in existence and the foreign representative still in office. The strong implication, the court said, was that once the foreign proceeding had come to an end, and the foreign representative no longer held office, there was no scope for further orders in support of the foreign proceeding to be made and any relief previously granted under the MLCBI should terminate. The court also said that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would surely have addressed the question explicitly and provided an appropriate mechanism for that purpose.

[4] *Australia*: Board of Directors of Rizzo-Bottiglieri-De-Carlini Armatori SpA v Rizzo Bottiglieri-De-Carlini Armatori SpA [2017] FCA 331 [13–14], CLOUT 1799 and [2018] FCA 153, in which court observed [paras. 27–29]: The problem is that once the foreign proceeding, pursuant to which the foreign representative brought proceedings for recognition in the local forum, has been either terminated or withdrawn, that event necessarily also extinguishes the status or authority of the foreign representative to act in respect of the debtor and his, her or its affairs. In reality, the foreign representative subsequently will be highly unlikely to be in a position financially (or feel responsible) to inform the local court that had acted earlier to recognize the foreign proceeding in the forum, of that fact under art. 18 of the MLCBI [para. 28]. As a matter of common sense, once the foreign representative ceases to occupy his or her position in the jurisdiction of the foreign court that appointed him or her (such as the court in Italy in this case), he or she will have no resort to funds of the debtor or, more particularly, no sense of responsibility to another court, such as this, to which the foreign representative may have no realistic chance of being made to account, if he or she fails to act under art. 18 *(a)* to draw attention to any substantial change of status of himself or herself or the recognized foreign proceeding [para. 29]. That practical reality means that any interim or final recognition orders by the local court […] will remain in force in its jurisdiction even though the change of status in the jurisdiction of the foreign court has removed the very foundation of, or continuing justification for, the local court's orders under the MLCBI. Thus, the interim stay and other orders made on 17 June 2015 remained in force in Australia in the period between the dismissal of the second proceeding in Italy on 28 April 2016 and 3 February 2017, when orders vacating those orders (with retrospective effect) were made, despite the earlier dismissal in Italy of the very proceeding that the orders of the court in Australia were supposedly continuing to recognize: [2017] FCA 331 at [paras. 13–19].

[5] *Australia*: Yakushiji (No. 2) [2016] FCA 1277 [paras. 17, 20–22] – court noted that since the person previously appointed as foreign representative was no longer able to fulfill that obligation, the debtors were best placed to bring to the recognizing court the information concerning termination orders issued in the foreign proceeding and the retirement of the foreign representative.

[6] *United States*: Oversight & Control Commission of Avanzit, S.A., 385 B.R. 525, 536 (Bankr. S.D.N.Y. 2008), CLOUT 925.

[7] *Australia*: Yakushiji (No. 2) [2016] FCA 1277 [paras. 17, 20–22].

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 19 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 34–46]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 174–177]; A/CN.9/422 [paras. 116, 119, 122–123]; A/CN.9/433 [paras. 110–114]; A/CN.9/435 [paras. 17–23];

(b) GE (1997): A/CN.9/436 [paras. 71–75]; A/CN.9/442 [paras. 135–140];

(c) GEI (2013): A/CN.9/763 [para. 57]; A/CN.9/766 [para. 46].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 175].

INTRODUCTION

1. The GEI [paras. 170–175][1] explains that article 19 authorizes the court, at the request of the foreign representative, to grant the type of relief that is usually available only in collective insolvency proceedings, as opposed to individual types of relief that may be granted before the commencement of insolvency proceedings under rules of civil procedure (i.e., measures covering specific assets identified by a creditor). Collective measures may be required before the recognition decision is made in order to protect the assets of the debtor and the interests of creditors, but those measures are only available on an urgent and provisional basis, pending the recognition decision. Paragraph 2 deals with issues of notice. Paragraph 3 provides that interim relief ordered under article 19 terminates upon recognition, although it may be extended under article 21, subparagraph 1 *(f)*. Paragraph 4 pursues the same objective as article 30, subparagraph *(a)*, of fostering coordination of pre-recognition relief with any foreign main proceedings, the existence of which should be included in the statement provided by the foreign representative under article 15, paragraph 3. The JP [paras. 146–147, 150–156] also provides an explanation of article 19.

CASE LAW ON ARTICLE 19

2. The chapeau to paragraph 1 refers to the application for relief under article 19 being made by the foreign representative.[2] In one case where the debtor applied for that relief, the court found there was insufficient evidence to show the debtor was the foreign representative for the purposes of article 19.[3]

3. A second requirement under article 19 is that an application for recognition must have been made. Where a foreign representative sought an order for a stay without seeking recognition, the court confirmed that it had no authority to consider such a request under the MLCBI; either an application for recognition was required for such relief to be ordered under article 19 or recognition for it to be ordered under a rticle 21.[4]

4. Courts have confirmed that the purpose of article 19 is to provide a mechanism to enable the court to order "urgently needed" relief where an application for recognition has been made and is pending,[5] to protect

assets or the interests of creditors when concern exists that the assets may perish, be susceptible to devaluation or otherwise in jeopardy in the period before the hearing of the recognition application. That jeopardy, it has been suggested, could include circumstances where efforts by creditors to control or possess assets or terminate unfavourable contracts, require security deposits, tighten credit terms or take other detrimental business actions against the creditor would interfere with the jurisdictional mandate of the court under the MLCBI, interfere with and cause harm to the debtor's efforts to administer its estates pursuant to the foreign proceeding and undermine the foreign representative's efforts to achieve an equitable result for the benefit of all the debtor's creditors, causing immediate and irreparable injury.[6] In a case where the interim relief sought was a stay on litigation, the court noted that recognition was required for such relief to be ordered; it was not a form of relief available under article 19, but rather under article 21.[7] Another purpose of interim relief, it is suggested, is to ensure that the effects of article 20, when recognition is granted, will not be rendered ineffective, especially where the relief sought concerns the right to transfer, encumber or otherwise dispose of any assets of the debtor.[8]

5. Courts have observed that since the framers of the MLCBI could not have anticipated the vast array of circumstances in which interim relief might be required, article 19 is expressed in non-exhaustive terms, using the word "including" before specifying particular types of relief that might be ordered.[9] Emphasis has been placed on flexibility of approach.[10] That flexibility has been regarded as justification for the issue under article 19 of a search warrant to ascertain whether there were assets that were being concealed that might be in jeopardy if some form of interim relief did not attach to them.[11]

Notes

[1] GE [paras. 170–174].

[2] *Republic of Korea*: relief can be granted by the court on its own motion: (2017) GOOKSEUNG 100001 (10 March 2017), the Seoul Bankruptcy Court ordered relief under the local equivalent of art. 19 (Debtor Rehabilitation and Bankruptcy Act, 2005, sect. 635) on its own motion on the day following the filing of an application for recognition, to quickly protect the debtor's assets, taking account of the origin of the foreign proceedings (United States); relief under art. 19 was ordered in the Republic of Korea for the first time in (2012) GOOKJI 1 (10 August 2012), Seoul Central District Court.

[3] *United States*: Daymonex Limited (Bankr. S.D. Ind, Feb. 7, 2007), CLOUT 757 – debtor applied for relief under art. 19 and the court found there was insufficient evidence to show the debtor was the foreign representative, noting that only the foreign representative could apply for relief under art. 19.

[4] *United States*: United States v J.A. Jones Const. Group, LLC 333 B.R. 637, 638 (E.D.N.Y. 2005), CLOUT 763.

[5] *Australia*: Chow Cho Poon (Private Limited) [2011] NSWSC 300 [para. 64], CLOUT 1218; Yu v STX Pan Ocean Co Ltd (South Korea) [2013] FCA 680 [para. 17], CLOUT 1333 – court noted that although art. 19 referred to the possibility that "relief mentioned in" art. 21 may be granted on a provisional basis, the source of power to grant provisional relief of that kind lay in art. 19, not art. 21. Accordingly, provisional orders would cease to operate altogether when recognition was granted. From that time, art. 20 would operate and if consequences additional to those accomplished by art. 20 were intended, additional orders under art. 21 would be necessary.

[6] *United States*: Japan Airlines Corp. (Bankr. S.D.N.Y. Jan. 28, 2010), pp.1–2.

[7] *United States*: Halo Creative & Design Limited v Comptoir des Indes Inc., case No. 14C 8196 (N.D. Ill Oct. 2, 2018); United States v J.A. Jones Constr. Group, LLC, 333 B.R. 637 (E.D.N.Y. 2005), CLOUT 763.

[8] *Australia*: Tucker (2009) FCA 1354 [para. 22], CLOUT 922 – court referred to relief available under art. 20, subpara. 1 *(c)*.

[9] *New Zealand*: Williams v Simpson (No. 1) [2011] NZHC 1631 (17 September 2010) [para. 44].

[10] Ibid.

[11] Ibid., *New Zealand*: Williams [para. 47] – in the same case, a second application for interim relief was made seeking the examination of certain persons to determine issues of ownership of the items that had been seized pursuant to the search warrant. The court refused to grant the application on the basis that the relief sought was not urgent as required under art. 19, para. 1. The court held that since the assets whose ownership was in question had already been seized and the issue of ownership would become relevant after the determination on recognition of the foreign proceedings, the order was not necessary.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 20 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 47–60]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 137–143]; A/CN.9/422 [paras. 94–110]; A/CN.9/433 [paras. 115–126]; A/CN.9/435 [paras. 24–48];

(b) GE (1997): A/CN.9/436 [paras. 76–79]; A/CN.9/442 [paras. 141–153];

(c) GEI (2013): A/CN.9/742 [para. 64]; A/CN.9/763 [para. 58]; A/CN.9/766 [para. 47].

3. Relevant working papers are referred to in the reports and in the GEI following [188].

INTRODUCTION[1]

1. The GEI [paras. 176–188][2] notes there are several differences between the relief available under articles 19 and 21 and that under article 20. First, article 20 provides for an effect or state of affairs, described in article 20, paragraph 1, that is applicable by law, not by order of the court, and that flows automatically from recognition of a foreign main proceeding.[3] Secondly, the extent of such an effect or state of affairs ("the scope, and the modification or termination, of the stay and suspension") can be affected by the operation of the laws referred to in each State's enactment of article 20, paragraph 2. Article 20 does not therefore import foreign law, but rather specifies the effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency. The relief automatically applicable under article 20 is not subject to the same requirements for adequate protection of interests under article 22 that apply to any discretionary relief granted under articles 19 and 21. Nor can the relief applicable under article 20 be modified or terminated under article 22, paragraph 3. It may, however, be affected in the event of concurrent proceedings under article 29, subparagraphs *(a)* (ii) and *(b)* (ii). The JP [paras. 161–167] also provides a discussion of article 20.

CASE LAW ON ARTICLE 20

ARTICLE 20, PARAGRAPH 1

Interpretation of words and phrases

"Commencement or continuation of individual actions or individual proceedings"

2. Words along those lines (the discussion is also relevant to article 21, subparagraph 1 *(a)*) have been interpreted by courts having regard to local cases, foreign cases and to the GE [paras. 145–146],[4] which indicate that the word "action" would cover an action before an arbitral tribunal and that the word "proceedings" might extend to "enforcement measures by creditors outside the court system". In one case, the court referred also to several local cases,[5] which suggested that the word "proceedings", used with the words "commence" and "continue", was far more appropriate to legal proceedings than to the doing of some act of a more general nature. Together, the court said, those words embraced all steps in legal proceedings from the issue of initiating process, to their

final termination in the process of execution or other means of enforcement of a judgment. The words "commence" or "continue" indicated, the court said, a process which had an independent existence of its own apart from the step by which it was commenced or continued; the process either continued after, or was in existence before, the taking of the relevant step. The court concluded that the service of a notice to terminate a contract, in accordance with its terms, was not the commencement or continuation of an individual action or proceeding.[6] In another State,[7] the court said the term "proceedings" was not confined to legal proceedings on the basis that the text did not say so and that the GEI contemplated "measures initiated by creditors outside the court system".[8]

"Debtor's assets"/ "assets of the debtor"

3. What constitutes "the debtor's assets" in article 20, paragraph 1 (the discussion is also relevant to article 21), has been considered by courts by reference to the definition of "assets of the debtor" in the Legislative Guide.[9] The court concluded that the debtor's interest in the ship in question (pursuant to a charter by demise) was an asset for the purposes of the legislation enacting the MLCBI and that admiralty proceedings with respect to that ship concerned the debtor's "rights, obligations or liabilities" in terms of article 20, subparagraph 1 *(a)*.

Scope of the automatic stay

4. In a case where the question concerned an arbitration conducted in a foreign State after the commencement of the recognition proceeding, the recognizing court held that the scope of the automatic stay under that State's enactment of article 20[10] was limited to proceedings that could have an impact on the debtor's property located in, or within the territorial jurisdiction of, that State.[11] The automatic stay in the recognition proceeding did not apply globally to all proceedings against the debtor and the arbitration was thus unaffected. In another State, where an arbitration hearing was scheduled to take place in that State (the receiving State) on the day following the court's consideration of the recognition application, it was held that the arbitration was automatically stayed as a result of the recognition decision.[12] A court has also said the automatic stay was not intended to operate upon recognition of collective foreign proceedings to prevent persons whose claims were not subject to those collective proceedings from being able to pursue those claims against the debtor.[13]

5. The scope of the automatic stay under article 20 has been the subject of requests for variation under article 21, subparagraph 1 *(a)*, especially in the context of reorganization proceedings where the debtor needs be able to continue trading; some courts have said that the article 20 stay may not be appropriate in those circumstances as it is primarily designed for foreign liquidations.[14] Lifting of the stay was sought to enable continuation of an arbitration in circumstances where a party had earlier undertaken not to continue with arbitration proceedings until "final determination of the recognition application". The court observed that the possibility of an interim determination did not exist under the MLCBI or the local enacting legislation and the word "final" (as included in the parties' undertaking) must refer to a time when appeal of the recognition judgment was no longer a possibility.[15]

Duration of the automatic stay

6. The MLCBI does not specify the length of the duration of the automatic stay. Most cases focus on the time at which the stay ceases to apply, although one case does address a request for effect retroactive to the date of commencement of the foreign proceeding.[16] It has been suggested that the automatic relief afforded by recognition of a foreign main proceeding is normally coterminous with the stay applicable in the corresponding foreign proceeding. Accordingly, absent exigent circumstances, the automatic stay under the MLCBI ceases when the foreign proceeding is closed,[17] the purpose of the stay, i.e., to allow the debtor time to devise a plan and prevent creditors from pursuing alternative remedies, being no longer applicable. It might be noted that on termination of the foreign proceeding there may be no foreign representative who has standing to apply for relief under the MLCBI (see also discussion under article 18 above).[18] The MLCBI does not specifically address closure of the recognition proceeding; in a case where the assets in the non-main proceeding had been fully administered and the foreign representative applied for an order to close the case, the court noted that there was little, if any, authority relating to the entry of a final order in recognition cases. However, as assets located in the recognizing State had been fully administered without dispute, the court found it appropriate to close the case.[19]

7. It has been suggested that continued enforcement of a stay after the closure of the foreign proceeding might be available in some circumstances, such as where the stay was violated prior to that closure[20] or to allow the plan approved in the foreign proceeding to control the distribution of the debtor's assets and prevent creditors from seeking to recover debts in excess of the amounts provided in that plan.[21]

ARTICLE 20, PARAGRAPH 2

8. As indicated in the GEI [para. 183],[22] notwithstanding the "automatic" or "mandatory" nature of the effects under article 20, paragraph 1, it is expressly provided under paragraph 2 that the scope of those effects depends on exceptions or limitations that may exist in the law of the enacting State to grant protection to those classes of people who would normally receive protection in insolvency proceedings commenced in the enacting State. Some of the exceptions or limitations that have been enacted include: preserving the right to take steps to enforce security over the debtor's property or to repossess goods in the debtor's possession under a hire-purchase agreement or to exercise a right of set-off against a claim by the debtor.[23]

9. Some enacting laws also provide discretion for the court to modify or terminate the stay and suspension in subparagraph 1 *(a)* or any part of it, either altogether or for a limited time, on such terms and conditions as the court thinks fit.[24]

ARTICLE 20, PARAGRAPH 3

10. The GEI [paras. 186–187] notes that paragraph 3 was added to article 20 to protect creditors from losing their claims where a stay applied pursuant to subparagraph 1 *(a)* and to authorize the commencement of individual actions to the extent necessary to preserve those claims.[25] Once the claims have been preserved, the stay would govern the taking of further action.[26]

11. Commencement of such individual actions may be subject, under the law of the receiving State, to certain exceptions. One law, for example, includes an exception for governmental units acting in a regulatory or police capacity. Under that provision, the court held that in seeking to commence a proceeding regarding a funding shortfall for the debtor's pension fund in another State, that State's pension regulator was acting as a trustee on behalf of private creditors for a pecuniary purpose and not as a regulator protecting the public safety or welfare. Accordingly, the action proposed by the foreign regulator would violate the applicable automatic stay.[27]

ARTICLE 20, PARAGRAPH 4

12. This paragraph clarifies that the automatic stay pursuant to subparagraph 1 *(a)* does not prevent a request for commencement of local insolvency proceedings or restrict participation in such proceedings. Even though observing that multiple proceedings should be the exception, one court has noted that commencement of a plenary proceeding in the receiving State in accordance with article 20, paragraph 4, may be appropriate, notwithstanding recognition of foreign proceedings, where creditors could demonstrate there was a need for additional protection.[28] Where recognition of a foreign proceeding, whether main or non-main, took place subsequent to the commencement of a local proceeding, another court indicated that recognition would not necessarily lead to dismissal of that prior local proceeding.[29]

Notes

[1] Some enacting States have not adopted art. 20 of the MLCBI, e.g., the Republic of Korea (Debtor Rehabilitation and Bankruptcy Act 2005) and Japan (Law on Recognition of and Assistance in Foreign Insolvency Proceedings, 2001). Relief in those States is available under provisions equivalent to arts. 19 and 21 of the MLCBI.

[2] GE [paras. 141–153].

[3] Noted in *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 55–56], CLOUT 1332.

[4] GEI [paras. 180–181].

[5] *England*: Fibria Cellulose S/A v Pan Ocean Co. Ltd [2014] EWHC 2124, (Ch) [paras. 67–70], CLOUT 1482 referring to Bristol Airport plc v Powdrill [1990] Ch 744, 765; Re Olympia & York Canary Wharf Ltd [1993] BCC 154, 157–158.

[6] Ibid., *England*: Fibria Cellulose S/A [para. 75].

[7] *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 69], CLOUT 1475.

[8] Referring to the GEI [para. 181]; GE [para. 146]; *Australia*: Pink v MF Global UK Limited [2012] FCA 260 [para. 20] – court, under art. 21, subpara. 1 *(a)*, extended the stay under art. 20, subpara. 1 *(a)*, to cover "any individual action or legal proceeding, including, without limitation, any arbitration, mediation or other quasi-judicial administrative action, proceeding or process whatsoever".

[9] The analysis was by reference to art. 8 and provisions of the enacting legislation that authorized interpretation by reference to the MLCBI and any document relating to it originating from UNCITRAL or the working group that assisted in preparing the MLCBI. See for instance: *New Zealand*: Kim and Yu v STX Pan Ocean Co. Ltd [2014] NZHC 845 [paras. 16–18], CLOUT 1481; see also *England*: Fibria Cellulose S/A v Pan Ocean Co. Ltd [2014] EWHC 2124 (Ch) [para. 61], CLOUT 1482 – although not explored at the hearing, the court posited two issues: *(a)* whether the contract in question had ceased to be an asset of the debtor because it had been assigned; and *(b)* whether the relevant asset of the debtor in this case was in relation to a contract that was not subject to termination or whether the asset of the debtor was the contract subject to the possibility of termination. In the latter scenario, for example, the court suggested that preventing the exercise of the right to terminate would not only protect, but also enhance, the assets of the debtor. For the definition of assets of the debtor in the Legislative Guide, see glossary, subpara. 12 *(b)*: "Assets of the debtor: property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned assets".

[10] United States Bankruptcy Code, 11 U.S.C. sect. 1520 *(a)* (enacting art. 20 *(a)* of the MLCBI), provides that, upon recognition of a foreign main proceeding: "sections 361 and 362 [the automatic stay] apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States."

[11] *United States*: JSC BTA Bank 434 BR 334, 337 (Bankr. S.D.N.Y. 2010), CLOUT 1211; see also Gold & Honey, Ltd., 410 B.R. 357, 373 n. 19 (Bankr. E.D.N.Y. 2009), CLOUT 1008; Pro-Fit Holdings Ltd., 391 B.R. 850, 863 (Bankr. C.D. Cal 2008), CLOUT 926.

[12] *England*: Samsun Logix Corporation [2009] EWHC 576 (Ch) [para. 11]; in a subsequent case – H & CS Holdings Pte. Ltd v Glencore International AG [2019] EWHC 1459 (Ch), CLOUT 1820 – modification of the stay was sought to permit the arbitration to continue, on the basis that the arbitration proceedings had concluded except for issuing of the decision and determination of costs; further costs would be incurred if the arbitration was stayed. The court modified the automatic stay to enable arbitration to proceed to award, but not enforcement.

[13] *England*: OGX Petroleo E Gas S.A. [2016] EWHC 25 (Ch) [para. 53], CLOUT 1622 – arbitration proceedings were being conducted under a contract entered into after approval of the reorganization plan and were not covered by that plan.

[14] In such cases, United Kingdom courts, as a matter of practice, replace the automatic stay with the stay applicable under the Insolvency Act, 1986, Schedule B1, para. 43: Pan Oceanic Maritime Inc. [2010] EWHC 1734 (Comm); Transfield ER Cape Ltd. [2010] EWHC 2851 (Ch) [paras. 5–6]; Ronelp Marine Ltd [2016] EWHC 2228 (Ch) [paras. 15–16]; 19 Entertainment Ltd. [2017] BCC 347 [paras. 20–22], CLOUT 1621; OJSC International Bank of Azerbaijan [2017] EWHC 2075 (Ch), CLOUT 1821; Videology Limited [2018] EWHC 2186 (Ch) [para. 19], CLOUT 1823.

[15] *England*: Sberbank of Russia v Ante Ramljak [2018] EWHC 348 (Ch), CLOUT 1796 – court denied the request to lift the stay as the time for appeal of the recognition decision had not passed; see also United Drug (UK) Holdings Ltd v Bilcare Singapore Pte Ltd. [2013] EWHC 4335 (Ch) [para. 24] – with respect to an arbitration commenced before recognition, court said given the clear reasons the applicant had evinced for wishing to remove the stay and the lack of real evidence that would enable the burden on the office holders to be measured, the balance came down squarely in favour of lifting the stay.

[16] *Canada*: Hanjin Shipping Co., 2016 BCSC 2213 [paras. 24–30] – court declined to make an order that the automatic stay be effective retroactive to the date of commencement of the foreign proceeding in order to promote fair treatment among creditors and international cooperation and comity, noting that no specific authority was provided as to the necessity of such an order, nor was any evidence or jurisprudence from around the world shown in support of the request.

[17] *Australia*: Yakushiji (No. 2) [2016] FCA 1277 [paras. 21–22]; Board of Directors of Rizzo-Bottiglieri-De-Carlini Armatori SpA v Rizzo-Bottiglieri-De-Carlini Armatori SpA [2017] FCA 331 [paras. 17–19], CLOUT 1799. *United States*: Daewoo Logistics Corp., 461 B.R. 175, 179 (Bankr. S.D.N.Y. 2011), CLOUT 1315. The Legislative Guide (part two, chap. VI, paras. 16–19) notes that States adopt different approaches to closure of proceedings.

[18] *England*: Sanko Steamship Co. Ltd. [2015] EWHC 1031 (Ch) [paras. 38–50]; Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia [2018] EWCA Civ 2802 [para. 97] CLOUT 1822 – the foreign representative applied to extend the existing moratorium for an indefinite period beyond the termination of the foreign proceeding to prevent creditors with claims governed by the law of England and Wales, who were not bound by the plan enabled by the foreign proceeding, from pursuing their claims in England. Denial of the request was upheld on appeal, the appeal court noting [98] that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

[19] *United States*: Three Estates Company Limited, case No. 07-23597 (Bankr. E D Cal Mar. 31, 2008), CLOUT 793.

[20] *United States*: Daewoo Logistics Corp., 461 B.R. 175, 180 (Bankr. S.D.N.Y. 2011), CLOUT 1315 *citing* Oversight & Control Commission of Avanzit, S.A., 385 B.R. 525, 533–34 (Bankr. S.D.N.Y. 2008), CLOUT 925 – court granted recognition after approval of a plan in the foreign proceeding in order to adjudicate a stay violation that occurred pre-approval. Court also suggested that further relief might be available after the closing of the foreign proceeding under article 7 of the MLCBI, which authorizes provision of additional relief to foreign representatives. See also *England*: Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia [2018] EWCA Civ 2802 [para. 97] CLOUT 1822 – Court of Appeal, noting the decisions of the United States courts in Daewoo and Ho Seok Lee, 348 B.R. 799, 803 (Bankr. W.D. Wash., 2006), CLOUT 754, observed [para. 100] that the background to the enactment of the MLCBI in the United States differed significantly to that of Great Britain or Australia and different interpretation and application of the MLCBI might thus be expected.

[21] *United States*: Ho Seok Lee, 348 B.R. 799, 803 (Bankr. W.D. Wash., 2006), CLOUT 754 – an alternative approach of keeping the Ch. 15 proceeding open in order to keep the stay operative, was dismissed by the court as not being cost-effective when it could grant a permanent injunction under art. 21.

[22] GE [para. 148].

[23] E.g., *England*: CBIR art. 20.2: "The stay and suspension referred to in para. 1 of this article shall be —

(a) the same in scope and effect as if the debtor, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 *(a)* or had his estate sequestrated under the Bankruptcy (Scotland) Act 1985 *(b)*, or, in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986; and *(b)* subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case, and the provisions of para. 1 of this article shall be interpreted accordingly."

[24] E.g., *England*: CBIR art. 20, para. 6; *New Zealand*: Cross-Border Insolvency Act, art. 20, para. 2. On the basis of such a provision, courts have granted relief from the stay following recognition to, for example, *(a)* allow continuation of admiralty proceedings initiated before the commencement of the foreign proceeding: *New Zealand*: Kim and Yu v STX Pan Ocean Co. Ltd [2014] NZHC 845, CLOUT 1481; *(b)* permit pursuit of claims for breach of fiduciary duties in a situation where the commencement of the foreign proceeding in question did not lead to the imposition of a stay on such claims: *New Zealand*: Downey v Holland [2015] NZHC 595, CLOUT 1480; *(c)* prevent steps from being taken to enforce a security in circumstances where the legislation enacting the MLCBI exempted such steps from the automatic stay applicable under art. 20: *England*: Pan Oceanic Maritime Inc. [2010] EWHC 1734 (Comm); *(d)* authorize a creditor to exercise its recoupment and set-off rights, instead of sending the creditor to the foreign court to ask for the same relief: *United States*: Sivec SRL, 476 B.R. 310 (Bankr. E.D. Okla. 2012), CLOUT 1312; *(e)* allow a State court to continue to administer and adjudicate the parties' relative rights to funds held by that court: Comercial V.H., S.A. de C.V. (Bankr. D. Ariz. September 13, 2012) – foreign representative of an insolvency proceeding in Mexico obtained recognition as a foreign main proceeding in order to appear in a court of the State of Arizona proceeding to assert the rights of the foreign proceeding to funds held in *custodia legis* by that court. Defendants in the state court action who feared that the representative would take the funds to Mexico objected to recognition and sought relief from the stay. The court declined, finding that the funds were adequately protected in the hands of the state court; *(f)* pursue contractual claims in an arbitration in the recognizing State, whose law governed the dispute: *England*: Re Pan Ocean Co. Ltd.; Seawolf Tankers Inc. v Pan Ocean Co. Ltd. [2015] EWHC 1500 (Ch) [paras. 59–60] – court balanced a number of factors including that there was no evidence to suggest the arbitration would adversely affect the foreign proceedings, there was no evidence of cost or equivalent detriment to the foreign representative, the issues of dispute raised were far from straightforward under applicable law and it was important to recognize that the parties had chosen arbitration, the law applicable and the location for dispute resolution. See also *England*: Ronelp Marine Ltd. v STX Offshore & Shipbuilding Co. Ltd. [2016] DEWHC 2228 (Ch) [para. 29] – court said creditor applying to continue existing proceedings (for breach of contract) must identify the nature of the interests to be promoted by the relief sought, address whether the grant of that relief is likely to impede the purpose of the insolvency proceedings, enable the court to balance the creditor's legitimate interests against those of other creditors, having regard to the probability of occurrence of prejudice on either side.

[25] See for example, *United States*: Sivec SRL, 476 B.R. 310, 315 and 319 (Bankr. E.D. Okla. 2012), CLOUT 1312, based on the need to protect the creditors interests in accordance with arts. 6, 19 and 21; Cozumel Caribe, S.A., de C.V., 482 B.R. 96 (Bankr. S.D.N.Y. 2012),

CLOUT 1311 – the Bankruptcy Court conditionally granted the foreign representatives' request for post-recognition relief in the nature of a temporary stay of a cause of action brought by a creditor to exercise its rights against funds of non-debtor affiliates allegedly present in the same account in the United States with funds of the foreign debtor, pending the determination of certain issues of ownership of the funds by the originating court in Mexico.

[26] GE [paras. 151–152].

[27] *United States*: Nortel Networks Corp., 669 F.3d 128 (3d Cir. 2011).

[28] *United States*: Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63, 82 (Bankr. S.D.N.Y. 2011) affirmed 474 B.R. 88 (S.D.N.Y. 2012), CLOUT 1208.

[29] *United States*: Tradex Swiss AG, 384 B.R. 34, 44 (Bankr. D. Mass. 2008), CLOUT 791 – where a proceeding in Switzerland was recognized as a non-main proceeding, the court concluded that dismissal of the local proceeding was not warranted as the purposes of Ch. 15 were best served by permitting that local proceeding to go forward. The trustee had begun collecting assets and should be permitted to continue with the administration of the case, especially if the proceeding in Switzerland was to remain "in limbo" until a decision was made on a pending appeal. The vast majority of creditors were located outside Switzerland, with a great number in the United States; RHTC Liquidating Co., 424 B.R. 714, 724–729 (Bankr. W.D. Pa. 2010) – where a proceeding in Canada was recognized as a foreign main proceeding, a motion to dismiss the local United States case was denied on the basis that the stated purposes of the cross-border legislation (reflecting the preamble of the MLCBI) were not best served by dismissal.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 21 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 61–73]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 148–152, 154–166]; A/CN.9/422 [paras. 111–113]; A/CN.9/433 [paras. 127–134, 138–139]; A/CN.9/435 [paras. 49–61];

(b) GE (1997): A/CN.9/436 [paras. 80–83]; A/CN.9/442 [paras. 154–159];

(c) GEI (2013): A/CN.9/742 [para. 65]; A/CN.9/763 [para. 59]; A/CN.9/766 [para. 48].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 195].

INTRODUCTION[1]

1. The GEI [paras. 189–195][2] notes that article 21 is broader in scope than article 20 and applies to both recognized main and non-main proceedings. Relief under article 21 is discretionary (as it is under article 19) and is typical of the relief most frequently granted in insolvency proceedings. The list in paragraph 1 of the relief available is not exhaustive (as indicated by use of the word "including") and the court is not restricted unnecessarily in its ability to grant, at the request of the foreign representative,[3] any type of relief that is available under the law of the enacting State. Article 22 permits the court to subject the relief granted under article 21 to any conditions it considers appropriate. The turnover of assets to the foreign representative in paragraph 2 is subject to the proviso that the interests of local creditors are adequately protected, as well as to the broader protection of article 22, paragraph 1, and the possibility that the court may subject that turnover to conditions under article 22, paragraph 2. The JP [paras. 168–182] also provides information on article 21.

2. See case law on article 20 above on the meaning of the words "assets of the debtor" and "commencement or continuation of individual actions or individual proceedings".

CASE LAW ON ARTICLE 21

3. Article 21 has been described by some courts as providing a very broad reservoir[4] of power that enables courts to grant any appropriate relief to effectuate the purpose of the MLCBI and to protect assets of the debtor or the interests of creditors.[5] It has been emphasized that the issue of relief should be treated separately to the question of recognition; recognition turns on the strict application of objective criteria under article 17, which promotes predictability and reliability, while relief is largely discretionary and turns on factors that remain flexible and pragmatic in order to foster cooperation in appropriate cases.[6] The question of whether granting relief under article 21 is appropriate must be determined by the court, at its discretion and after recognition has been ordered.

4. Courts have underlined the distinction between the automatic relief available on recognition of a foreign main proceeding and the discretionary nature of relief available on recognition of a foreign non-main proceeding, observing that the relief that can be granted under article 21, paragraph 1, is circumscribed in several ways: it must be necessary to protect the interests of the creditors (meaning the interests of the general body of creditors as a whole)[7] or, as an alternative, to protect the assets of the debtor;[8] it would be subject to the public policy exception under article 6;[9] and regard must be had to article 22, paragraph 1, which emphasizes the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favouring one group of creditors over another.[10] Under article 22, paragraph 2, the court may impose conditions on discretionary relief, such as by requiring the posting of a security or bond.[11]

ARTICLE 21, PARAGRAPH 1

5. Courts have suggested that the words "upon recognition" in the chapeau of article 21 define the date from which relief may be granted, but that those words do not necessarily define the date by reference to which the rights (in respect of which relief is to be granted) are to be identified.[12]

6. Courts have taken different views of the scope of the relief that can be ordered under article 21, paragraph 1. In some States, it has been suggested, the recognizing court can give effect to the position in the foreign main proceeding, which might mean the relief that can be ordered in the recognizing State is not limited to the relief that would be available in a hypothetical domestic insolvency proceeding.[13] In other States, courts have said that the words "any appropriate relief" do not allow the court to grant relief that would not be available when dealing with a domestic insolvency.[14] Some courts have also said that while the relief granted in the foreign proceeding and that available under article 21 need not be identical,[15] it must be of a type that is cognizable under the law of the recognizing court and not manifestly contrary to public policy under article 6.[16]

7. In a State in which the statutory regime enacting the MLCBI makes specific reference to comity,[17] courts have held that, once a foreign main proceeding has been recognized, the enacting legislation specifically contemplates that the court will exercise its discretion to fashion appropriate post-recognition relief consistent with the principles of comity.[18] That has been held to include enforcing certain orders for relief issued in the foreign proceeding that were broader than would have been permitted under the law of the recognizing State.[19] The key determination, the court said, was whether the procedures used in the foreign proceeding met the fundamental standards of procedural fairness in the recognizing State.[20] Another court in the same State made its own order under article 21 on the same terms as the foreign order prohibiting the termination of executory contracts without the leave of the court,[21] while in a further case the court held that it could apply the law of the foreign proceeding, to avoid fraudulent transfers in the recognizing State, because the court had the authority under article 21 to grant relief under the avoidance law as "appropriate relief".[22] In a case that considered what might constitute "appropriate relief" under article 21, paragraph 1, the court said that the general power to grant "any appropriate relief" meant relief that could have been awarded under current law or under the previously applicable law. The type of relief sought in the particular case (concerning third party releases) did not fall into either of those categories and could not therefore be granted. When such relief had been granted, the court went on to say, it had been granted under the equivalent of article 7, not article 21.[23]

8. Courts in another State have adopted a similar approach. In one case, the court said that giving effect to the debtor-in-possession finance facility order made in the foreign proceeding raised no issues of public policy in the recognizing State, notwithstanding that it was, in part, impermissible under local law because that type of charge could not secure an obligation that existed before the commencement of the insolvency proceedings.[24] The court was satisfied, however, there would be no material prejudice to local creditors and the fact that the order was made by the particular foreign court was considered to be significant; the recognizing court said there was no basis for second-guessing the decision of that court. The recognizing court concluded that recognition of the foreign order was necessary for protection of the debtor company's property and the interests of creditors.[25]

9. A different interpretation suggests that approach goes too far and even though the words "any appropriate relief" are capable of being given a wide literal meaning, the relief that may be ordered under article 21 can only reflect the relief that could be ordered in the case of a domestic insolvency.[26] In one case, the court observed that since the parties had agreed that the contract in question would be governed by the law of the recognizing State (in which an insolvency termination clause would be valid), the court should not seek to override that bargain and accordingly, declined to restrain the serving of a termination notice.[27] Courts in that

same State have also held that there is nothing in article 21 to suggest it would apply to the recognition and enforcement of foreign judgments against third parties.[28] In another State, an appeal court has held that the relief that could be granted on recognition of a foreign proceeding provides procedural support for that proceeding and could not substantively change a creditor's claim. Recognition of a foreign discharge order, the court went on to say, went beyond the scope of relief available under the MLCBI.[29]

ARTICLE 21, SUBPARAGRAPH 1 *(a)*

(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;

10. A stay under article 21, subparagraph 1 *(a)*, was held to apply to an action for breach of contract by the debtor. In order to determine that claim, the court said, it would have to find that certain funds currently held in the debtor's account in the defendants' bank were not part of the debtor's insolvency estate and instead belonged to the plaintiff. Since such a finding would have an adverse impact on the estate, the claims were barred by article 21, subparagraph 1 *(a)*.[30] In another case, two arbitrations had commenced, only the second of which directly involved the insolvent company and was thus automatically stayed under art. 20 on recognition of the foreign proceedings. The court considered whether the first arbitration should also be stayed, finding that it was at least arguable that the underlying dispute related to the property of the debtor company, or at least to property in relation to which the debtor had an arguable claim to a beneficial interest which, under article 22, paragraph 1, the court had to be satisfied was adequately protected. The court permitted the first arbitration to continue, but enforcement or execution of any arbitral award was to be stayed until the debtor had the opportunity to restore the matter to the court in the event that any aspect of the interests of its creditors or office holders was not addressed by the arbitrators, or upon appeal.[31] In a case which involved an application for indefinite continuation of the stay applicable under article 20, the court denied the application on the basis that the effect sought was substantive, rather than procedural; and would forever prevent certain creditors from exercising their rights under the law of the recognizing State (which was also the law of the contract) in order to conform their position to the law of the State in which the insolvency was taking place. The court indicated that even if it had the jurisdiction to grant that relief, it was unlikely to do so given the balancing required under article 22.[32]

ARTICLE 21, SUBPARAGRAPH 1 *(b)*

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

11. No cases addressing the interpretation of this subparagraph have been reported.

ARTICLE 21, SUBPARAGRAPH 1 *(c)*

(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;

12. No cases addressing the interpretation of this subparagraph have been reported.

ARTICLE 21, SUBPARAGRAPH 1 *(d)*

(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;

13. Article 21, subparagraph 1 *(d)*, has both a jurisdictional and a discretionary component. The court must be satisfied that the information sought concerned the debtor's assets, affairs, rights, obligations or liabilities and, if it was so satisfied, then it had discretion to order the delivery of that information. In exercising that discretion, one court said, it must have regard to all relevant circumstances and ensure that the interests of the person against whom the order was sought were adequately protected.[33]

14. It has been suggested that article 21, subparagraph 1 *(d)* was intended to set a common minimum standard. The foreign representative was entitled to seek relief under that s ubparagraph regardless of whether a local officeholder would be entitled to that relief under local law. If local law provided for additional relief, the foreign representative could seek that under article 21, subparagraph 1 *(g)*. In the case in question, the court said the precise scope of article 21, subparagraph 1 *(d)*, was unimportant as the foreign representative could rely on article 21, subparagraph 1 *(g)*; if subparagraph 1 *(d)* was narrower than subparagraph 1 *(g)*, that was of no consequence in that case.[34]

15. Where a foreign representative sought discovery against an individual, the court ruled that the scope of the discovery was limited by the requirement that it must concern the "debtor's assets, affairs, rights, obligations or liabilities." Since certain private information sought did not concern the "debtor's assets, affairs, rights, obligations or liabilities" (but rather the assets of the person who had allegedly controlled the debtor) the request was denied. Other requests, however, were clearly germane to the assets, affairs, rights and obligations or liabilities of the debtor and were permitted.[35] In another case, where discovery was sought against third-party non-debtors, the court differentiated between those entities with economic relationships to the debtor and those unrelated to the debtor. It held that the foreign representative generally was not permitted to obtain discovery relating to third-party non-debtor entities unless *(a)* the documents that had been

requested pertained to transactions with debtor entities, or *(b)* the targets of the discovery requests were entities in which a majority of the stock was owned by a debtor entity. As to the latter types of document request, the court held that broad financial discovery was permissible because the ownership interests in these non-debtor targets were assets of the debtor's estate.[36] Discovery has been ordered in a recognizing jurisdiction in a situation in which it would not have been available under the law of the main proceeding.[37] In some States, discovery may also be afforded as "additional relief" under the additional assistance provisions of article 7.[38]

16. Following recognition of the foreign proceeding as a main proceeding, examination of a former director of the debtor, apparently residing in the recognizing State, was ordered under article 21, subparagraph 1 *(d)*, on the basis that that person was likely to have an intimate knowledge of the affairs of the debtor. Although the director asserted that he had resigned from a directorship of the debtor, the court indicated it was not necessary to determine his status vis-à-vis the company (e.g., as an actual or shadow director) because article 21, subparagraph 1 *(d)*, extended to anyone that could be regarded as a "witness".[39] It has been considered fair to characterize a desire to examine witnesses under article 21, subparagraph 1 *(d)*, as an attempt to "protect", or preserve the value of an inchoate asset, and while a potential cause of action was not a perishable asset, relevant limitation periods might constrain the time available for a liquidator to fully apprise him or herself of relevant considerations, before deciding whether to issue proceedings.[40]

ARTICLE 21, SUBPARAGRAPH 1 *(e)*

> *(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;

17. The power of entrustment under article 21, subparagraph 1 *(e)*, satisfies the need of the foreign representative to gain control of the assets and is thus incidental to the task of administering and realizing assets of the debtor in the recognized proceeding, but it does not authorize distribution of those assets. This is achieved by the power under article 21, paragraph 2, to entrust the foreign representative with distribution of the debtor's assets in the recognizing State, several courts noting the distinction between these two provisions.[41] The granting of relief under subparagraph 1 *(e)*, it has been observed, permits all creditors worldwide to pursue their rights and remedies in one court of competent jurisdiction and is therefore the more economical and efficient approach to take.[42]

18. Courts have emphasized the limitation in subparagraph 1 *(e)* that the assets in question must be located in the recognizing State. An action seeking to recover certain assets by challenging transfers from the foreign debtors was held not to be within that specific territorial limitation of subparagraph 1 *(e)*, which referred to tangible property located within the territory of the recognizing State and intangible property deemed under applicable non-bankruptcy law to be located within that territory, because in the case in question there were no such assets.[43] In a subsequent case in the same State, the court declined to follow that decision, holding that subparagraph 1 *(e)* did not limit the court's subject matter jurisdiction over an intangible asset located in a foreign State.[44]

19. Administration and realization of assets under subparagraph 1 *(e)* have been made subject to conditions. In a case concerning the question of whether entrusting the administration or realization of equity interests of the debtor to the foreign representative would trigger defaults under loan documents and other agreements, the court made the order under subparagraph 1 *(e)* with a caveat: because the foreign representatives were "stepping into the shoes" of the debtor, whatever actions they took in the performance of their duties had to comport with the fiduciary duties imposed by the applicable law. If they ignored those duties, the court would be available to address any disputes that might arise.[45] In another case, the court entrusted the foreign representatives with administration and realization of certain assets within the territory of the recognizing State under article 21, subparagraph 1 *(e)*, and allowed them to seek turnover of those assets under other sections of the bankruptcy law, by motion on notice with an opportunity for opposing parties to be heard. That would enable the court to ensure the interests of creditors and affected parties were protected under article 22.[46]

20. In a case where the only assets of the debtor that could be subject to an order under article 21, subparagraph 1 *(e)*, were ships entering the waters of the recognizing State, the court noted that while article 20, by virtue of article 20, paragraph 2, preserved the operation of local law (which in this case would include the right of secured creditors to realize or otherwise deal with their security), additional orders under article 21 did not.[47] The court denied the relief sought, but ordered that any application for the issue of a warrant of arrest in the State of any vessel owned or chartered by the debtor should be dealt with by a judge of the same court and that the court's reasons for the present judgment should be drawn to the attention of that court at the time such application might be made.

ARTICLE 21, SUBPARAGRAPH 1 *(f)*

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

21. Relief granted under article 19, subparagraph 1 *(c)* (referring to article 21, paragraphs 1 *(c)*, *(d)* and *(g)*), was extended on recognition of foreign main proceedings because of the failure of the debtor and its directors to comply with the relief ordered under article 19 and the inability of the foreign representative to discharge its duties without that relief being extended.[48]

ARTICLE 21, SUBPARAGRAPH 1 *(g)*

(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.

22. It might be noted that some States have omitted subparagraph 1 *(g)* from their enactment of the MLCBI.[49]

ARTICLE 21, PARAGRAPH 2

(see also discussion of adequate protection under article 22)

23. The collection of property is permitted by article 21, subparagraph 1 *(e)*, while article 21, paragraph 2, permits the foreign representative to distribute the property in the foreign proceeding, provided creditors in the recognizing State are adequately protected pursuant to article 21, paragraph 2, and article 22, paragraph 1. Adequate protection[50] in the context of the MLCBI has been described in one State as embodying three basic principles: "[*(a)*] the just treatment of all holders of claims against the bankruptcy estate; [*(b)*] the protection of local claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceedings; and [*(c)*] the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by local law".[51] The relationship between article 21, paragraph 2, and article 22, paragraph 1, has been noted – that the notion of adequate protection involves an evaluation of the protection afforded to relevant creditors. The balancing of the protection of the local creditors under article 21, paragraph 2, and the protection of all creditors under article 22, paragraph 1, the court said, is thus achieved by recognizing the equality of all creditors, when considering the dealing with, and access to, the funds of the company.[52]

24. A court denied a request for turnover of funds to the foreign representative on the basis that the creditor would not be adequately protected in the foreign proceeding, noting that basic elements of due process were lacking in that proceeding and that the creditor's status would be vastly different from the status it would have in the recognizing State.[53] In another case, the recognizing court was satisfied that local creditors were adequately protected in the light of the evidence of the foreign law and arrangements made in a protocol to protect the interests of creditors who had submitted proofs of debt in the local liquidation. Those arrangements included review by the local liquidators of any proofs rejected by the foreign liquidators, and the preservation for those creditors of set-off rights under local law.[54]

25. It was noted by one court that while the GE characterizes article 22, paragraph 1, as a general statement of the principle of protection of local interests, it later acknowledges [para. GE 163][55] that while in many cases the affected creditors under article 22, paragraph 1, will be "local" creditors, it is not advisable to attempt to limit the article to local creditors, given the difficulty of crafting an appropriate definition and the absence of any justification for discriminating against creditors on the basis of criteria such as place of business or nationality.[56] The court concluded it must be satisfied that the interests of local creditors were sufficiently protected before allowing a foreign representative to distribute property in a foreign proceeding and, although not an express requirement, it was not precluded from satisfying itself that foreign creditors' interests were also sufficiently protected before allowing such distribution.[57]

ARTICLE 21, PARAGRAPH 3

26. Courts have noted that the restriction under this paragraph of article 21 applies only in the case of non-main proceedings,[58] and that since the scope of non-main proceedings might be less than all-encompassing, the scope of the foreign proceeding should be considered in fashioning appropriate relief.[59]

27. A recognizing court found that local assets should be administered in the foreign proceedings on the basis that it was efficient to have a single mechanism for the distribution of the debtor's assets in accordance with the foreign law, where that mechanism was designed to treat all similarly situated creditors in a similar way, with the exception of the revenue rule. The foreign court made orders allowing foreign creditors, including the tax authority of the recognizing State, to file and prove claims and participate in the foreign proceeding.[60]

RELATIONSHIP BETWEEN ARTICLES 21 AND 7

28. An appeal court of one State[61] has outlined an approach for analysing requests for relief under articles 7 and 21. That approach requires a receiving court to first determine whether relief requested by a foreign representative falls into one of the enumerated categories of article 21.[62] If not, the court should decide whether the relief could be considered "appropriate relief" under article 21, paragraph 1, which entails, inter alia, consideration of whether the requested relief would otherwise be available under the law of the receiving State. If the requested relief went beyond the relief currently available under the law of that State, article 7 functioned as a "catch-all" that included forms of relief "more extraordinary" than those permitted under either the specific or the general provisions of article 21. The court reasoned that such a framework would prevent courts from subjecting relief under article 7 to the same limitations as relief under article 21, unless those limitations were specifically applicable and would avoid "all-encompassing applications" under article 7 and expanding the reach of the law enacting the MLCBI "beyond current international insolvency law."

Notes

[1] *Republic of Korea*: legislation enacting the MLCBI (Debtor Rehabilitation and Bankruptcy Act 2005) does not include the equivalent of art. 20 of the MLCBI and relief must therefore be sought under the equivalents of arts. 19 and 21 (DRBA sects. 635 and 636). Art. 22 has also not been implemented, but it has enacted art. 21, para. 2 (DRBA sects. 636 (2)). (2014) GOOKJI 1 (26 May 2014) – after reviewing protections available for creditors from the Republic of Korea, including opportunities for participation in the foreign proceeding, the court granted an application for repatriation of assets to the United States. (2010) GOOKJI 1 (7 February 2011) – the court ordered a stay of a pre-judgment attachment on a domestic asset of the debtor.

[2] GE [paras. 154–160].

[3] Some States have broadened the article to enable relief to be granted at the request of other parties. For example, in Japan, the Law on Recognition of and Assistance to Foreign Insolvency Proceedings 2001, art. 25 (relief similar to art. 21 of the MLCBI), enables the court to grant relief upon or after recognition on its own initiative or on the petition of any interested party.

[4] *United States*: Atlas Shipping A/S, 404 B.R. 726, 739 (Bankr. S.D.N.Y. 2009), CLOUT 1277 *quoting* Leif M. Clark, "Ancillary and other cross-border insolvency cases under Chapter 15 of the Bankruptcy Code" (2008) at 70; *England*: Larsen v Navios International Inc [2011] EWHC 878 (Ch) [para. 23 *(b)*], CLOUT 1273 – court said there is every reason to give art. 21 a broad scope.

[5] *United States*: AJW Offshore, Ltd., 488 B.R. 551, 559 (Bankr. E.D.N.Y. 2013); see also Rede Energia, S.A., 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014), CLOUT 1630.

[6] *United States*: Bear Stearns 389 B.R. 325, 333 (S.D.N.Y. 2008), CLOUT 794; the JP [para. 149].

[7] *England*: Larsen v Navios International Inc [2011] EWHC 878 (Ch) [para. 23 *(a)*], CLOUT 1273.

[8] *England*: Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) [para. 61], CLOUT 1482; *United States*: Atlas Shipping A/S, 404 B.R. 726, 739 (Bankr. S.D.N.Y., 2009), CLOUT 1277.

[9] See art. 6 above; Ibid. *England*: Pan Ocean [para. 104] – court discussed different outcomes in United States and England with respect to relief sought in the case of Dr. Juergen Toft, see *United States*: Toft, 453 B.R. 186, 192 (Bankr. S.D.N.Y. 2011), CLOUT 1209.

[10] *United States*: Lavie v Ran (*In re* Ran), 607 F.3d 1017, 1026 (5th Cir. 2010); Atlas Shipping A/S, 404 B.R. 726, 739 (Bankr. S.D.N.Y., 2009), CLOUT 1277 and Toft, 453 B.R. 186, 196 (Bankr. S.D.N.Y. 2011), CLOUT 1209 *quoting* Tri-Continental Exchange, Ltd., 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006), CLOUT 766.

[11] *United States*: Tri-Continental Exchange, Ltd., 349 B.R. 627, 636 (Bankr. E.D. Cal. 2006), CLOUT 766.

[12] *England*: Larsen v Navios International Inc. [2011] EWHC 878 (Ch) [paras. 22, 24], CLOUT 1273 – court held that rights of set-off were to be determined as at the date of commencement of the foreign insolvency proceeding, not at the date of recognition of that proceeding.

[13] *United States*: Sino–Forest Corporation, 501 B.R. 655, 665–666 (Bankr. S.D.N.Y. 2013) – following the approach in Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697–699 (Bankr. S.D.N.Y. 2010), CLOUT 1007, on third-party releases; Vitro S.A.B. de C.V., 701 F.3d 1031, 1044 n. 42, 1053–1054 (5th Cir. 2013), CLOUT 1310; Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 322–329 (5th Cir. 2010), CLOUT 1006.

[14] *England*: Fibria Cellulose S/A v Pan Ocean Co. Ltd [2014] EWHC 2124 [paras. 107–108] (30 June 2014), CLOUT 1482.

[15] *United States*: Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010), CLOUT 1007; CT Inv. Management Co., LLC v Carbonell,10 Civ. 6872 (S.D.N.Y. Jan. 11, 2012), p. 5; Rede Energia, S.A., 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014), CLOUT 1630.

[16] *United States*: Toft, 453 B.R. 186, 192 (Bankr. S.D.N.Y. 2011), CLOUT 1209.

[17] United States Bankruptcy Code, 11 U.S.C. sect. 1509 *(b)* (3), provides that comity shall be granted following the United States recognition of a foreign proceeding under Ch. 15, subject to the caveat that comity shall not be granted when to do so would contravene fundamental United States public policy under sect. 1506.

[18] *United States*: Atlas Shipping A/S, 404 B.R. 726, 739 (Bankr S.D.N.Y. 2009), CLOUT 1277.

[19] *United States*: Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 698 (Bankr. S.D.N.Y. 2010), CLOUT 1007 – the court observed that the United States and Canada shared the same common law traditions and fundamental principles of law, that courts in Canada afforded creditors a full and fair opportunity to be heard in a manner consistent with standards of United States due process and that United States federal courts had repeatedly granted comity to proceedings from Canada; see also Sino–Forest Corporation, 501 B.R. 655 (Bankr. S.D.N.Y. 2013).

[20] *United States*: Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010), CLOUT 1007, *cited* in Sino–Forest Corporation, 501 B.R. 655, 662–663 (Bankr. S.D.N.Y. 2013) – the court held that the foreign procedures met that test. In analysing procedural fairness, courts have looked at factors such as whether: *(a)* creditors of the same class are treated equally in the distribution of assets; *(b)* the liquidators are considered fiduciaries and are held accountable to the court; *(c)* creditors have the rights to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; *(d)* the liquidators are required to give notice to potential claimants; *(e)* there are provisions for creditors meetings; *(f)* a foreign country's insolvency laws favour its own citizens; *(g)* all assets are marshalled before one body for centralized distribution; and *(h)* there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.

[21] *United States*: Gandi Innovations Holdings, LLC (Bankr. W.D. Tex. 2009); also W.C. Wood Corp., Ltd., case No. 09-11893 (Bankr. D. Del. June 1, 2009) – the recognizing court made an order under art. 21 expressly prohibiting the termination of executory contracts; see also *Canada*: Lightsquared LP (2012) ONSC 2994 [paras. 38–39], CLOUT 1204 – the recognizing court made an order restraining the right to discontinue or terminate any supply of products or services to the United States debtors.

[22] *United States*: Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 329 (5th Cir. 2010), CLOUT 1006 – the court applied the law of Nevis.

[23] *United States*: Vitro S.A.B. de C.V., 701 F.3d 1031, 1056–1058 (5th Cir. 2013), CLOUT 1310; see note under art. 7 with respect to United States enactment of that provision and the direction as to comity; see also CGG S.A., 579 B.R. 716 (Bankr. S.D.N.Y. 2017) – court found the recognition and enforcement of the order sanctioning a sauvegarde plan in France was "appropriate relief" under section 1521 *(a)* of the

Bankruptcy Code, and also "additional assistance" under section 1507; Cell C Proprietary Ltd., 571 B.R. 542 (Bankr. S.D.N.Y. 2017) and Rede Energia S.A., 515 B.R. 69 (Bankr. S.D.N.Y. 2014), CLOUT 1630.

[24] *Canada*: Hartford Computer Hardware, 2012 ONSC 964, CLOUT 1205.

[25] *Canada*: See also Massachusetts Elephant and Castle Group Inc., 2011 ONSC 4201, CLOUT 1206 – recognition of a number of orders made in the United States proceedings, appointment of an information officer and granting of an administrative charge; LightSquared LP [2012] ONSC 2994, CLOUT 1204 – after granting the initial recognition, the court also had to consider a request for additional discretionary relief pursuant to sect. 49 of the Companies' Creditors Arrangement Act, including the appointment of an information officer, the granting of an administrative charge and the recognition of United States first-day orders. The court found the requested relief to be appropriate in the circumstances – [paras. 35, 37] on the basis that the relief sought was necessary for the protection of the debtor company's property or the interests of a creditor or creditors, and would facilitate these proceedings and the dissemination of information concerning the United States proceedings.

[26] *England*: Fibria Cellulose S/A v Pan Ocean Co. Ltd [2014] EWHC 2124 (Ch) [paras. 107–108], CLOUT 1482; Larsen v Navios International Inc [2011] EWHC 878 (Ch) [paras. 23 *(f)*, 31–32], CLOUT 1273; Rubin v Eurofinance SA [2010] EWCA Civ 895 [para. 62].

[27] *England*: Pan Ocean Co Ltd [2014] EWHC 2124 (Ch), CLOUT 1482 – the court distinguished the interpretation given in Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319 (5th Cir. 2010) [paras. 106, 114], CLOUT 1006, which appeared to support an interpretation of those words that would allow the recognizing court to give effect to an order of the foreign court, even if the recognizing court could not itself have made such an order in its own domestic proceedings. While noting that art. 8 of the MLCBI directed the court to have regard to the need to promote uniformity in its application, the court gave several reasons for not following the United States case. These included that although the legislative history of Ch. 15, and in particular the words "any appropriate relief", appeared to enable United States' courts to apply the law of the foreign proceedings, there was no comparable legislative history in Great Britain and it was open to the court to conclude that implementation of the MLCBI in the United States and Great Britain was not identical.

[28] *England*: Rubin v Eurofinance SA [2012] UKSC 46 [para. 143], CLOUT 1270. On the issue of enforcement of judgments, see UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments and Guide to Enactment, available at https://uncitral.un.org.

[29] *Republic of Korea*: (2006) GOOKSEUNG 1 (22 January 2007), Seoul Central District Court, CLOUT 1002; (2007) GOOKSEUNG 2 (12 February 2008), Seoul Central District Court; (2008) HAHAP 20 (28 August 2008), Seoul Central District Court; RA 1524, Seoul High Court, CLOUT 1000; (2009) Ma 1600 (25 March 2010), Supreme Court of Korea. See also *Japan*: Azabu Building Company Ltd, case No. (shou) 1 of 2006; case No. (mi) 5 of 2007, Tokyo District Court, CLOUT 1478 – the effect of a debt discharge in the foreign proceeding can be recognized in Japan only if the discharge satisfies the conditions for recognition of the effect of a foreign judgment under section 118 of the Civil Procedure Code.

[30] *United States*: Capitaliza-T Sociedad De Responsabilidad Limitada De Capital Variable v Wachovia Bank of Del. N.A., 10 Civ.520 (D. Del. Dec. 20, 2011) – following recognition of the foreign main proceeding taking place in Mexico, the court entered an order under the equivalent of art. 21, subpara. 1 *(a)*, staying the commencement or continuation of proceedings concerning the debtor's assets, rights, obligations or liabilities. An action was commenced in a different court for, inter alia, breach of contract by the debtor. That court concluded that in order to determine that claim it would have to find that certain funds currently held in the debtor's account in the defendants' bank were not part of the debtor's bankruptcy estate and instead belonged to the plaintiff. The court concluded that since the debtor was the real party in interest and a determination against the non-debtor defendants would have an adverse impact on the property in the debtor's estate, the claims were barred by the order under art. 21, subpara. 1 *(a)*. The court did, however, allow the plaintiffs to amend one of their complaints, but indicated that it would then be stayed pursuant to the order under art. 21, subpara. 1 *(a)*.

[31] *England*: In the matter of Armada Shipping SA [2011] EWHC 216 (Ch) [para. 64].

[32] *England*: Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia [2018] EWHC 59 (Ch) [paras. 142 (3), 158 (4)], denial of relief affirmed on appeal. Appeal court said indefinite stay could only be ordered if two conditions were satisfied: stay was necessary to protect debtor's creditors and the stay was an appropriate way of achieving that protection. Court also said that if the power to grant the stay under art. 21 had been intended to override the substantive rights of creditors under the proper law governing their debts, it could be expected to have been explicit, or at the very least the subject of discussion and positive recommendation at the preparatory stage. In the absence of that material, the court could find no reason to treat the power under art. 21 as anything other than procedural in nature with the main object of providing a breathing space of the kind envisaged by the GE: Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia [2018] EWCA Civ 2802 [paras. 89, 97].

[33] *England*: Picard v FIM Advisers LLP [2010] EWHC 1299 (Ch) [para. 23] – in exercising its discretion, the court considered in some detail the period to be covered by the order, the locations to be searched and several disputed categories of documents. The court found that the need for the trustee to discharge its duties, including investigating the conduct, property, liabilities and financial conditions of the debtor, outweighed oppression on the respondent. *New Zealand*: ANZ National Bank Ltd v Sheahan and Lock [2012] NZHC 3037 (15 November 2012) [paras. 111–114].

[34] *England*: Chesterfield United Inc. [2012] EWHC 244 (Ch) [paras. 11–12], CLOUT 1271.

[35] *United States*: Glitnir banki hf, case No. 08-14757, 21 (Bankr. S.D.N.Y. Aug. 19, 2011).

[36] *United States*: Petroforte Brasiliero de Petroleo Ltda., 542 B.R. 899, 903 (S.D. Fla 2015), CLOUT 1625 – court said if a debtor owned a majority interest in a third-party target, the trustee was entitled to all financial information of any such third party in order to value the ownership interest.

[37] *United States*: Platinum Partners Value Arbitrage Fund L.P., 583 B.R. 803 (Bankr. S.D.N.Y. 2018) – discovery concerned work papers of the debtor's former accountants. The court said the scope of discovery available in the foreign jurisdiction was not a valid basis upon which the recognizing court, in the exercise of its discretion, must limit the relief available to the foreign representative. The court rejected arguments that discovery should first be sought in the originating jurisdiction and that the discovery dispute was subject to arbitration under the terms of the letter of engagement of the accountant.

[38] *United States*: Millennium Global Emerging Credit Master Fund Ltd., 471 B.R. 342 (Bankr. S.D.N.Y. 2012); United States Bankruptcy Code, 11 U.S.C. sect. 1507 (enacting art. 7, MLCBI), gives effect to the principle of art. 7 of the MLCBI, but is much more detailed, specifying the requirements for such relief to be granted.

[39] *Australia*: Crumpler v Global Tradewaves [2013] FCA 1 [para. 23], CLOUT 1331.

[40] *New Zealand*: ANZ National Bank Ltd v Sheahan and Lock [2012] NZHC 3037 (15 November 2012) [paras. 105, 112].

[41] The distinction is noted in *United States*: Atlas Shipping A/S, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009), CLOUT 1277; Tri-Continental Exchange Ltd., 349 B.R. 627, 636 (Bankr. E.D Cal 2006), CLOUT 766.

[42] *United States*: Atlas Shipping A/S, 404 B.R. 726 (Bankr. S.D.N.Y. 2009), CLOUT 1277 – relief was granted under art. 21, subpara. 1 *(e)*, and para. 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 the foreign proceedings.

[43] *United States*: *In re* Fairfield Sentry Ltd. Litigation, 458 B.R. 665 (S.D.N.Y. 2011).

[44] *United States*: British-Am. Ins. Co. v Fullerton, 488 B.R. 205, 233–36 (Bankr. S.D. Fla. 2013), CLOUT 1309.

[45] *United States*: Lee, 472 B.R. 156, 186 (Bankr. D. Mass. 2012).

[46] *United States*: AJW Offshore, Ltd., 488 B.R. 551, 561 (Bankr. E.D.N.Y. 2013) – court said the same protection would apply to discovery under art. 21, subpara. 1 *(d)*, i.e., by motion on notice with an opportunity for hearing to the adverse parties and by making examination and production of documents available, with any discovery allowed to be subject to conditions imposed in accordance with art. 22; International Banking Corporation B.S.C., 439 B.R. 614, 627 (Bankr. S.D.N.Y. 2010), CLOUT 1317 – court declined to release to the foreign representative funds that were subject to an attachment order in favour of a foreign bank, because the attachment order was issued and perfected prior to the commencement of the foreign proceeding. The court directed that parties seek a ruling from the foreign court as to the voidability of the attachment orders under applicable foreign law; in the interim, the funds were to continue to be held in the United States; Tri-Continental Exchange Ltd., 349 B.R. 627, 636 (Bankr. E.D Cal 2006), CLOUT 766 – court granted entrustment under art. 21, subpara. 1 *(e)*, without conditions, noting that if it later transpired there was reason for the court to have discomfort about its conclusion, art. 22, para. 3, enabled it to revise its position and exercise its art. 22, para. 2, authority to impose conditions on the entrustment to the foreign representatives, such as the giving of security or the filing of a bond.

[47] *Australia*: Yu v STX Pan Ocean Co Ltd [2013] FCA 680 [para. 41], CLOUT 1333 – relief sought included "5. Pursuant to paragraph *(e)* of article 21 (1) of the Model Law, the administration and realisation of all of the Defendant's assets located in Australia be entrusted to the foreign representative", which the court denied.

[48] *Australia*: Lawrence v Northern Crest [2011] FCA 925, CLOUT 1217.

[49] E.g., Colombia, Mauritius, Romania, Seychelles and South Africa.

[50] While the MLCBI requires "adequate protection", the United States legislation uses the term "sufficient protection".

[51] *United States*: Atlas Shipping (2009) 404 B.R.726, 740, CLOUT 1277, *quoting In re* Artimm, 335 B.R. at 160, which analysed the previous law, but was noted as being "essentially the same" as art. 21, para. 2 – in Atlas there were no United States claimants, the creditors opposing relief were foreign creditors, and the claims had no connection to the United States other than the success in garnishing the debtor's funds in New York in support of London arbitration against the debtor.

[52] *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 139–114], CLOUT 1332 – court was concerned with how a local (recognizing) court should approach the question of the position of a creditor who had enforceable rights in the local (recognizing) jurisdiction, but who would be stripped of all the benefit of those rights if assets were sent to the foreign main proceeding, because the law of that jurisdiction did not permit the enforcement of such a debt (in this case a revenue claim).

[53] *United States*: Sivec SRL, 476 B.R. 310, 328–329 (Bankr. E.D.Okla. 2012), CLOUT 1312 – in the United States, the creditor was a secured creditor, while in the foreign proceeding in Italy, the creditor was not recognized as a creditor and at best would be treated as an unsecured claimant and likely receive nothing on its claim.

[54] *England*: Swissair Schweizerische Luftverkehraktiensgesellschaft [2009] EWHC 2099 (Ch) [para. 14].

[55] GEI [para. 198].

[56] *United States*: SNP Boat Service S.A. v Hotel Le St. James, 483 B.R. 776, 783–784 (S.D. Fla. 2012), CLOUT 1314.

[57] Ibid.

[58] *England*: Swissair Schweizerische Luftverkehraktiensgesellschaft [2009] EWHC 2099 (Ch) [para. 14].

[59] *United States*: British-American Insurance Co., Ltd. 425 B.R. 884 (Bankr. S.D.Fla. 2010), CLOUT 1005 – the proceeding for which recognition was sought related to the insolvency of a branch of the debtor and it was argued that that proceeding could not be regarded as being for the purposes of liquidation or reorganization of the debtor (as required by art. 2 *(a)*) as it did not have a comprehensive impact on the debtor's insolvency estate.

[60] *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 61], CLOUT 1475.

[61] United States. See JP [para. 181] referring to Vitro S.A.B. de C.V. 701 F.3d 1031, 1056–1058 (5th Cir. 2013), CLOUT 1310, case No. 29 in the JP. Applying the framework to the facts before it, the appeal court affirmed the denial of the foreign representative's request to enforce an order confirming the foreign reorganization plan that novated and in effect released the obligations of subsidiaries of the foreign debtor that had guaranteed notes issued by the debtor, but had not themselves applied to commence insolvency proceedings. The court first determined that art. 21, paras. 1 and 2, did not provide for discharge of the obligations of non-debtor guarantors. Next, the court determined that the general grant of relief in art. 21, para. 1, did not provide the requested relief because non-consensual, non-debtor releases through a bankruptcy proceeding were "generally not available" under local law and were "explicitly prohibited" in the particular court. Turning to art. 7, the court noted that such releases were sometimes available in other courts and the relief sought was therefore not precluded under art. 7. The court found, however, that since the debtor had failed to provide evidence of the existence of extraordinary circumstances sufficient to establish a case for non-debtor releases under the law of those courts that allowed such releases, the lower court had not abused its discretion in denying relief under art. 7.

[62] *United States*: Cozumel Caribe, S.A., de C.V., 482 B.R. 96 (Bankr. S.D.N.Y. 2012), CLOUT 1311 – court held it was unnecessary to look to art. 7 because art. 21 would permit the relief sought – the stay of a declaratory action brought in the recognizing State. With respect to art. 22, para. 1, court concluded that at least with respect to the funds belonging to the non-debtor affiliates remaining in the cash management account, the applicant was sufficiently protected as a temporary matter as long as the funds remained in the United States. The court observed that the applicant might be dissatisfied with the status, pace or a ruling in the foreign proceeding, but that alone did not justify permitting the applicant to continue the proceedings in the recognizing court, as those proceedings involved the same legal issues as the foreign 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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 22 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 82–93]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [para. 113]; A/CN.9/433 [paras. 140–146]; A/CN.9/435 [paras. 72–78];

(b) GE (1997): A/CN.9/436 [para. 85]; A/CN.9/442 [paras. 161–164];

(c) GEI (2013): A/CN.9/715 [para. 39]; A/CN.9/763 [para. 60]; A/CN.9/766 [para. 49].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 199].

INTRODUCTION[1]

1. Article 22, paragraph 1, provides mandatory protection for the interests of creditors and other interested persons when relief is granted or denied under articles 19 or 21. The GEI [paras. 196–199][2] and the JP [paras. 157–159] note the idea underlying article 22 is that there should be a balance between the relief that may be granted to the foreign representative and the interests of persons that may be affected by that relief, such as creditors, the debtor and other interested persons. Article 22, paragraph 2, reinforces the idea inherent in the nature of discretionary relief (i.e., the relief granted under articles 19 and 21) that the court may tailor that relief to the case at hand. 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. The article also addresses the need for the interests of the persons that may be affected by that relief to be adequately protected when the court is granting, modifying or terminating that relief. The requirement for adequate protection in article 22 is broader than the requirement in article 21, paragraph 2, which refers only to adequate protection of creditors of the recognizing State. Article 22, paragraph 3, provides for modification or termination of the relief granted under articles 19 or 21.

CASE LAW ON ARTICLE 22

2. Several courts have referred to article 22 as giving effect to the preamble to the MLCBI by implementing fair, efficient and cooperative procedures designed to maximize the value of the debtor's assets for distribution.[3]

ARTICLE 22, PARAGRAPH 1

Interpretation of words and phrases

"Interested persons"

3. The words "interested persons" in paragraph 1 have been interpreted to mean any person potentially affected by the relief[4] and would include persons against whom, for example, an order for delivery of information under article 21, subparagraph 1 *(d)*, was sought.[5] Courts have also considered the interpretation of similar terms, such as "party in interest", which it has been held should be construed broadly to protect the interests of affected parties and give courts broad latitude to shape the relief to be ordered.[6]

"Adequate protection"[7]

4. Courts have emphasized the need, in ordering relief under articles 19 and 21, to achieve a balance between the different interests referred to under article 22, paragraph 1, without unduly favouring one group of creditors over another[8] so that protection can be considered adequate for the purposes of both article 22 and article 21, paragraph 2.[9] In achieving that balance, it has been noted that the interests of creditors and those of the debtor are often antagonistic and achieving the protection of one side may well occasion some expense to the other.[10] In addition to the interests to be balanced under article 22, paragraph 1, it has been suggested that there may need to be a balance between those interests and protection of local creditors under article 21, paragraph 2. This can be achieved, it is suggested, by recognizing the equality of all creditors, when considering dealings with and access to the available funds of the

debtor.[11] However, one appellate court has suggested that while the question of whether the interests of foreign creditors in general were adequately protected could be considered before remitting property to the foreign jurisdiction, that consideration would not involve an inquiry into the individual treatment a particular creditor would receive in the specific foreign proceeding because that would require the court to judge the foreign proceeding.[12]

5. As noted above (see discussion under article 21, paragraph 2), one court has identified three basic principles governing what amounts to adequate protection: *(a)* the just treatment of all holders of claims against the bankruptcy estate; *(b)* the protection of local claimants against prejudice and inconvenience in the processing of claims in the foreign proceeding; and *(c)* the distribution of proceeds of the foreign estate substantially in accordance with the order prescribed by local law.[13] Another court has suggested that what adequate protection requires, whether or not the above principles should be adopted, is an evaluation of the protection afforded to relevant creditors.[14] In one case, creditors' interests were held to be adequately protected because they were able to file their claims in the foreign proceeding, in which they were entitled to equal treatment with other unsecured creditors.[15]

6. Other examples of circumstances giving rise to a discussion about adequate protection have included:

(a) When the debtor was not eligible to be wound up in the recognizing State, the local creditor could not prove for any distribution in the foreign proceedings (because it had a revenue claim that was excluded under the law of the originating State) and it could not avail itself of statutory remedies under the law of the recognizing State because of the existing relief ordered under article 21 that conferred a benefit on all other creditors of the debtor;[16]

(b) When the foreign representative sought economic control of the foreign debtor's equity interests in the recognizing State, which the debtors argued would expose them to liability;[17]

(c) When the relief sought (permanently staying a lawsuit brought by a secured creditor in the recognizing State and requiring the parties to try their claim in the originating State) would result in the creditor not being able to set off its claim because set-off rights were not allowed in the foreign proceeding and the creditor would be deprived of notice in the foreign proceeding because it was not regarded as a creditor under the law of the originating State;[18]

(d) Where the applicant in the recognizing State sought the release of certain funds held in that State, on the basis that it was dissatisfied with the status, pace or ruling in the foreign proceeding, the court held it would be adequately protected if the funds remained in the recognizing State;[19]

(e) Where creditors sought to both liquidate and determine the priority of their claims in local courts rather than the foreign proceeding and the foreign representative had agreed to creditors liquidating their claims in any court of competent jurisdiction, including a local court, the court found that an appropriate balance had been reached.[20]

ARTICLE 22, PARAGRAPH 2

7. It has been assumed that the wording of article 22, given its breadth, authorizes the court to require a bond or security to be posted in appropriate cases as a matter of discretion.[21]

ARTICLE 22, PARAGRAPH 3

8. It has been noted that while article 22, paragraph 3, refers to modification or termination of the relief granted under articles 19 or 21, it makes no reference to amending the legal effect of recognition of the foreign main proceedings brought about by article 20.[22] In a case where a broad stay ordered in the originating State had been recognized in the receiving State, relief from that stay was sought in the recognizing State in order to pursue claims that arose solely under the labour laws of the recognizing State for the protection of employees in the recognizing State. Having weighed the interests of the interested parties, the court modified the stay under article 22, paragraph 3, for the specific purpose of preserving the claims, noting that it would be unreasonable to require the applicants to seek relief from the stay in the originating State in view of the nature of the claims.[23]

Notes

[1] Legislation enacting the MLCBI in the Republic of Korea (Debtor Rehabilitation and Bankruptcy Act 2005) does not include art. 22 of the MLCBI. It does however include the equivalent of art. 21, para. 2 (DRBA sect. 636 (2)) and the court considered protections available for creditors in making an order for repatriation of assets under that article: (2014) GOOKJI 1 (26 May 2014), Seoul Central District Court. Similarly, the Law on Recognition of and Assistance in Foreign Insolvency Proceedings of Japan does not include the equivalent of art. 22, but anticipates that creditors will be adequately protected by way of court supervision and court orders.

[2] GE [paras. 161–167].

[3] *United States*: SPhinX, Ltd., 351 B.R. 103, 113 (Bankr. S.D.N.Y. 2006) affirmed on appeal 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768; *Australia*: Akers v Saad Investments [2013] FCA 738 [para. 38], CLOUT 1219 affirmed on appeal [2014] FCAFC 57, CLOUT 1332.

[5] *United States*: Cozumel Caribe, S.A. de C.V., 482 B.R. 96,108 (Bankr. S.D.N.Y. 2012), CLOUT 1311, International Banking Corporation B.S.C. 439 B.R. 614, 626 (Bankr. S.D.N.Y. 2010), CLOUT 1317.

[6] *England*: Picard (Foreign Rep of Bernard Madoff Investment Securities LLC) v FIM Advisers LLP [2010] EWHC 1299 [para. 22] (Ch).

[7] *United States*: International Banking Corporation, B.S.C., 439 B.R. 614, 626 (Bankr. S.D.N.Y.2010); Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 108 (Bankr. S.D.N.Y. 2012); Zhejiang Topoint Photovoltaic Co., Ltd. case No. 14-24549 (Bankr. D.N.J. May 12, 2015) p. 3.

[8] *See* United States Bankruptcy Code, 11 U.S.C. sect. 1522 (enacting art. 22 of the MLCBI). The Bankruptcy Code substitutes the term "sufficient protection" for the phrase "adequate protection" used in the MLCBI because "adequate protection" is used elsewhere in the Code. The drafters sought to avoid importing the large body of case law construing "adequate protection" into Ch. 15, thereby allowing a separate body of law to develop, consistent with principles of international law and promoting uniformity, as provided in art. 8 of the MLCBI.

[9] *United States*: Tri-Continental Exchange, Ltd., 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006), CLOUT 766 *cited* in Sivec SRL, 476 B.R. 310, 323 (Bankr. E.D.Okla. 2012), CLOUT 1312; Jaffé v Samsung Electronics Co., Ltd., 737 F.3d 14, 29 (4th Cir. 2013), CLOUT 1337 – appeal court held that the District Court correctly interpreted the sufficient protection requirement of sect. 1522 *(a)* as requiring a particularized balancing analysis that considers the "interests of the creditors and other interested entities, including the debtor," 11 U.S.C. sect. 1522 *(a)*, and, in this case in particular, a weighing of the interests of the foreign representative (the debtor) in receiving the requested relief against the competing interests of those who would be adversely affected by the grant of such relief (here, the licensees). It also agreed that sect. 1506 was an additional, more general protection of United States interests that may be evaluated apart from the particularized analysis of sect. 1522 *(a)*.

[10] *United States*: Vitro S.A.B. de C.V., 701 F.3d 1031, 1060 (5th Cir. 2013), CLOUT 1310 – appeal court said that the Bankruptcy Court did not abuse its discretion in finding the foreign reorganization plan did not provide for an appropriate balance among the interests of the debtor, its creditors, and certain guarantors under arts. 21 and 22 and thus did not provide creditors "sufficient protection" as required specifically under art. 21; AJW Offshore, Ltd., 488 B.R. 551, 561 (Bankr. E.D.N.Y. 2013) – court said no protections under art. 22 were required to grant the relief sought (to realize and administer assets within the United States) on the basis that the foreign representatives were granted broad powers in the foreign proceeding and removal of assets from the United States was not sought.

[11] *United States*: Jaffé v Samsung Electronics Co., Ltd., 737 F.3d 14, 27 (4th Cir. 2013), CLOUT 1337.

[12] *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [para. 139], CLOUT 1332 – court cited earlier authority (Debis Financial Services (Aust) Pty Limited v Allied Bellambi Collieries Pty Limited [1999] NSWSC 935 [para. 14]; 17 ACLC 1636), in which the court considered what was meant by the term "adequate protection": "adequate" is a word which imports notions of relativity. It is relevantly defined in the Macquarie Dictionary as: "equal to the requirement or occasion; fully sufficient, suitable, or fit […]". In other words, the protection as to which the court is required to be satisfied is not protection which is absolute or perfect in all circumstances, but protection which is adequate or suitable considering the circumstances which actually prevail." The court also considered the discussion in Atlas Shipping A/S, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009), CLOUT 1277.

[13] *United States*: SNP Boat Service, S.A. v Hotel St. James, 483 B.R. 776, 786 (S.D. Fla. 2012), CLOUT 1314.

[14] *United States*: Atlas Shipping A/S, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009), CLOUT 1277 *quoting* Artimm S.r.L. 335 B.R. 149, 160 (Bankr. C.d. Cal 2005) (analysing the concept under sect. 304 *(c)* of the old Code, but noting that the analysis would be "essentially the same" under the United States Bankruptcy Code, 11 U.S.C. sect. 1521 *(b)*).

[15] *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 128–138], CLOUT 1332 – court went on to say that the most potent informing principle is the notion of fair and equal treatment of creditors and pari passu distribution of assets of the debtor.

[16] *United States*: Daebo Int'l Shipping Co., Ltd., 543 B.R. 47, 54 (Bankr. S.D.N.Y. 2015), CLOUT 1626.

[17] *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57, CLOUT 1332 – court considered that art. 22, para. 1, gave the court of the forum jurisdiction to make orders enabling the payment of taxation and penalty liabilities to be made from the debtor's assets held by it or a foreign representative appointed under arts. 19 or 21 before those assets were removed from the local forum and sent to the debtor's COMI or elsewhere at the direction of the foreign representative.

[18] *United States*: Lee, 472 B.R. 156, 182 (Bankr. D. Mass. 2012) – the foreign representative testified that he had a duty under the foreign law to take possession of those property interests and that he was a rational actor, with a duty to protect and maximize the value of the property and to respect applicable transfer restrictions. The court concluded that the foreign representative had satisfied the burden of proof that creditors and the debtor would be sufficiently protected if the turnover order were granted, and that the debtors had not met their ultimate burden of establishing the absence of adequate protection.

[19] *United States*: Sivec, Srl., 476 B.R. 310, 328–329 (Bankr. E.D. Okla. 2011), CLOUT 1312.

[20] *United States*: Cozumel Caribe, S.A., de C.V. 482 B.R. 96, 111 (Bankr. S.D.N.Y. 2012), CLOUT 1311.

[21] *United States*: Energy Coal S.P.A., 582 B.R. 619 (Bankr. D. Del. Jan. 2, 2018) [para. 28].

[22] *United States*: Tri-Continental Exchange, Ltd., 349 B.R. 627, 636 (Bankr. E.D. Cal. 2006), CLOUT 766; Millard 501 BR 644 – court said there appeared to be no case […] where a foreign representative was required to post a bond (in favour of a foreign taxing authority whose $18 million default judgment the foreign representatives sought to contest) to obtain recognition or to enjoy the fruits of recognition and accordingly, it refused to do so. It might be noted that the United States Bankruptcy Code, 11.U.S.C. sect. 1522 *(b)* (enacting art. 22 of the MLCBI), adds the words "including the giving of security or the filing of a bond" to the text of art. 22, para. 2, as drafted.

[23] *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 60, 80], CLOUT 1332 – the court noted that that effect, if it was to occur, came from the results of an application under art. 20, para. 2.

[24] *United States*: Sanjel (USA) Inc. (Bankr. W.D. Tex. July 28, 2016), CLOUT 1623.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 23 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 210–216] and on the work of its forty-sixth session (*Official Records of the General Assembly, Sixth-eighth session, Supplement No. 17* (A/68/17)) [para. 197]. See also summary records of the thirtieth session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/433 [para. 134]; A/CN.9/435 [paras. 62–66];

(b) GE (1997): A/CN.9/436 [paras. 86–88]; A/CN.9/442 [paras. 165–167];

(c) GEI (2013): A/CN.9/742 [para. 66]; A/CN.9/763 [para. 61]; A/CN.9/766 [para. 50].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 203].

INTRODUCTION[1]

1. The GEI [paras. 200–203][2] and the JP [paras. 183–186] note that the purpose of article 23 is to provide that, as an effect of recognition, the foreign representative has standing to initiate actions under the law of the enacting State to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is narrowly drafted in that it neither creates any substantive rights regarding such actions nor provides any solution involving conflict of laws; the MLCBI does not address the right of a foreign representative to bring such an action in the enacting State under the law of the State in which the foreign proceeding is taking place. The effect is that the foreign representative is not prevented from initiating such actions by the sole fact that he or she is not the insolvency representative appointed in the enacting State. Under paragraph 2, the court must consider whether any action to be taken under the article 23 authority relates to assets that should be administered in the foreign non-main proceeding. The GEI [para. 203][3] also notes that while the granting of standing under article 23 is not without difficulty, the right to commence such actions is considered essential to protect the integrity of the assets of the debtor and is often the only realistic way of achieving that protection.

CASE LAW ON ARTICLE 23

2. One court has suggested that article 23, as a simple grant of standing, neglects to address choice of law and forum issues. It does not create or establish any legal right of avoidance nor does it create or imply any legal rules with respect to the choice of applicable law as to the avoidance of any transfer of obligation.[4] However, in one appellate decision, the court ruled that that limitation did not apply to a foreign representative's pursuit of avoidance actions available to it under the law of the State in which the foreign proceeding was pending.[5]

3. In a State where recognizing courts typically order that the foreign representative should have the same powers as if they had been appointed as liquidator of the debtor company under the relevant local law, the foreign representative would thus, in accordance with article 23 of the MLCBI, have standing to initiate actions to avoid or otherwise render ineffective acts detrimental to creditors of the debtor company that would be available in the State to a person appointed as liquidator to the company under the State's law.[6]

Notes

[1] It might be noted that article 23 has not been enacted in the Republic of Korea. United States Bankruptcy Code, 11 U.S.C. sect. 1523 (enacting art. 23 of the MLCBI) modifies art. 23 to accommodate United States policy concerns that the avoidance provisions of the Bankruptcy Code should only be available to a foreign representative in a plenary proceeding where the court could give full consideration to the relevant choice of law issues. *See also* 11 U.S.C. sect. 1521 *(a)* (7) (United States enactment of art. 21 of the MLCBI), which bars a foreign representative from employing the avoidance provisions listed in the section; these can be pursued only if a full bankruptcy case is initiated under another chapter of the Code. See JP (2014) [para. 186]. For that reason, it has been suggested, art. 23 of the MLCBI cannot be relied upon to interpret the United States legislation: O'Sullivan v Loy (*In re* Loy), 432 B.R. 551 (E.D. Va. 2010).

[2] GE [paras. 165–167].

[3] GE [paras. 167].

[4] *United States*: Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 325 (5th Cir. 2010), CLOUT 1006. In holding that an avoidance action may be commenced under foreign law, the court said, at 327, that "the application of foreign avoidance law […] raises fewer choice of law concerns as the court is not required to create a separate bankruptcy estate". See also Massa Falida do Ban Cruzeiro do Sul S.A., 567 B.R. 212 (Bankr. S.D.Fla. 2018).

[5] Ibid., *United States*: Fogerty 324 – appellate court said that "If Congress wished to bar all avoidance actions whatever their source, it could have stated so; it did not." Prior to this appellate decision, a similar interpretation had been approved in Atlas Shipping A/S, 404 B.R. 726, 744 (Bankr. S.D.N.Y. 2009), CLOUT 1277 where the court held that maritime attachments obtained after the foreign insolvency case had been filed, but before the Ch. 15 application was made, were void under United States law (*citing* Cunard Steamship Co. Ltd. v Salen Reefer Svcs. AB., 773 F.2d 452, 460 (2d Cir. 1985)). It ordered the funds be remitted to the foreign court in Denmark and indicated that the foreign court should determine the voidability of the post-filing attachments. The United States court had concluded that the decision of the 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 Ch. 15. In another decision involving maritime attachments, CSL Australia Pty. Ltd. v Britannia Bulkers A/S, case No. 08-15187 (S.D.N.Y. Sept. 8, 2009), the foreign proceedings had been recognized and the United States court with jurisdiction over the maritime proceedings vacated attachments and ordered funds be remitted to Australia so that the court in Australia could determine whether the attachment was valid or avoidable under the law of Australia. In International Banking Corporation B.S.C., 439 B.R. 614, 628 (Bankr. S.D.N.Y. 2010), CLOUT 1317, the court refused to release funds when an attachment was completed prior to commencement of the foreign case in Bahrain. To protect the interests of the United States creditors, the court ruled that the attachments would not be invalidated until the court in Bahrain had made certain rulings, including a determination on the voidability of the attachments and any security interests created; see also Awal Bank, BSC v HSBC Bank United States, 455 B.R. 73 (Bankr. S.D.N.Y. 2011).

[6] *Australia*: Wild v Coin Co International PLC [2015] FCA 354 [paras. 71–73], CLOUT 1473 – court also said nothing in art. 21, subpara. 1 *(g)*, of the MLCBI or art. 23 of the MLCBI authorized it to make a determination specifying the commencement date of the administration in Australia (in order to calculate the date of the relation back day for the purpose of bringing avoidance actions under art. 23) at a stage when no such action had been brought. The court held that making such a determination would constitute a determination which affected the rights of parties who had not had any opportunity to be heard; see also King (Trustee), in the matter of Zetta Jet Pte Ltd v Linkage Access Limited [2018] FCA 1979, CLOUT 1818 – court said that art. 23 of the MLCBI was merely a procedural standing rule and did not alter the substantive law of Australia. Accordingly, art. 23 did not create any cause of action that the foreign representative could enforce if other domestic laws did not confer jurisdiction.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 24 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 117–123]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [paras. 148–149]; A/CN.9/433 [paras. 51, 58]; A/CN.9/435 [paras. 79–84];

(b) GE (1997): A/CN.9/436 [paras. 89–90]; A/CN.9/442 [paras. 168–172];

(c) GEI (2013): A/CN.9/763 [para. 62]; A/CN.9/766 [para. 51].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 208].

INTRODUCTION

1. The GEI [paras. 204–208][1] explains that the purpose of article 24 is to avoid denial of standing to the foreign representative of both main and non-main proceedings to intervene in proceedings merely because the procedural legislation may not have contemplated the foreign representative as being among those having such standing. The Guide also clarifies that the word "intervene" in the context of article 24 is intended to refer to cases where the foreign representative appears in court and makes representations in proceedings, whether those proceedings be individual court actions or other proceedings instituted by the debtor against a third party or by a third party against the debtor. The proceedings in which the foreign representative might intervene are those that have not been stayed under article 20, subparagraph 1 *(a)*, or article 21, subparagraph 1 *(a)*. The article makes it clear that the conditions of the local law remain intact. Intervention in individual proceedings under article 24 can be distinguished from participation in collective proceedings under article 12.

CASE LAW ON ARTICLE 24

2. Case law confirms the right of the foreign representative to intervene in proceedings in which the debtor is a party after the foreign proceedings have been recognized.[2]

Notes

[1] GE [paras. 168–172].

[2] United States cases mentioning the grant of authority under art. 24 of the MLCBI tend to raise issues of interpretation of United States Bankruptcy Code, 11 U.S.C. sect. 1509 (enacting art. 9 of the MLCBI), which is more extensive than art. 9 of the MLCBI, e.g., CT Inv. Mgmt. Co., LLC v Carbonell, 10 Civ. 6872 (S.D.N.Y. Jan. 6, 2012); Fogerty v Petroquest Resources, Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319 (5th Cir. 2010), CLOUT 1006; Reserve Int'l Liquidity Fund, Ltd. v Caxton Int'l Ltd., 09 Civ. 9021 (S.D.N.Y. 2010); United States v J.A. Jones Constr. Group, LLC, 333 B.R. 637 (E.D.N.Y. 2005), CLOUT 763.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on chapter IV are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 124–129]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 75–76, 80–83, 118–133]; A/CN.9/422 [paras. 129–143]; A/CN.9/433 [paras. 164–172]; A/CN.9/435 [paras. 85–94];

(b) GE (1997): A/CN.9/436 [paras. 91–95]; A/CN.9/442 [paras. 173–183];

(c) GEI (2013): A/CN.9/742 [paras. 67–68]; A/CN.9/763 [para. 6]; A/CN.9/766 [para. 52].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 223].

INTRODUCTION[1]

1. The GEI [paras. 209–223][2] indicates that a widespread limitation to cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvency is derived from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authority, supporting cooperation and coordination. Chapter IV is aimed at providing that specific authorization, while leaving it up to courts and insolvency representatives to determine when and how to cooperate. Such cooperation does not require a formal decision to recognize the foreign proceeding. The emphasis on direct communication (article 25, para. 2) is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. Article 26 reflects the important role that insolvency representatives can play in devising and implementing cooperative arrangements, within the parameters of their authority. Article 27 provides an indicative list of the types of cooperation that are authorized by articles 25 and 26. The Practice Guide[3] expands upon the forms of cooperation mentioned in article 27 and compiles practice and experience with the use of agreements concerning the coordination of proceedings under subparagraph *(d)*, which are referred to in the Practice Guide as cross-border insolvency agreements or protocols.

CASE LAW ON ARTICLE 25

2. The GEI [para. 212][4] suggests that the requirement of cooperation is not tied to a formal order of recognition. Few cases address that situation, although in one that does, the court confirmed that in circumstanc es where the foreign proceeding is not entitled to recognition, articles 25 and 26 are not intended to limit any jurisdiction the court might otherwise have to provide assistance.[5]

3. For article 25 to apply, one court said there must be a "foreign representative" of a "foreign proceeding" (whether main or non-main was unimportant) as defined in article 2.[6] What article 25 envisaged, it has been suggested, was some form of collaboration, joint enterprise or agreed parallel or complementary action of two or more courts in relation to the exercise of the independent jurisdiction of each within the framework of the law of the States concerned and not that one State should disregard important provisions of its own legal system.[7] The forms of cooperation listed in article 27 supported that interpretation. It was not possible, the court went on to say, to think that a court could "cooperate with" another without that other court being aware.[8] Moreover, granting the relief sought by a foreign representative or hearing and determining a case brought by them did

not amount to cooperation with that foreign representative under chapter IV; article 25 did not provide a means of outflanking articles 19 and 21.[9]

4. It has been suggested that cooperation under article 25 is principally administrative and would not require the court to refuse any kind of modification to recognition orders already made[10] or prevent a court considering matters relevant to the protection of the local creditor in making orders under articles 20, paragraph 2 or 22, paragraph 3.[11]

5. It has also been suggested that the goals of articles 25 and 27 would be furthered by approval of a settlement agreement that would resolve the recognition proceedings, the foreign proceedings and claims and issues between the parties.[12] Those goals would also be furthered, it was suggested, by the court not placing itself in a position that could impede the progress of the main proceeding, which was the vehicle through which it was anticipated that primary recovery for all creditors (including those in the recognizing State) would be accomplished.[13]

ARTICLE 25, PARAGRAPH 2

6. Local conditions may apply to the manner in which communication between courts may take place.[14] Courts may be reluctant to communicate if such communication might be seen, for example, as pre-empting the foreign court's decision on certain matters or impinging on the principle of comity, which is based on common courtesy and mutual respect, or as an unwarranted interference.[15] Particular concerns may arise where an application has been made ex parte and all interested parties have not been heard.[16]

Notes

[1] It should be noted that the enacting legislation of some States e.g., Great Britain, has changed the imperative "shall" in art. 25 of the MLCBI to the discretionary "may": Cross-Border Insolvency Regulations 2006, Schedule 1, art. 25.

[2] GE [173–178, 179–180].

[3] Practice Guide [article 27, paras. 1–21]; see also JP [paras. 187–204].

[4] GE [para. 177].

[5] See *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum (2012) FCA 904 [para. 55], CLOUT 1214.

[6] *Australia*: Chow Cho Poon (Private) Limited [2011] NSWSC 300 [paras. 33–37], CLOUT 1218.

[7] Ibid., *Australia*: Chow Cho Poon [para. 57] *quoting* Rubin v Eurofinance [2009] EWHC 2129 [para. 71] (Ch), CLOUT 1270; *Republic of Korea*: (2014) GOOKJI 1 (26 May 2014), following recognition of the foreign proceeding in (2014) GOOKSEUNG 1 (8 May 2014), the Seoul Central District Court appointed the foreign representative as "cross-border insolvency administrator" (a role not found in the MLCBI), who then sought to repatriate to the United States the proceeds of sale of the debtor's real estate in the Republic of Korea. In the first case initiated by the courts in the Republic of Korea based on art. 25 of the MLCBI (Debtor Rehabilitation and Bankruptcy Act, sect. 641), the court actively cooperated with the originating court (Eastern District of Virginia, United States) and granted the application after satisfying itself that creditors from the Republic of Korea would be protected (the DRBA does not include the equivalent of art. 22 of the MLCBI) and were offered the same opportunities for participation in the United States proceedings as United States creditors.

[8] Ibid., *Australia*: Chow Cho Poon [para. 59].

[9] Ibid., *Australia*: Chow Cho Poon [para. 65].

[10] *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [para. 153], CLOUT 1332.

[11] Ibid., *Australia*: Akers [para. 156].

[12] *United States*: Grand Prix Assocs., case No. 09-16545 (Bankr. D.N.J. June 26, 2009).

[13] *United States*: Tri-Continental Exchange, Ltd., 349 B.R. 627 (Bankr. E.D. Cal. 2006), CLOUT 766.

[14] *Australia*: Lehman Brothers Australia Limited [Parbery; in the matter of Lehman Brothers Australia Limited (in liq) [2011] FCA 1449 [paras. 59, 62], CLOUT 1215 – court observed that cooperation between the court in Australia and any foreign court will generally occur within a framework or protocol that has previously been approved by the court and is known to the parties in the specific proceeding [in accordance with a Practice Note of the Federal Court]. Such a protocol would need to provide for notice of the proposed communication to be given to the parties directly affected.

[15] *England*: Perpetual Trustee Corp. Limited [2009] EWHC 2953.

[16] *Australia*: Parbery; in the matter of Lehman Brothers Australia Limited [2011] FCA 1449 [paras. 53, 59, 62], CLOUT 1215.

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.

TRAVAUX PRÉPARATOIRES

See references under article 25 above.

INTRODUCTION

See introduction under article 25 above.

CASE LAW ON ARTICLE 26

1. While no case law dealing expressly with the interpretation of article 26 has been reported, one court has noted that since the MLCBI as enacted in that State was expressly not intended to limit the jurisdiction of the court to otherwise extend assistance to the courts of other nations [articles 8, 25 and 26], the court was able to grant the relief sought under other law, notwithstanding its inability to recognize the foreign proceedings under the MLCBI.[1]

Notes

[1] *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904, CLOUT 1214.

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*].

TRAVAUX PRÉPARATOIRES

See references under article 25 above.

INTRODUCTION

See introduction under article 25 above.

ADDITIONAL REFERENCES ON ARTICLE 27

1. The Practice Guide discusses the various subparagraphs of article 27. See chapter II [paras. 2–3] on subpara. *(a)*; [paras. 4–10] on subpara. *(b)*; [para. 11] on subpara. *(c)*; [paras. 12–13] on subpara. *(d)*; [paras. 14–16] on subpara. *(e)*; and [paras. 18–21] on subpara. *(f)*; and chapter III [paras. 148–181].

CASE LAW ON ARTICLE 27

2. One court has suggested that the forms of cooperation included in article 27 give the impression that the MLCBI contemplated there should be practical cooperation and communication within the framework of the law in both States, but not that one State should disregard important provisions of its own legal system.[1] It might be noted that the types of cooperation referred to in article 27 provide for coordination of proceedings, not for proceedings in one country to be treated as proceedings in the other.[2] Enforcing a judgment of a foreign court directly in the receiving State was held not to constitute cooperation within the meaning of article 27; the receiving court said much clearer words would have been used if that had been the intention behind these provisions.[3]

3. In a case involving a cooperation protocol, the foreign representative was to seek recognition of what had been agreed should be the foreign main proceeding, and a locally appointed officer was to exercise, in the recognizing State, the powers granted to the foreign representative by the foreign court, so long as that officer acted in good faith collaboratively with the foreign representative. The court said that while it was very unusual that the foreign main proceeding would not be directing the restructuring of the local subsidiary, it was reluctant to upset the balance that had been struck in the cooperation protocol and thus declared the foreign proceeding to be the main proceeding.[4]

Notes

[1] *Australia*: Chow Cho Poon (Private Limited) [2011] NSWSC 300 [para. 57], CLOUT 1218 *citing England*: Rubin v Eurofinance SA [2009] EWHC 2129 (Ch) [para. 71], CLOUT 1270.

[2] *England*: Rubin v Eurofinance [2009] EWHC 2129 (Ch) [para. 71], affirmed [2012] UKSC 46, CLOUT 1270.

[3] *England*: Rubin v Eurofinance [2012] UKSC 46, CLOUT 1270 – Supreme Court rejected the suggestion (not a concluded view) of the Court of Appeal [2010] EWCA Civ 895 [para. 31] that cooperation "to the maximum extent possible" should surely include enforcement of a judgment even though not specifically mentioned in the MLCBI or GE. The Supreme Court said there was nothing in arts. 21, 25 and 27 to suggest that they apply to the recognition and enforcement of foreign judgments against third parties. See generally UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018).

[4] *Canada*: Urbancorp Toronto Management Inc., 2016 CarswellOnt 8410, 37 C.B.R. (6th) 44, 2016 ONSC 3288 [paras. 27–32] (Ont. S.C.J. [Commercial List]).

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 28 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 94–101]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [paras. 192–197]; A/CN.9/433 [paras. 173–181]; A/CN.9/435 [paras. 180–183];

(b) GE (1997): A/CN.9/436 [para. 96]; A/CN.9/442 [paras. 184–187];

(c) GEI (2013): A/CN.9/742 [para. 69]; A/CN.9/763 [para. 64]; A/CN.9/766 [para. 53].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 228].

INTRODUCTION[1]

1. The GEI [paras. 224–228][2] notes that article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of local insolvency proceedings concerning the same debtor, provided the debtor has assets in the State.[3] While that local insolvency proceeding would ordinarily be limited to the assets located in the State, in some situations a meaningful administration of the local proceeding would have to include certain assets located abroad, especially when there is no foreign proceeding necessary or available in the State where the assets are located. Article 28 allows the effects of the proceeding in the enacting State to extend, to the extent necessary, to other property of the debtor that should be administered in that proceeding. There are two restrictions to that extension: the extension is permissible to the extent necessary to implement cooperation and coordination under articles 25–27 and the foreign assets must be subject to administration in the enacting State under the law of the enacting State. Article 28 is also discussed in the JP [paras. 205–209].

CASE LAW ON ARTICLE 28

2. While article 28 extends the jurisdiction of the court over certain foreign assets of the debtor upon the commencement of a subsequent plenary bankruptcy case, one court has indicated that it did not expand jurisdiction as to the debtor itself, thus confirming the shared and cooperative nature of the jurisdiction over a debtor that was already subject to the jurisdiction of at least one foreign court.[4] In another case, the court observed that where there were concurrent proceedings, the local court must cooperate with the foreign proceedings, but that did not mean the local court could not commence local proceedings. It was clear throughout the MLCBI, it was said, that local proceedings could be commenced irrespective of the existence of unrecognized foreign proceedings.[5]

3. Following discharge of the debtor in the originating State, the proceeding was reopened and recognition was sought. After recognition of the foreign proceeding was granted, a local proceeding was commenced in the recognizing State to enable a local creditor to pursue its claim. On appeal, the court held that the local proceeding was properly commenced in the recognizing State on the basis that the relief that could be granted on recognition of a foreign proceeding provided procedural support for that proceeding and could not substantively change the creditor's claim. Recognition of a discharge order went beyond the scope of relief available under the MLCBI, the creditor's claim had not been discharged by the foreign discharge order and the creditor was therefore eligible to commence a local proceeding.[6]

Notes

[1] *Mexico*: the legislation implementing the MLCBI, Commercial Insolvency Law 2000, includes 2 provisions (sects. 293 and 294) not included in the MLCBI, which require that where the debtor has an establishment in Mexico, insolvency proceedings must be brought against that debtor in Mexico in order to grant recognition of a foreign proceeding concerning that debtor. A court has indicated this requirement is consistent and congruent with the principle of equality of domestic and foreign creditors; if such proceedings were not commenced it would result in the risk that claims of creditors from Mexico would not be heard in the foreign proceeding and the debtor would only pay foreign claimants: case No. 171137, Commercial Insolvency Act. Conditions for Recognition of Foreign Proceedings in Mexico. Ninth Epoch. Collegiate Circuit Courts, Weekly Federal Court Report, vol. XXVI, October 2007, p. 3210 (Court precedent I.11o.C.176C).

[2] GE [paras. 184–187].

[3] *United States*: Toft, 453 B.R. 186, 192 (Bankr. S.D.N.Y. 2011), CLOUT 1209 – court explained the fact that art. 28 contemplates commencement of a local proceeding following recognition of a foreign main proceeding only where the debtor has assets suggests that the MLCBI contemplates no assets are required for a recognition application.

[4] *United States*: JSC BTA Bank, 434 B.R. 334, 343–344 (Bankr. S.D.N.Y. 2010), CLOUT 1211.

[5] *Australia*: Bank of Western Australia v Henderson (No. 3) [2011] FMCA 840 [12, 17, 19], CLOUT 1216.

[6] *Republic of Korea*: (2006) GOOKSEUNG 1 (22 January 2007), Seoul Central District Court, CLOUT 1002; (2007) GOOKSEUNG 2 (12 February 2008), Seoul Central District Court; (2008) HAHAP 20 (28 August 2008), Seoul Central District Court; RA 1524, Seoul High Court, CLOUT 1000; (2009) Ma 1600 (25 March 2010), Supreme Court of Korea. See also *Japan*: Azabu Building Company Ltd, case No. (shou) 1 of 2006; case No. (mi) 5 of 2007, Tokyo District Court, CLOUT 1478 – effect of a discharge of debt in the foreign proceeding can be recognized in Japan only if the discharge satisfies the conditions for recognition of the effect of a foreign judgment under section 118 of the Civil Procedure Code.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 29 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 106–110]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/435 [paras. 190–191];

(b) GE (1997): A/CN.9/442 [paras. 188–191];

(c) GEI (2013): A/CN.9/742 [para. 70]; A/CN.9/766 [para. 53].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 232].

INTRODUCTION

1. The GEI [paras. 229–232][1] notes that article 29 provides guidance to the court on the approach to be taken to cases in which the debtor is subject to a foreign and a local proceeding at the same time. The salient principle is that the commencement of the local proceeding does not prevent or terminate the recognition of a foreign proceeding, but article 29 maintains the pre-eminence of the local insolvency proceeding over the foreign proceeding. This has been done by *(a)* requiring relief granted to the foreign proceeding to be consistent with the local proceeding; *(b)* any relief already granted to the foreign proceeding must be reviewed and modified or terminated to ensure consistency with the local proceeding; *(c)* if the foreign proceeding is a main proceeding, the automatic effects of recognition under article 20 are to be modified or terminated if inconsistent with the local proceeding; and *(d)* if a local proceeding pending at the time the foreign proceeding is recognized as a main proceeding, the foreign proceeding does not enjoy the automatic effects of article 20 The principle in article 21, paragraph 3, 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, is restated in article 29, subparagraph *(c)*. Article 29 is also discussed in the JP [paras. 210–213].

CASE LAW ON ARTICLE 29

2. In a case where the debtor was already subject to a local liquidation when the foreign representative sought recognition of a foreign proceeding, the court said that article 29, subparagraph *(a) (i)*, required the order sought in the recognition proceeding (i.e., for remittal of funds) to be consistent with the local liquidation. The court went on to say that it was not necessary to examine the precise meaning and limits of that qualification because in the circumstances of the case the proposed remittal was unquestionably consistent with the liquidation.[2]

3. Another case involved the question of whether an insolvency order could be made in one State against a debtor who

was already under an insolvency administration in another State, but recognition of that administration had not been sought. The court noted it was clear throughout the MLCBI that local proceedings could be commenced irrespective of the existence of unrecognized foreign proceedings. The court observed that article 29 required the foreign insolvency representative to take action; it did not provide a remedy that could be sought by an individual creditor. Where the foreign representative declined to take that action, the individual creditor could seek to commence a local proceeding.[3]

Notes

[1] GE [paras. 188–191].

[2] *England*: Swissair Schweizerische Luftverkehraktiensgesellschaft [2009] EWHC 2099 [para. 14] (Ch).

[3] *Australia*: Bank of Western Australia v Henderson (No. 3) [2011] FMCA 840 [para. 44], CLOUT 1216.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 30 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 111–112]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

GE (1997): A/CN.9/442 [paras. 192–193].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 234].

INTRODUCTION

1. The GEI [paras. 233–234][1] notes that the objective of article 30 is similar to that of article 29 in that it is designed to aid cooperation through proper coordination and consistency of relief. It deals with cases in which the debtor is subject to insolvency proceedings in more than one foreign State and the foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State. The provision applies irrespective of whether there is a proceeding 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. Article 30 requires that any relief granted in favour of a foreign non-main proceeding must be consistent with the foreign main proceeding, thus according preference to the foreign main proceeding, if there is one. Where there are only foreign non-main proceedings, any relief ordered should be coordinated. Relief granted under article 30 may be terminated or modified to ensure that consistency can be achieved. Article 30 is also discussed in the JP [paras. 214–218].

CASE LAW ON ARTICLE 30

2. Very little case law has been reported on article 30. In one case, an application for recognition sought coordination under article 30, but since only a single foreign non-main proceeding had been recognized, relief under article 30 was denied.[2]

Notes

[1] GE [paras. 192–193].

[2] *United States*: British-American Insurance Co., Ltd., 425 B.R. 884 (Bankr. S.D. Fla. 2010), CLOUT 1005.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 31 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 94, 102–105]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [para. 196]; A/CN.9/433 [paras. 173, 180–181]; A/CN.9/435 [paras. 180, 184];

(b) GE (1997): A/CN.9/436 [para. 97]; A/CN.9/442 [paras. 194–197];

(c) GEI (2013): A/CN.9/742 [para. 71]; A/CN.9/766 [para. 53].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 238].

INTRODUCTION

1. The GEI [paras. 235–238] explains that for jurisdictions in which insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of a foreign main proceeding, a rebuttable presumption of insolvency of the debtor for the purposes of commencing a proceeding in the enacting State. The presumption does not apply if the foreign proceeding is a non-main proceeding. The court of the enacting State is not bound by the decision of the foreign court and local criteria for demonstrating insolvency remain operative, as clarified by the words "in the absence of evidence to the contrary".

CASE LAW ON ARTICLE 31

2. Article 31 has not been authoritatively considered.

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.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 32 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17* (A/52/17)) [paras. 130–134]. See also summary records of that session (*Yearbook,* vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 89–93]; A/CN.9/422 [paras. 198–199]; A/CN.9/433 [paras. 182–183]; A/CN.9/435 [paras. 96, 197–198];

(b) GE (1997): A/CN.9/436 [para. 98]; A/CN.9/442 [paras. 198–200].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 241].

INTRODUCTION

1. The GEI [paras. 239–241] explains that the rule in article 32 (sometimes referred to as the "hotchpot" rule) provides a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to avoid a situation 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. An example of how the rule operates can be found in GEI [para. 239]. 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 that claims of secured creditors or creditors with rights *in rem* are paid in full, those claims are not affected by the provision. Article 32 is also discussed in the JP [paras. 219–222].

CASE LAW ON ARTICLE 32

2. Operation of the "hotchpot" rule has been discussed generally[1] in the context of determining adequate protection under article 22; the principle of "hotchpot" is based on fairness and equality.

Notes

[1] *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 135 [para. 139], CLOUT 1332.

Annex

List of cases by jurisdiction

AUSTRALIA

Akers v Deputy Commissioner of Taxation [2014] FCAFC 57, CLOUT 1332 *affirming* Akers (as joint foreign representative) v Saad Investments Company Ltd [2013] FCA 738, *affirming* Akers v Saad Investments Co Limited (in official liq) [2010] FCA 1221 (also 190 FCR 285), CLOUT 1219; also Akers & Ors v Deputy Commissioner of Taxation [2014] HCA Trans 213, CLOUT 1474 *denying leave to appeal to High Court*: articles 16 (3); 17 (3), (4); 20; 21 (2); 22 (3); 25 (1); 32

Bank of Western Australia v Henderson (No. 3) [2011] FMCA 840, CLOUT 1216: preamble, articles 1; 8; 28

Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA [2017] FCA 331, CLOUT 1799; Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA [2018] FCA 153: articles 15 (2), (3); 18; 20

Chow Cho Poon (Private Limited), Re [2011] NSWSC 300, CLOUT 1218: articles 1, 2 *(a)*, 2 (debtor); 16 (2), (3); 17 (2); 25; 26

Crumpler (as liquidator and joint representative) of Global Tradewaves Ltd v Global Tradewaves (in liq); in the matter of Global Tradewaves (in liq) [2013] FCA 1127, CLOUT 1331: article 21 (1) *(d)*

Gainsford, in the matter of Tannenbaum vs Tannenbaum [2012] FCA 904, CLOUT 1214: articles 8; 16 (2), (3); 17 (2); 25; 26

Hur (in his capacity as Foreign Representative of Samsun Logix Corporation) v Samsun Logix Corporation [2009] FCA 372, *CLOUT 9211[1]

Kapila, Re Edelsten [2014] FCA 1112, CLOUT 1475; Kapila (Trustee), in the matter of Edelsten (Bankrupt) (No. 2) [2016] FCA 1269: preamble; articles 2 *(c)*, 2 *(f)*; 8; 16 (3); 17 (2); 20 (1), (3)

Katayama v Japan Airlines Corporation [2010] FCA 794: articles 2 *(a)*, *(d)*; 16 (3)

King, in the matter of Zetta Jet Pte Ltd [2018] FCA 1932, CLOUT 1817; King (Trustee), in the matter of Zetta Jet Pte Ltd v Linkage Access Limited [2018] FCA 1979, CLOUT 1818: articles 8; 17 (2)

Lawrence v Northern Crest Investments Limited (in liq) [2011] FCA 672, CLOUT 1217: article 21 (1) *(f)*

In the matter of Legend International Holdings Inc. [2016] VSC 308, CLOUT 1619: article 16 (3)

Moore, as Debtor-in-possession of Australian Equity Investors [2012] FCA 1002, CLOUT 1477: articles 16 (3); 17 (2) (movement of COMI)

Parbery, in the matter of Lehman Brothers Australia Limited (in liq) [2011] FCA 1449, CLOUT 1215: article 25 (2)

Pink v MF Global UK Limited (in special administration) [2012] FCA 260: articles 17 (1); 20 (1)

Raithatha (as liquidator of Ariel Industries PLC (in creditors voluntary liquidation) and Ariel Fasteners Ltd (in creditors voluntary liquidation)) v Ariel Industries PLC (in creditors voluntary liquidation) and Anor [2012] FCA 1526: articles 2 *(a)*, 8; 15 (2) *(c)*

Tucker, Aero Inventory (UK) Ltd v Aero Inventory (UK) Limited (No. 2), Re [2009] FCA 1354, and [2009] FCA 1481, CLOUT 922: articles 2 *(a)*, *(d)*; 8; 19

Wild v Coin Co International PLC (Administrators appointed [2015] FCA 354, CLOUT 1473: article 23

Winter v Winter and Ors [2010] FamCA 933: article 1

[1] CLOUT cases marked with an asterisk (*) have not given rise to issues of interpretation of the articles of the MLCBI. They are referred to in footnote 16 of the Digest, but not in the substantive articles. They have been reported in CLOUT as examples of applications under the MLCBI.

Yakushiji (in his capacity as foreign representative of Kaisha) v Kaisha [2015] FCA 1170, CLOUT 1620; Yakushiji (in his capacity as foreign representative of Kaisha) v Kaisha (No. 2) [2016] FCA 1277: articles 18; 20

Young, Jr (on behalf of debtor-in-possession of Buccaneer Energy Ltd) v Buccaneer Energy Ltd [2014] FCA 711, CLOUT 1476: article 16 (3)

Yu v STX Pan Ocean Co Ltd (South Korea); in the matter of STX Pan Ocean Co Ltd (receivers appointed in the Republic of Korea) [2013] FCA 680, CLOUT 1333: articles 19; 21 (1) *(e)*

CANADA

Re Angiotech Pharmaceuticals Limited, 2011 BCSC 115, CLOUT 1207: article 16 (3)

Re Caesars Entertainment Operating Co., 2015 CarswellOnt 3284; 23 C.B.R. (6th) 154; 2015 ONSC 712; [2015] O.J. No. 1201 (Ont. S.C.J.): article 16 (3)

Re Cinram International Inc., 2012 ONSC 3767; 91 CBR (5th) 46, CLOUT 1269: article 16 (3)

Colt Holding Company LLC, 2015 ONSC 3928: article 16 (3)

Re Digital Domain Media Group Inc., 2012 BCSC 1565, CLOUT 1334: article 16 (3)

Fraser Papers Inc., 56 CBR (5th) 194; 2009 OJ 2648 (SCJ): article 16 (3)

Gyro-Trac (USA) Inc., 2010 QCCS 1311; 2010 QCCA 800; 66 CBR (5th) 159 (Que CA): article 16 (3)

Re Hanjin Shipping Co., 2016 CarswellBC 3287; 42 C.B.R. (6th) 120; 2016 BCSC 2213: article 20

Re Hartford Computer Hardware Inc., 2012 ONSC 964; 212 A.C.W.S. (3d) 315, CLOUT 1205: articles 6; 21 (1)

Re Horsehead Holding Corp and Zochem Inc. (2016), 2016 ONSC 958; 2016 CarswellOnt 1748 (Ont. S.C.J. [Commercial List]): article 16 (3)

Re Lightsquared LP et al, 2012 ONSC 2994, CLOUT 1204 (art. 21 at paras. 38–39): articles 16 (3); 21 (1)

Re Massachusetts Elephant and Castle Group Inc., 2011 ONSC 4201; (2011) 81 CBR (5th), CLOUT 1206: article 16 (3)

Re Payless Holdings Inc. LLC, 2017 CarswellOnt 5926; 2017 ONSC 2242 (Ont. S.C.J.): article 16 (3)

Re Probe Resources Ltd., 2011 CarswellBC 1043; 79 C.B.R. (5th) 148 (B.C. S.C.): articles 8; 15 (2), (3)

Re Syncreon Group B.V., 2019 ONSC 5774: articles 2 *(a)*, 2 (debtor)

Re Urbancorp Toronto Management Inc., 2016 CarswellOnt 8410; 37 C.B.R. (6th) 44; 2016 ONSC 3288 (Ont. S.C.J. [Commercial List]): article 16 (3)

Xerium Technologies Inc., 2010 ONSC 3974: article 16 (3)

CHILE

Onix Capital SA (*cited* in *Cross-Border Insolvency*: *A Commentary on the UNCITRAL Model Law on Cross-Border Insolvency,* Fourth Edition, vol. 1, Globe Law and Business, 2017, p. 136): article 5

ENGLAND AND WALES

Re Agrokor DD [2017] EWHC 2791 (Ch) (9 November 2017), CLOUT 1798: articles 2 *(a)* (enterprise groups); 6; 8

In the matter of Armada Shipping SA [2011] EWHC 216 (Ch): article 21 (1) *(a)*

Candey Ltd. v Crumpler [2020] EWHC Civ 26: article 17 (1)

Ivan Cherkasov, William Browder, Paul Wrench v Nogotkov Kirill Olegovich, The Official Receiver of Dalnyaya Step LLC (in liq) [2017] EWHC 3153 (Ch) (5 December 2017), CLOUT 1797: article 6

In the matter of Chesterfield United Inc. & Partridge Management Group SA [2012] EWHC 244 (Ch) (1 February 2012), CLOUT 1271: articles 8; 21 (1) *(a)*

In the matter of European Insurance Agency AS, High Court (Ch), case No. 6-BS30434 (7 September 2006), *CLOUT 769

Fibria Cellulose S/A v Pan Ocean Co. Ltd (In the matter of Pan Ocean Co. Ltd) [2014] EWHC 2124 (30 June 2014), CLOUT 1482: articles 20 (1); 21 (1)

Brian Glasgow (the Bankruptcy Trustee of Harlequin Property (SVG) Ltd.) v ELS Law Ltd. [2017] EWHC 3004 (Ch): article 17 (1)

H & CS Holdings Pte. Ltd v Glencore International AG [2019] EWHC 1459 (Ch) (25 March 2019), CLOUT 1820: article 20 (1)

Larsen & Anor (Foreign Representatives of Atlas Bulk Shipping AS) & Anor v Navios International Inc [2011] EWHC 878 (Ch) (13 April 2011), CLOUT 1273: articles 2 *(a)*, 21 (1)

In re Namirei Showa Co. Ltd., High Ct (Ch) 16 October 2008, 7542/08, *CLOUT 100

In re New Paragon Investments Limited [2012] BCC 371 (25 November 20112), CLOUT 1272: article 2 *(a)*

In the matter of 19 Entertainment Ltd [2016] EWHC 1545 (Ch) (29 April 2016), CLOUT 1621: article 20 (1)

In the matter of OGX Petróleo E Gás S.A. [2016] EWHC 25 (Ch) (12 January 2016), CLOUT 1622: articles 17 (improper purpose); 20 (1)

In the matter of OJSC International Bank of Azerbaijan [2017] EWHC 2075 (Ch) (6 June 2017), CLOUT 1821: article 20 (1)

Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia [2018] EWHC 59 (Ch) (18 January 2018); [2018] EWCA Civ 2802 (18 December 2018), CLOUT 1822: articles 8; 18; 20 (1); 21 (1) *(a)*

Re Pan Ocean Co. Ltd.; Seawolf Tankers Inc. v Pan Ocean Co. Ltd. [2015] EWHC 1500 (CH): article 20 (2)

In the matter of Pan Oceanic Maritime Inc. [2010] EWHC 1734 (Comm), (14 May 2010): article 20 (1), (2)

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[2] The Republic of Korea manages recognition and relief applications with respect to the same foreign proceeding separately, hence the numerous case references with respect to the same recognition application.

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