INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 2A Guidance Text

UNCITRAL Model Laws Relating to Insolvency

2022 / 2023

CONTENTS

INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

INSOL International

6-7 Queen Street, London, EC4N 1SP, UK
Tel: +44 (0)20 7248 3333
Fax: +44 (0)20 7248 3384

www.insol.org

Module Author

Mr Peter J M Declercq
INSOL Fellow
Partner, DCQ Legal
London
United Kingdom

Published: September 2022

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 UNCITRAL Model Law on Cross-Border Insolvency, including the purpose and function of each part;
- a relatively detailed overview of the practicalities in applying the UNCITRAL Model Law on Cross-Border Insolvency as illustrated by appropriate case law;
- a general overview of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments;
- a general overview of the UNCITRAL 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 UNCITRAL Model Law on Cross-Border Insolvency. Candidates will not be examined on Part B (UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments) and Part C (UNCITRAL 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 2023**.

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 2023**, or by **11 pm (23:00) BST (GMT +1) on 31 July 2023**. However, if you elect to submit your assessment on 1 March 2023, you may not submit the assessment again on 31 July 2023 (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 2023 (or 31 July 2023, 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 the web pages 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 UNCITRAL Model Law on Cross-Border Insolvency; and
- be able to answer questions based on a set of facts relating to the UNCITRAL 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.

The following texts can be found on the UNCITRAL website (www.uncitral.org):

- **UNCITRAL Guide to Enactment**: UNCITRAL Guide to Enactment and Interpretation (1997, updated 2014).

- **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).

- **Practice Guide**: The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).

- **The Judicial Perspective**: The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective (2011, updated 2013).

- **Legislative Guide – Part Three**: The UNCITRAL Legislative Guide on Insolvency Law – part three deals with treatment of enterprise groups in insolvency (2010).

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

- **Model Law on Enterprise Group Insolvency**.

- **Digest of Case Law**: In February 2021, the first Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency was published and has been provided to you as an additional module document on the web pages for this Module.

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]

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

---

1 See generally N 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 J Clift and N 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 WG V 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.

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 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

---

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.

"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]

---

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. However, harmonisation of insolvency law efforts are still ongoing in Europe, as is evidenced by the study that was published in *Harmonisation of transactions avoidance laws*, by R Bork and M Veder (Intersentra, February 2022).

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]

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." 2022 marks the 25th anniversary of the adoption of the MLCBI, which has now been enacted in 55 jurisdictions in 51 States, with additional jurisdictions using it for reference when drafting their laws – https?//unis.unvienna.org/unis/en/pressrels/2022/unisl330.html (official press release of 30 May 2022).

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.

- **Access** - providing access of foreign representatives and creditors to courts;
- **Recognition** – recognition of foreign proceedings;
- **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.
- **Digest of Case Law** – In February 2021 the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency was published. This was the result of co-operation between

[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.

national correspondents, the UNCITRAL secretariat and delegates to UNCITRAL Working Group V (Insolvency Law) with contributions from INSOL International. The Digest of Case Law 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 articles of the MLCBI.[25]

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.

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.[26]

[25] Digest of Case Law, Introduction to Digest of Case Law, para 16.
[26] UNCITRAL Guide to Enactment, p 32 at para 46. For selected case law on the Preamble, see Digest of Case Law,

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[27] 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 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:[28]

- **New terminology limited**: New legal terminology added by the Model Law to the existing insolvency law of the enacting State, is limited;[29]

Preamble, paragraphs 2-6.

[27] *Idem*, p 19-20 at para 3.

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

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

- **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;[30]

- **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;[31]

- **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,[32] as well as to the protection of local creditors and other interested parties (including the debtor) against undue prejudice;[33]

- **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;[34]

- **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.[35]

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.[36]

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.[37]

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

---

30 Model Law, Art 20.
31 *Idem*, Art 28.
32 *Idem*, Art 19(2).
33 *Idem*, Art 22.
34 *Idem*, Art 6. It should be noted, however, that it is expected that the public policy exception should only rarely be used.
35 *Idem*, Arts 25-27.
36 Judicial Perspective, p 9 at para 26.
37 *Idem*, p 10 at para 28.

quickly with the passage of time, this ability is critical when there is a need for a court to act with urgency.[38]

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.

[38] *Idem*, pp 10-11 at para 29.

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:[39]

- Inward-bound requests for recognition of a foreign proceeding;
- 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.[40] 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.[41] 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.[42] 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).

---

[39] UNCITRAL Guide to Enactment, p 35 at para 53. For selected case law on Art 1, see Digest of Case Law, Ch I General provisions, paras 2-4.

[40] 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. Following Brexit (ie, the UK's exit from the EU on 31 December 2020) and as a result of the existence of transitional provisions with a limited scope, the German bank Geensill Bank AG was nevertheless able to successfully apply under the CBIR for recognition in the UK of its German insolvency proceedings: *Re Greensill Bank AG* [2021] EWHC 966 (Ch), see in particular paras 16-21 of this judgment of 31 March 2021.

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

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

6.4 Key definitions (Article 2)[43]

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:[44]

- a proceeding (including an interim proceeding);[45]
- that is either judicial or administrative;
- that is collective in nature;[46]
- that is in a foreign State;
- that is authorised or conducted under a law relating to insolvency;[47]
- in which the assets and affairs of the debtor are subject to control or supervision by a foreign court;[48] and
- which proceeding is for the purpose of reorganisation or liquidation.[49]

---

[43] For selected case law on Art 2, see Digest of Case Law, Ch I, General provisions, paras 2-46.

[44] 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.

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

[46] 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).

[47] 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".

[48] 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).

[49] 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,

In the judgment by the English court in the *Agrokor*[50]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:

- "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:[51]

- *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;

---

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)".

50 *In the matter of Agrokor DD* [2017] EWHC 2791 (Ch). A similar, more recent English case is *Ms Svitlana Vasylivna Groshova (in her capacity as authorised officer of the Deposit Guarantee Fund of Ukraine in respect of the liquidation of PJSC Bank Finance and Credit) and Deposit Guarantee Fund of Ukraine* [2021] EWHC 1100 (Ch) (the "PJSC Bank Case"). In a judgment of 29 April 2021, the English court considered the application for recognition under the CBIR in the UK of the Ukrainian liquidation of PJSC Bank Finance and Credit ("PJSC Bank") as a foreign main proceeding. Similar to the *Agrokor* case, in the PJSC Bank Case the English court considered in a clear and helpful manner whether the various elements of the definitions "foreign proceeding" and "foreign representative" were met in this case, as well as the requirements of arts 6, 15, and 17 of the MLCBI.

51 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 Herzegovina (p 22) and Montenegro (pp 22 and 23). Unlike the English court, each of these jurisdictions denied recognition.

- *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);[52]

- *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;

- *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.

---

[52] In *Re Industria De Alimentos Nilza SA and other companies Leite v Amicorp (UK) Ltd* [2020] EWHC 3560 (Ch) (the Nilza Case), the English court had to consider whether Brazilian so-called "Extension Applications" qualify as "foreign proceedings" in the context of a recognition and relief application in the UK under the CBIR. In short, "Extension Applications" allow an insolvency granted for one debtor to be extended to another debtor. For such "Extension Proceedings" there is no direct parallel under English law according to the court (para 28 of the Nilza Case). The court considered the "Extension Proceedings" to be somewhere between (i) proceedings commenced separately against each entity but in which, at some stage, an order is made for substantive consolidation of their assets, and (ii) the more radical concept of "group proceedings" where there is only one application and one set of proceedings in respect of which two or more separate entities whose assets are consolidated from the start. (paras 39-40 of the Nilza Case). As for the "collective nature" of Extension Proceedings, based on the reasoning in the *Agrokor* case, the English court held in para 46 of the Nilza Case: "by:

(i) adopting the rationale applied by HHJ Matthews in *Agrokor*, that it would create a significant hole in the range of possible options for international recognition if the English courts were not prepared to recognise proceedings affecting a distinct company with a form of "group proceedings" that is unfamiliar to this jurisdiction, and

(ii) taking into account the court's willingness, in extreme and unusual circumstances, to permit a liquidator to pool assets of two or more insolvent entities

I am satisfied that the likely pooling of Buglin and Endipa's assets to meet the claims of Nilza's creditors does not preclude the Extension Proceedings from being "collective proceedings" for purposes of 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.[53]

By specifying the required characteristics of a "foreign proceeding" and a "foreign representative", the definitions limit the scope of application of the Model Law.[54]

6.4.3 Main or non-main proceedings[55]

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[56] economic activity with human means and goods or services."[57]

---

[53] 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.

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

[55] 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.

[56] 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."

[57] 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".

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[58] 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.[59]

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.[60] 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)[61] may take priority over the Model Law if the enacting State is a party to the Cape Town Convention.

---

58 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.

59 *Idem*, p 43, para 81.

60 *Idem*, pp 48-49, paras 91- 93. Digest of Case Law, Ch I, General provisions, states in para 2 on p 17 that "reported cases have not dealt with issues of interpretation of article 3."

61 The Cape Town Convention can be accessed via the following link: https://www.unidroit.org/instruments/security-interests/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.[62] 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.[63]

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.[64] 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.[65]

6.8 The public policy exception (Article 6)[66]

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 public policy exceptions should be interpreted restrictively and should only apply in exceptional circumstances concerning matters of fundamental importance for the enacting State.[67]

In the *Agrokor* case,[68] 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

---

62 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. Digest of Case Law, Ch I, General provisions, states in para 2 on p 18 that "reported cases have not dealt with issues of interpretation of article 4."

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

64 *Idem*, p 51, para 99. For a reported case on art 5, see Digest of Case Law, Chapter I, General provisions, para 2 on p 19.

65 *Idem*, p 51, para 100.

66 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.

67 UNCITRAL Guide to Enactment, p 52, para 104. For selected case law on Art 6, see Digest of Case Law, Ch I, General provisions, paras 2-9.

68 See note 50, *supra*, and the discussion in that part of the guidance text.

process and as such justify a denial of the requested recognition based on the public policy exception.[69]

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.[70] 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:[71]

- 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.

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.[72]

---

[69] 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.

[70] UNCITRAL Guide to Enactment, p 53, para 105. For selected case law on Art 7, see Digest of Case Law, Chapter I, General provisions, para 2.

[71] 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].

[72] UNCITRAL Guide to Enactment, p 53, paras 106-107. For selected case law on Art 8, see Digest of Case Law, Chapter I, General provisions, paras 2-6. In this context, it should further be understood that each separate implementation of the Model Law in essence departs from the "original or archetype" for various reasons, principally the necessity to tailor the Model Law to fit domestic law and policy. The nuances involved in trying to achieve – using art 8 of the Model Law – the desired uniformity when interpreting local enactments of the Model Law is addressed in: "*A comparative analysis of the use of the UNCITRAL Model Law on Cross-border Insolvency in Australia, Great Britain and the United States*", Stewart Maiden, (2010) 18 *Insolv LJ* 63, pp 63-76.

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.

Article 9 expresses this principle of direct access by a foreign representative to courts of the enacting State.[73] 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.

[73] *Idem*, p 55, para 108. For a reported case on Art 9, see Digest of Case Law, Chapter II, Access of foreign representatives and creditors to courts in this State, para 2.

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.[74] Again, no prior recognition of the foreign proceeding is required for this type of access.[75]

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.[76]

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. According to Digest of Case Law,[77] the immunity afforded by article 10 has been reiterated in the orders issued by some courts.

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. 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.[78]

---

[74] 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.

[75] UNCITRAL Guide to Enactment, p 57, paras 112-114. Digest of Case Law, Chapter II, Access of foreign representatives and creditors to courts in this State, states in para 2 on p 31 that "reported cases have not dealt with issues of interpretation of article 11."

[76] *Idem*, p 58, paras 115-117. Digest of Case Law, Ch II, Access of foreign representatives and creditors to courts in this State, states in para 2 on p 32 that "reported cases have not dealt with issues of interpretation of article 12."

[77] See Digest of Case Law, Ch II, Access of foreign representatives and creditors to courts in this State, on Art 10, para 2 on p 30.

[78] *Idem*, p 60, paras 119-120. For a reported case on Art 13, see Digest of Case Law, Chapter II, Access of foreign

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.[79]

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-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

representatives and creditors to courts in this State, para 2.

[79] *Idem*, pp 61-63, paras 121-126. Digest of Case Law, Ch II, Access of foreign representatives and creditors to courts in this State, states in para 2 on p 34 that "reported cases have not dealt with issues of interpretation of article 14."

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.[80]

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 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

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

recognition is requested was correctly commenced under the applicable law of the foreign State.[81]

8.2.3 Recognition requirements (Article 15)[82]

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)[83]

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.

---

[81] *Idem*, p 15, para 41. In the judgment of 10 December 2021 in *the Trustees in bankruptcy of Li Shu Chung v. Li Shu Chung* [2021] EWHC 3346 (Ch), the English court accepted that it should not go behind the judgment despite Mr Li's challenges to the Hong Kong court's findings. The receiving court would not embark on a consideration of whether the foreign proceeding was correctly commenced under the applicable law because "it would deprive the Model Law of much of its force if a debtor could challenge the findings of fact or law made by the foreign court before the receiving court would recognise the foreign proceeding."

[82] For selected case law on Art 15, see Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, paras 2-6.

[83] For selected case law on Art 16, see Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, paras 5-8.

- 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.

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).[84] In the absence of public policy grounds in the enacting State for denying a request for recognition,[85] 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,[86] 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

---

[84] *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.

[85] 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 documents"-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.

[86] 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). For selected case law on Art 17, see Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, paras 6-23.

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.[87] However, some States, when enacting the Model Law, have included reciprocity provisions in relation to recognition.[88] 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 Law, as the South African approach to reciprocity demonstrates.[89] 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[90]

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[91] does provide some guidance. Similar to the COMI concept under the European Insolvency Regulation,[92] 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

---

87 The Judicial Perspective, p 18, para 47.

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

89 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.

90 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). For guidance on the meaning of COMI, cases decided under the EIR, operation of the presumption under the MLCBI, burden of proof, ascertainability and factors for COMI with respect to corporate debtors and individuals, see Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, paras 9-31 on Art 16.

91 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.

92 *Idem*, p 44, para 82.

considered by a court to determine the debtor's COMI include, but are not limited to, the following:[93]

- 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;
- 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.[94] While the COMI of a debtor can move, if such

---

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

94 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,

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[95]

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 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.[96]

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.[97]

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

---

but has been discussed in the Lexis-Nexis Update "Clarity on cross-border conundrum (*Re Toisa Limited*)" written by C Moller and H Rudkin of Reed Smith LLP and A Goodison of South Square (who acted for Toisa Limited). However, in the judgment of 10 December 2021 in *the Trustees in bankruptcy of Li Shu Chung v Li Shu Chung* [2021] EWHC 3346 (Ch), the so-called "Commencement Approach" instead of the "Filing Approach" was followed in contrast to *Re Toisa Limited*. In *Li Shu Chung*, references in support of the "Commencement Approach" were made to *Re Stanford International Bank Ltd* [2011] Ch 33 and *Re Videology Ltd* [2018] BPIR 1795.

95 See generally, UNCITRAL Guide to Enactment, p 76, para 161. On abuse of process, bad faith, fraud, and improper purpose, see also Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, paras 24-28 on Art 17.

96 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).

97 The Judicial Perspective, p 17, para 44 also emphasises the continuing duty of disclosure the foreign representative has. For selected case law on Art 18, see Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, paras 2-3.

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 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)[98]

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[99] – 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:[100]

---

[98] See generally UNCITRAL Guide to Enactment, pp 87-89 at paras 189-195 and The Judicial Perspective, pp 57-64, paras 168-186. For selected case law on Art 21, see Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, paras 3-28.

[99] 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.

[100] 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." In particular, the relief of "forced disclosure" is a tool to be considered in cases that involve crypto currencies that require so-called "private keys" to unlock and access them. When using the "examination of witnesses" relief or "taking evidence", there may, however, be limitations to how the information so obtained can be used. For example, in *Al Jaber and ors v Mitchell and ors* [2021] EWCA Civ 1190, a BVI liquidation of a company was recognised as a foreign main proceeding in the UK and the liquidator as foreign representative, and the liquidator was granted relief for the examination of witnesses and the production of books, papers and other records pursuant to s 236 of the Insolvency Act 1986. However, in its 30 July 2021 judgment, the English Court of Appeal concluded that in a s 236 examination in a compulsory winding-up all participants, including the examinee, are entitled to immunity from suit. It was not necessary to determine whether an examinee is truly a witness under a s 236 examination process, because in the widest sense of the word they are providing a statement which is subject to a statement of truth which becomes evidence.

- 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;[101]

- 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.

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[102] – 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.

---

[101] *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.

[102] 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.

8.3.2 Automatic relief when a foreign main proceeding is recognised (Article 20)[103]

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).[104] For example, the interests of the parties may be a reason for allowing an arbitral 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

---

[103] See generally UNCITRAL Guide to Enactment, pp 83-86, paras 176-188 and The Judicial Perspective, pp 55-56, paras 161-167. For selected case law on Art 20, see Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, paras 2-12.

[104] 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 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. A similar modification of the automatic stay, with a reference to *Ronelp Marine*, was made by the English court in its judgment of 1 July 2021 in *NMC Healthcare Limited (in Administration)* [2021] EWHC 1806 (Ch).

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)[105]

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 main proceeding, the court may – based on paragraph 4 of Article 19 – refuse to grant such interim relief.[106]

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

---

[105] See generally UNCITRAL Guide to Enactment, pp 80-81, paras 170-175 and The Judicial Perspective, pp 50-52, paras 150-156. For selected case law on Art 19, see Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, paras 2-5.

[106] 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.

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*[107] 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.[108]

In a recent English case between *Igor Vitalievich Protasov and Khadzhi-Murat Derev*[109] the question was whether under article 21 MLCBI a worldwide freezing order that was granted as provisional relief under article 19 MLCBI could continue following recognition in the UK of a Russian bankruptcy as a foreign main proceeding. While the English court held to have jurisdiction in the strict sense to grant such post-recognition discretionary relief, it found that relevant restrictions and limitations existed which served to inhibit the proper exercise of that jurisdiction.[110] The English court found that the English bankruptcy regime offers other forms of protection which mean that relief in the form of a freezing order or similar injunction is simply not warranted.[111] According to the court, "(…) the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law, and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation. Absent some exceptional reason, a freezing order or other similar order will not in my view be required or justified. In this case, I am not persuaded that any special or exceptional reasons exist."[112]

8.3.4.1 Rubin v Eurofinance SA[113]

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

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

[108] 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. An interesting case with an extraordinary fact pattern that deals with the limits to appropriate relief outside the scope of the MLCBI but based on "common law", is *Kireeva v Bedzhamov*. In that still ongoing matter the English Court of Appeal in its judgment of 21 January 2022 [2022] EWCA Civ 35 held – in a split decision 2 to 1 – that Ms L Kireeva, as the Russian bankruptcy trustee in the Russian bankruptcy of Mr G Bedzhamov, could not be granted any relief or assistance in the UK based on the common law in respect of certain London real estate of Mr Bedzhamov. It is understood that this Court of Appeal judgment is subject to an appeal to the UK Supreme Court.

[109] Order of 24 February 2021 by Mr Justice Adam Johnson, [2021] EWHC 392 (CH) (the *Protasov v Derev* Case).

[110] Paragraphs 45 and 47 of the *Protasov v Derev* Case judgment.

[111] Paragraph 48 of the *Protasov v Derev* Case judgment.

[112] Paragraph 52 of the *Protasov v Derev* Case judgment.

[113] [2010] UKSC 46.

defendants, could be recognised and enforced in the UK.[114] Under English common law principles of private international law,[115] 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.

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.[116]

8.3.4.2 Fibria Celulose S/A v Pan Ocean Co Ltd[117]

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:

---

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

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

[116] 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 on the UNCITRAL website at www.uncitral.org – 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 para 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 J Clift and N Cooper in *INSOL World* – Fourth Quarter 2018, pp 24-25.

[117] [2014] EWHC 2124 (Ch).

- 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:

- 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*[118] 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)[119] 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"[120] derives from the 1890 case, *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux*.[121] In short, the Gibbs Rule

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

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

[120] 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).

[121] (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

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.[122] 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.[123] In particular, in the context of granting relief under the Model Law the Gibbs 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.[124]

8.3.4.4 The IBA case[125]

Mr Justice Hildyard had to extensively address the Gibbs Rule in the IBA case[126] 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.[127]

---

and recover damages in an English court. (….)"

[122] 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.

[123] The *IBA* case, *supra* note 122, at 46.

[124] 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.

[125] *Supra*, note 122.

[126] 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 120, 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.

[127] 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 122, at 39.)

While the High Court of Singapore has held that in its application of common law the Gibbs Rule does not apply,[128] 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."[129] The real question in the IBA Case was therefore whether the principles of "modified universalism" as expressed in the 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.[130]

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.[131] 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.[132]

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?[133] Mr Justice Hildyard considered in this context the decision of Mr Justice Norris in *Re BTA Bank JSC*[134] (the *BTA* case),[135] 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.[136] Mr Justice Hildyard found the *BTA* case decision

---

[128] *Pacific Andes Resources Development Ltd* [2016] SGHC 210 at 48 (*IBA* case, *supra* note 122, at 53).
[129] *IBA* case, *supra*, note 122, at 57, and see further also at 51-56.
[130] *Idem*, at 58-59.
[131] *Idem*, at 155.
[132] *Idem*, at 71-75.
[133] *Idem*, at 90.
[134] [2012] EWHC 4457 (Ch).
[135] 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 122, at 116-124).
[136] *IBA* case, *supra*, note 122, at 106-110.

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 necessary for him to determine and on which he considered it therefore unnecessary for him to express a view.[137]

The *Pan Ocean* case (as addressed above in Section 8.3.4.2) was also considered by Mr Justice Hildyard.[138] 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.[139] 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.[140] Finally, Mr Justice Hildyard also considered that the introduction of the Model Law on Insolvency Related Judgments[141] may solve the problem created by the Gibbs Rule in a restructuring context.[142]

---

[137] *Idem*, at 113-115.
[138] *Idem*, at 129-146.
[139] *Idem*, at 158(4).
[140] *Idem*, at 158(5).
[141] *Supra*, note 116.
[142] *IBA* case, *supra*, note 122, at 160.

8.3.4.5 IBA case appeal[143]

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?[144] 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).[145]

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.[146]

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."[147]

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 "Restructuring Plan (RP)" (also referred to by some as a "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 RP tool or "super scheme" at the time may have been an attractive option. If

[143] See note 122, *supra*, for the case citation.
[144] *IBA* case appeal, *supra* note 120, at 83.
[145] *Idem*, at 84-85.
[146] *Idem*, at 86.
[147] *Idem*, at 87.

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.[148]

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 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.[149]

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.[150]

8.3.5 Balancing interests (Article 22)[151]

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)).

[148] *Idem*, at 88-89.
[149] *Idem*, at 97-98.
[150] *Idem*, at 100-101.
[151] See generally UNCITRAL Guide to Enactment, pp 90-91, paras 196-199. For selected case law on Art 22, see Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, paras 2-8.

8.3.6 Power to avoid antecedent transactions (Article 23)[152]

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.

8.3.7 Standing (locus standi) to intervene in local proceedings (Article 24)[153]

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.

---

[152] *Idem*, pp 91-92, paras 200-203. For selected case law on Art 23, see Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, paras 2-3.

[153] *Idem*, pp 93-94, paras 204-208. For selected case law on Art 24, see Digest of Case Law, Ch III, Recognition of a foreign proceeding and relief, para 2.

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

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.[154] 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.

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

9.2 Domestic courts - mandatory co-operation and direct communication with foreign courts or foreign representatives (Article 25)[155]

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)[156]

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)).

9.4 Means of co-operation (Article 27)[157]

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;

[155] For selected case law on Art 25, see Digest of Case Law, Ch IV, Cooperation with foreign courts and foreign representatives, paras 2-6.

[156] Digest of Case Law, Ch IV, Cooperation with foreign courts and foreign representatives, states in para 1 on p 81 that "no case law dealing expressly with the interpretation of article 26 has been reported."

[157] For selected case law on Art 27, see Digest of Case Law, Ch IV, Cooperation with foreign courts and foreign representatives, paras 2-3.

- 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:[158]

- 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.

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

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

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.[159] 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).[160] 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

- 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:[161]

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

[159] See generally, UNCITRAL Guide to Enactment, pp 100-107, paras 224-241 and The Judicial Perspective, pp 67-66, paras 192-222.
[160] For selected case law on Art 28, see Digest of Case Law, Ch V, Concurrent proceedings, paras 2-6.
[161] For selected case law on Art 29, see Digest of Case Law, Ch V, Concurrent proceedings, para 2-3.

- 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[162]

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.

[162] Digest of Case Law, Ch V, Concurrent proceedings, states in para 2 on Art 30 that "very little case law has been reported on article 30."

10.5 Presumption of insolvency (Article 31)[163]

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)[164]

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.

[163] *Idem*, Ch V, Concurrent proceedings, states on p 88 in para 2 on Art 31 that "Article 31 has not been authoritatively considered."

[164] *Idem*, Ch V, Concurrent proceedings, states on p 89 in para 2 on Art 32 that "Operation of the 'hotchpot' rule has been discussed generally in the context of determining adequate protection under article 22; the principle of 'hotchpot' is based on fairness and equality."

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:[165]

(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;

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

(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);

(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;[166]

(b) Scope, purpose and goals;[167]

(c) Resolution of disputes;[168]

(d) Stays of proceedings;[169]

(e) Investigation of assets;[170]

(f) Distribution;[171] and

(g) Effectiveness and conditions precedent to effectiveness.[172]

Other sample clauses included in the Practice Guide are clauses relating to: language,[173] terminology and rules of interpretation,[174] comity and independence of courts and allocation of responsibilities between courts,[175] treatment of claims,[176] insolvency representatives,[177]

[166] *Idem*, pp 45-46.
[167] *Idem*, pp 47-48.
[168] *Idem*, p 63.
[169] *Idem*, pp 70-71.
[170] *Idem*, pp 87-88.
[171] *Idem*, p 89.
[172] *Idem*, p 108.
[173] *Idem*, p 48.
[174] *Idem*, pp 49-50.
[175] *Idem*, p 61.
[176] *Idem*, p 62.
[177] *Idem*, pp 62-63.

deferral,[178] right to appear and be heard,[179] future proceedings,[180] priority of proceedings,[181] applicable law,[182] general means of co-operation,[183] supervision of the debtor and reorganisation plans,[184] treatment of assets: supervision by the courts,[185] allocation of responsibilities for commencing proceedings,[186] submission of claims, claims verification and admission and post-commencement finance,[187] communication between courts,[188] communication between the parties: information-sharing between insolvency representatives,[189] communication between the parties: sharing information with other parties and notice,[190] confidentiality of communication[191], amendment, revision and termination,[192] costs and fees,[193] preservation of rights,[194] preservation of jurisdiction,[195] and limitation of liability and warranties.[196]

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

[178] *Idem*, pp 63-64.
[179] *Idem*, p 64.
[180] *Idem*, pp 64-65.
[181] *Idem*, p 70.
[182] *Idem*, p 71.
[183] *Idem*, p 85.
[184] *Idem*, p 86.
[185] *Idem*, p 87.
[186] *Idem*, p 88.
[187] *Idem*, p 89.
[188] *Idem*, pp 102-103.
[189] *Idem*, pp 103-104.
[190] *Idem*, p 104.
[191] *Idem*, p 105.
[192] *Idem*, p 108.
[193] *Idem*, p 110.
[194] *Idem*, p 112.
[195] *Idem*, p 113.
[196] *Ibid*.

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 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[197]

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,

[197] In June 2022, INSOL International published a special report titled "The Restructuring of Corporate Groups – A global analysis of substantive, procedural and synthetic group procedures", covering the following jurisdictions: Australia, Belgium, Brazil, Canada, Cayman Islands, France, Germany, Hong Kong, Ireland, Malaysia, Singapore, South Africa, Spain, The Netherlands, the United Arab Emirates, the United Kingdom, and the United States of America. The publication further contains a note on "Brexit: implications for group restructurings and insolvency proceedings."

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[198] should be promoted as well as addressing recommendation 5 of the Legislative Guide.[199]

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.

---

[198] 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.

[199] 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.

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)[200]

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;

(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)[201]

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)[202]

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)[203]

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

---

[200] Part Three, pp 25-26.
[201] *Idem*, pp 32-34.
[202] *Idem*, pp 46-47.
[203] *Idem*, pp 51-52.

13.4.5 Substantive consolidation (Recommendations 219-231)[204]

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)[205]

These recommendations deal with the appointment of a single or the same insolvency representative, the purpose of appointment of insolvency representatives in an enterprise 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)[206]

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)[207]

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)[208]

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.

---

[204] *Idem*, pp 71-74.
[205] *Idem*, pp 78-79.
[206] *Idem*, p 82.
[207] *Idem*, p 89.
[208] *Idem*, pp 100-103.

13.4.10 Co-operation between insolvency representatives and between insolvency representatives and foreign courts (Recommendations 246-250)[209]

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)[210]

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

13.4.12 Cross-border insolvency agreements (Recommendations 253-254)[211]

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

[209] *Idem*, pp 104-105.
[210] *Idem*, p 107.
[211] *Idem*, pp 110-111.

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

Please note that due to the fact that no countries have yet adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, 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.[212] 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[213] 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.[214] 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.[215] 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.

---

[212] 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.

[213] For further details of the *Rubin v Eurofinance* case, see Part A, Section 8.3.4.1 above.

[214] IRJ Guide to Enactment, Pt two, at para 2.

[215] *Idem*, at paras 3 and 8.

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 highlighted.[216] 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.[217] 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".[218] 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.[219] 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.[220]

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[221]

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[222]

An insolvency related judgment does not include a judgment commencing an insolvency proceeding[223] 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[224] and (ii) must be issued on or after the commencement of that insolvency proceeding.[225]

---

[216] *Idem*, at para 20.
[217] *Idem*, at paras 22-23.
[218] *Idem*, at para 24.
[219] *Idem*, at paras 25-27.
[220] *Idem*, at paras 28-29.
[221] *Idem*, at para 31.
[222] *Idem*, at para 32.
[223] IRJ Model Law, art 2(d)(ii).
[224] *Idem*, art 2(d)(i)(a).
[225] *Idem*, art 2(d)(i)(b).

14.2.3 Relationship with MLCBI[226]

In those States where the MLCBI has already been enacted, the IRJ Model Law is intended to complement that legislation[227] and clarify it, but it does not intend to replace legislation enacting the MLCBI or limit the application of that legislation.[228] 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[229]

(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.[230]

---

[226] IRJ Guide to Enactment, at paras 35-41.
[227] IRJ Model Law, Preamble 1(f).
[228] *Idem*, Preamble 2(b).
[229] Such exception with respect of recognition of insolvency proceedings is not available under the MLCBI.
[230] 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.[231]

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."[232]

Article 2 provides for the following four new defined terms:

14.3.1 "Insolvency Proceeding" (sub-paragraph (a))[233]

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-

[231] IRJ Guide to Enactment, Pt two, at paras 43-45.
[232] *Idem*, at paras 46-47.
[233] *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.[234]

14.3.2 "Insolvency representative" (sub-paragraph (b))[235]

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))[236]

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))[237]

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:

---

[234] *Idem*, at paras 48-49.
[235] *Idem*, at paras 50-51.
[236] *Idem*, at paras 52-56.
[237] *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.[238] 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)[239]. 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)[240]

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

[238] *Idem*, at para 63.
[239] *Idem*, at paras 73-74.
[240] *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)[241]

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[242] 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**);[243]

---

[241] *Idem*, at paras 80-82.
[242] See also IRJ Model Law, art 4.
[243] IRJ Guide to Enactment, 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.[244]

- 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[245] procedures may be cumbersome and time-consuming (**paragraph 4**).[246]

- 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**).[247]

14.8 Provisional relief (article 12)[248]

"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)[249]

Recognition should be granted if:

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

---

[244] *Idem*, at paras 85-86.
[245] "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.
[246] IRJ Guide to Enactment, Pt two, at paras 88-91.
[247] *Idem*, at para 92.
[248] *Idem*, at paras 93-95.
[249] *Idem*, at paras 96-97.

(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);

(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.[250]

14.10.1 No proper notification of proceedings giving rise to the insolvency-related judgment (article 14(a))[251]

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

[250] *Idem*, at para 98.
[251] *Idem*, at paras 99-102.

capable of being cured retrospectively by the court in the receiving State would **not** be sufficient to justify refusal.

14.10.2 Fraud (article 14(b))[252]

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))[253]

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))[254]

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))[255]

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.

---

[252] *Idem*, at para 103.
[253] *Idem*, at paras 104-106.
[254] *Idem*, at paras 107.
[255] *Idem*, at paras 108-109.

The basis of jurisdiction of the originating court can also be a ground for refusal (article 14(g))[256]

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))[257]

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.

[256] *Idem*, at paras 110-115.
[257] *Idem*, at paras 116-120.

14.10.7 Equivalent effect (article 15)[258]

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 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)[259]

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[260]

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.

---

[258] *Idem*, at paras 121-123.
[259] *Idem*, at paras 124-125.
[260] *Idem*, at paras 126-127.

PART C: THE UNCITRAL MODEL LAW ON ENTERPRISE GROUP INSOLVENCY

Please note that due to the fact that no countries have yet adopted the Model Law on Enterprise Group Insolvency, 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.[261]

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.[262]

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".[263] 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.[264]

---

[261] 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.

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

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

[264] *Idem*, at p 3, under 3. On the topic of finding COMI in Group Insolvencies, the approach taken in the EGI Model Law is addressed, alongside the EIR framework as well as the US approach under Chapter 15 of the US Bankruptcy Code, by R van den Sigtenhorst, *Finding COMI in Group Insolvencies: Taking a Page from the Chapter 15 Playbook*, (INSOL International Technical Paper Series 49, April 2021).

15.2 Main features of the EGI Model Law[265]

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), 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;

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

- 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)[266]

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)[267]

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

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

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, 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[268]

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

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

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.

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).[269]

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. [270]

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**)

[269] *Idem*, at p 18, under 71.
[270] *Idem*, at p 18, under 68 to 69.

- The scope of co-operation to the maximum extent possible under article 14 is set forth in **article 15**;

- 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[271]

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[272]

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[273]

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.

---

[271] *Idem*, at p 19, under 72 to 73.
[272] *Idem*, at pp 20-21, under 75 to 82.
[273] *Idem*, at p 22, under 83 to 84.

15.10 Article 12[274]

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.[275] 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[276]

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[277]

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[278]

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

[274] *Idem*, at p 23, under 85 to 88.
[275] *Idem*, at p 19, under 73.
[276] *Idem*, at p 24, under 89 to 91.
[277] *Idem*, at p 25-26, under 92 to 94.
[278] *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[279]

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[280]

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.

[279] *Idem*, at pp 27-28, under 97 to 103.
[280] *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[281]

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

[281] *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[282]

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.[283]

15.17.1 Article 21[284]

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:

---

[282] *Idem*, at pp 33-36, under 123 to 136.
[283] *Idem*, at p 36, under 137.
[284] *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[285]

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[286]

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[287]

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

[285] *Idem*, at pp 40-42, under 152 to 164.
[286] *Idem*, at pp 43-44, under 165 to 172.
[287] *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[288]

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[289]

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)[290]

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

[288] *Idem*, at p 47, under 181 to 184.
[289] *Idem*, at p 48, under 185 to 187.
[290] *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)[291]

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;

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

- more efficient cross-border reorganisation; and

- 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[292]

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[293]

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:

---

[292] *Idem*, at pp 52-53, under 199 to 206.
[293] *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)[294]

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[295]

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

[294] *Idem*, at p 54, under 210 and 211.
[295] *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[296]

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[297]

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).

[296] *Idem*, at p 55, under 215.
[297] *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.

INSOL INTERNATIONAL

INSOL International
6-7 Queen Street
London
EC4N 1SP
Tel: +44(0) 20 7248 3333 | Fax: +44(0) 20 7248
www.insol.org