

ABI Presents:

Cross-border Restructurings: Evaluating Structures and Managing the Process Across Jurisdictions

Overview of Topics

Recognition:

- UNCITRAL Model Law on Cross Border Insolvency (1997),
- UK - Cross Border Insolvency Regulations 2006 (CBIR) (universal), section 426 Insolvency Act 1986 (relevant countries/territories only),
- European Union – adoption of UNCITRAL model law by 4 member states - Greece, Poland, Romania and Slovenia.
- US – Chapter 15
 - Recent/Relevant US Cases: Black Gold (9th Cir. BAP 2022); Zawawi (MD FL 2022) [currently on appeal to 11th Cir.] ; Barnet (2nd Cir. 2013) – relates to whether section 109(a) applies in Ch. 15 cases; Modern Land (China) 2022

UK issues:

- Supreme Court decision in *Rubin v Eurofinance SA [2012]* – CBIR procedural only – does not extend to recognition of foreign judgments.
- Also see *Re OJSC International Bank of Azerbaijan [2018]* – cannot be used to circumvent the rule in *Gibbs – Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux [1890]*,
- Possible adoption by the UK of article x of the UNCITRAL Model Law on the Recognition and Enforcement of Insolvency Related Judgments (2018),
- Also UNCITRAL Model Law on Enterprise Group Insolvency (2019).

US issues:

- Is personal jurisdiction required for a US court to issue an order or grant relief with respect to a non-US party in a US case?
- Confusion among US courts in applying Ch 11 principles in Ch 15 cases

Release of claims against third parties:

- UK - ability under English law compositions: Common application to both affiliated and non-affiliated parties, e.g. group guarantors and insurers and other claims against debtor's management, employees, agents and advisors. 'Necessary to give legal or commercial effect to the compromise or arrangement between the scheme company and its creditors.
- US – from a cross-border perspective, question is whether in Ch 15 cases, US courts will recognize third party releases that are valid under the law of the foreign proceeding but may not be valid under applicable law in the jurisdiction of the Ch 15 case
 - How have US courts addressed the issue of non-consensual third party releases in Chapter 15 cases?
 - In *Avanti Communications*, SDNY order recognized third party releases as provided in the English scheme of arrangement; not focused on whether such releases would have been authorized under applicable US law in Ch 11 cases; rather whether permitted under Ch 15

- Different result reached in *in re Vitro* by 5th Cir; recognizing third party releases against public policy in the US, therefore US court cannot recognize through Ch 15

UK Post Brexit and other recent EU developments, Treaty and EU framework:

- Hague Convention on Choice of Court Agreements (2005), Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (2007), Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019),
- EU Directive on Preventative Restructuring frameworks (2019) – interface with other EU legislation (Recast EU Insolvency Regulation (2015) as amended and Recast ‘Brussels’ Regulation (2012)) recognition intra Europe.

Status of English schemes of arrangements and restructuring plans:

- Basis for jurisdiction and exercise of jurisdiction,
- Whether schemes or restructuring plans are insolvency proceedings (*Re Gategroup Guarantee Limited [2021]*) and impact on various treaties/conventions – also Cape Town Convention – Aircraft Protocol.

Faculty: Cross-Border Restructurings: Managing the Process Across Jurisdictions

Adrian Cohen is a partner in Proskauer's Business Solutions, Governance, Restructuring & Bankruptcy Group in London. He has more than 30 years of experience in corporate restructuring and insolvency law, and has advised sponsors, debtors, lenders, commercial counterparties and insolvency officeholders. Mr. Cohen's practice spans multiple sectors, including real estate and real estate finance, hotels and leisure, media and entertainment, aircraft finance, infrastructure and project finance, energy, mining and steel production, financial services and banking. He also has experience advising governments and regulatory authorities in the GCC region on insolvency law reform. Mr. Cohen has been a regular lecturer on insolvency and restructuring law and practice at external conferences and seminars, including for the LMA, INSOL International, INSOL Europe, III, the Dubai Economic Council and the Hawkamah Institute for Corporate Governance. He received his LL.B. with honors from the London School of Economics and his LL.M. from Queen Mary University of London.

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Stephen D. Lerner is global chair of the Squire Patton Boggs Restructuring & Insolvency Practice Group in Cincinnati and New York. He has a national and cross-border restructuring practice in which he represents debtors, distressed businesses, committees of unsecured creditors, secured and unsecured creditors, equity interest-holders, boards of directors, indenture trustees and acquirers of troubled businesses in chapter 11 reorganization cases, chapter 15 cross-border cases, chapter 9 municipal restructurings and out-of-court restructurings throughout the U.S., Europe, the United Arab Emirates, South America and India. Most recently, Mr. Lerner served as the court-appointed examiner in the precedent-setting Purdue Pharma chapter 11 case in the Southern District of New York. In July 2022, the Ferrellgas restructuring team, which he led, was honored with the Turnaround of the Year (Large) Award by Global M&A Network. He also served as lead restructuring advisor to Dana Gas PJSC, the largest independent gas company in the Middle East, in its US\$700 million Islamic financing restructuring, which was awarded the Middle East Restructuring of the Year in 2019 by the International Financial Law Review. The firm's U.S. restructuring team, which he led, was named 2020 USA Restructuring Firm of the Year – Middle Markets by Global M&A Network. Mr. Lerner has been a guest lecturer at Harvard Business School, the University of Michigan Law School and the University of Cincinnati Law School. He is admitted to practice before the U.S. Court of Appeals for the Sixth Circuit, the U.S. District Courts for the Eastern and Southern Districts of New York and Southern District of Ohio, and the U.S. Supreme Court. Mr. Lerner received his B.A. in 1982, his M.A. in 1982 and his J.D. in 1985 from the University of Pennsylvania.

Jordina Walker is a director and head of Trustee Services for CSC Global Financial Markets in London and is responsible for the firm's London successor trustee and restructuring business. Prior to joining CSC, she served as head of the London trustee desk at Intertrust, where she focused on special situations and complex new trustee transactions. Prior to that, Ms. Walker worked with the London structured finance team of Paul Hastings and started her career as a lawyer at Norton Rose Fulbright, spending seven years advising trustees, originators, corporate issuers and service providers across new money deals and restructurings. She is a member of The Law Society of England and Wales. Ms. Walker received her LL.B. from the London School of Economics and her LL.M. from Birkbeck University.

In re Avanti Commc'ns Grp. PLC

582 B.R. 603 (Bankr. S.D.N.Y. 2018)
Decided Apr 9, 2018

Case No. 18–10458 (MG)

04-09-2018

IN RE: AVANTI COMMUNICATIONS GROUP
PLC, Debtor in a Foreign Proceeding.

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MARTIN GLENN, United States Bankruptcy
Judge

605 *605

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MEMORANDUM OPINION GRANTING RECOGNITION OF FOREIGN MAIN PROCEEDING AND ENFORCEMENT OF SCHEME OF ARRANGEMENT

MARTIN GLENN, United States Bankruptcy
Judge

606 Recognition and enforcement of schemes of
arrangement sanctioned by UK courts *606 has
become commonplace in chapter 15 cases in the
United States (the "US"). Schemes of arrangement
are used to restructure balance sheets of foreign
companies that often include US dollar-

denominated debt. The debt may be issued by one
company in a large corporate group, with
guarantees of the debt issued by the affiliates.
When the debt is restructured, the scheme of
arrangement often provides that the affiliate-
guarantees are released, even though the affiliates
are not parties to the scheme proceeding. Without
releasing those guarantees, it would be difficult to
restructure the debt because the collective assets
and earnings of the group are needed to support
the restructured debt without the risk of some
creditors that hold the guarantees separately
reaching the assets of the affiliates, endangering
the ability of the group to meet its restructured
debt obligations. This is exactly the situation
presented in this Chapter 15 Case of Avanti
Communications Group plc (the "Debtor," or
"Avanti").

Third-party releases are often problematic in
chapter 11 cases—seemingly prohibited entirely in
some Circuits but permitted under limited
circumstances in other Circuits. Courts must
confront the issue whether bankruptcy courts have
the power to grant such releases, and under what
circumstances. Circuit courts in the Fifth, Ninth,
Tenth and the District of Columbia Circuits have
held that the Bankruptcy Code only permits a
bankruptcy court to grant releases against a debtor,
and prohibits third-party releases absent consent.
See, e.g., Maxtile, Inc. v. Jiming Sun (In re
Maxtile, Inc.), 237 Fed. Appx. 274, 276 (9th Cir.
2007) ; *Bank of N.Y. Trust Co. v. Official*
Unsecured Creditors' Comm. (In re Pac. Lumber
Co.), 584 F.3d 229, 251–52 (5th Cir. 2009) ;
Landsing Diversified Props.–II v. First Nat'l Bank

and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.), 922 F.2d 592, 600–02 (10th Cir. 1990) (*per curiam*); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1152 (D.C. Cir. 1986). Circuit courts in the Second, Fourth, Sixth, Seventh and Eleventh Circuits have held that third-party releases may be given consensually and, in limited circumstances, may be approved without consent. *See, e.g.*, *SEProperty Holdings, LLC v. Seaside Engineering & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070, 1077–78 (11th Cir. 2015); *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347–50 (4th Cir. 2014); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141–43 (2d Cir. 2005); *Airadigm Commc'ns., Inc. v. FCC (In re Airadigm Commc'ns., Inc.)*, 519 F.3d 640, 655–57 (7th Cir. 2008); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 657–58 (6th Cir. 2002). Issues with consent arise when less than 100% of the impaired creditors vote to confirm the plan. In the present case, the Scheme was overwhelmingly approved by 98% of the only creditor class whose rights were modified by the Scheme, including the Releases of non-debtor affiliate-guarantees. This leaves open the issue whether the Court should recognize and enforce the Scheme in this case that would bind the small number of non-voting impaired creditors to the Releases.

The issues presented by third-party releases in chapter 15 cases have received a different analysis than in chapter 11 cases, focusing primarily on the foreign court's authority to grant such relief. The issue in chapter 15 cases then is whether to recognize and enforce the foreign court order based on comity. Well-settled case law in the UK expressly authorizes third-party releases in scheme proceedings, particularly the release of affiliate-guarantees. The UK Court sanctioned the Avanti Scheme, and the Court concludes that the Avanti

607 *607 Scheme should be recognized and enforced in the US.

Although no objections to the motions seeking to recognize and enforce the Avanti Scheme were filed in this Court—and the Court has already entered an order enforcing the Avanti Scheme—the Court believes that an explanation of the reasons for its ruling is appropriate.

This Chapter 15 Case was filed by Patrick Willcocks, the foreign representative (the "Foreign Representative") of Avanti, a limited liability company incorporated under the laws of England and Wales, in connection with a proceeding (the "UK Proceeding") commenced under Part 26 of the Companies Act 2006 (the "Companies Act") pending before the High Court of Justice of England and Wales (the "UK Court") concerning a scheme of arrangement (the "Scheme").

The Foreign Representative filed a *Verified Petition for Recognition of Foreign Main Proceeding and Certain Related Relief* [ECF Doc. # 2] (the "Verified Petition" and, together with the Voluntary Chapter 15 Petition [ECF Doc. # 1], the "Petition"), seeking (i) recognition of the UK Proceeding as a "foreign main proceeding" under chapter 15 of the Bankruptcy Code, (ii) granting relief afforded to foreign main proceedings under section 1520 of the Bankruptcy Code, (iii) recognizing, granting comity to, and giving full force and effect in the United States, to the UK Proceeding, the Scheme, the Convening Order and the Sanction Order (as defined below), and (iv) enjoining parties from taking any action inconsistent with the Scheme in the US, including giving effect to the releases set out in the Scheme (the "Releases"), including certain releases given in favor of certain of the Debtor's direct and indirect subsidiaries (the "Subsidiary Guarantors") that guaranteed the 2023 Notes (the "Guarantor Releases").

The Petition is supported by the: (i) *Declaration of Patrick Willcocks in Support of Verified Petition for Recognition of Foreign Main Proceeding and Certain Related Relief* (the "Willcocks Declaration," ECF Doc. # 3); and (ii) *Declaration*

of Nicholas Angel as English Counsel to Debtor in Support of Verified Petition for Recognition of Foreign Main Proceeding and Certain Related Relief (ECF Doc. # 4). The Foreign Representative also filed the *Second Declaration of Patrick Willcocks in Support of the Verified Petition* (the "Second Declaration," ECF Doc. # 13), indicating that the UK Court sanctioned the Scheme on March 26, 2018. A copy of the UK Court's order sanctioning the Scheme (the "Sanction Order") was attached to the Second Declaration as Exhibit C.

The Avanti Scheme only adjusts the debt of the 2023 Noteholders (as explained below), who overwhelmingly approved the Scheme by a vote of over 98% of that class of creditors. For the reasons set forth below, the Court grants the relief sought in the Petition.

I. BACKGROUND

The following facts are taken from the Petition and the Willcocks Declaration.

A. The Debtor

The Debtor is a public limited company incorporated under the laws of England and Wales, with subsidiaries incorporated in England, Isle of Man, Germany, Sweden, Turkey, Cyprus, Kenya, Nigeria, Tanzania and South Africa. The Debtor's headquarters and primary place of business is in London, England. Avanti is a satellite operator providing fixed satellite services in Europe, the Middle East and Africa through its fleet of Ka-band satellites. The Debtor's satellites
608 are positioned in orbital *608 slots that are recorded in the International Telecoms Union Master International Frequency Register. Avanti sells satellite data communications services on a wholesale basis to a range of service providers who supply four key end markets: broadband, government, enterprise and backhaul.

Avanti's current fleet consists of two Ka-band satellites, HYLAS 1 and HYLAS 2, which have been commercially operational since April 2011

and November 2012. A further satellite, Artemis, a multiband satellite acquired from the European Space Agency (ESA) on December 31, 2013, was successfully re-orbited in November 2017. Avanti also has leased a steerable Ka-band beam, HYLAS 2-B, under an indefeasible right of use agreement entered into in June 2015 with another satellite operator, and also has a payload, HYLAS 3, under construction which will be deployed on the ESA's EDRS-C satellite. HYLAS 3 is currently under construction and continues to experience delays, but is expected to launch in the first three months of 2019 (although this date is subject to further change).

Avanti's HYLAS 4 satellite, which will complete its coverage of Europe, the Middle East and Africa, has now been constructed after experiencing some delays in the factory and, in February 2017, was successfully delivered to its launch site in Kourou, French Guyana. HYLAS 4 is expected to launch soon, aiming to be in orbital position ready for service in July 2018 with sufficient fuel to support the satellite for up to 19 years in orbit. HYLAS 4 is expected to generate revenue from July 2018, largely within Avanti's existing fixed cost base, and to have a strong positive effect on Avanti's business as it completes EMEA coverage and greatly increases the amount of capacity available in mature markets in Western Europe and new markets in Africa.

B. Capital Structure

As of December 31, 2017, Avanti's capital structure was composed of the following material financing agreements. As of December 31, 2017, Avanti had approximately \$68.0 million of cash and cash equivalents.

1. Avanti is a borrower under a super-senior term loan facility agreement (the "Super Senior Facility Agreement"), maturing in 2020 (the "Super Senior Facility") with approximately \$118 million currently outstanding.

2. Avanti issued its 10%/15% Senior Secured Notes due 2021 (the "2021 Notes") under an Indenture, dated as of January 26, 2017 (as amended, the "2021 Indenture"). Approximately \$323.3 million in aggregate principal amount of the 2021 Notes are outstanding.

3. Avanti issued its 12%/17.5% Senior Secured Notes due 2023 (the "2023 Notes" and together with the 2021 Notes, the "Notes") under an Indenture, dated as of October 3, 2013 (as amended, the "2023 Indenture" and together with the 2021 Indenture, the "Indentures"). Approximately \$557 million in aggregate principal amount of the 2023 Notes are outstanding.

4. The Notes and the Super Senior Facility Agreement are subject to an intercreditor agreement, dated January 26, 2017 (the "Intercreditor Agreement"). Under the Intercreditor Agreement, lenders to the Super Senior Facility Agreement rank *pari passu* amongst themselves and above both the holders of the 2021 Notes (the "2021 Notes Creditors") and the holders of the 2023 Notes (the "Scheme Creditors").

C. The Restructuring

Due to delays associated with the manufacture,
609 procurement and launch of two of *609 its
satellites, Avanti experienced financial difficulties,
with a materially over-leveraged capital structure.
As a result, Avanti entered into preliminary
discussions with Solus Alternative Asset
Management LP, Tennenbaum Capital Partners,

LLC and Great Elm Capital Management, Inc. (collectively, the "Ad Hoc Group," *see* Petition at 356) for a proposed comprehensive restructuring of its indebtedness that, it hoped, would create a sustainable long-term capital structure. On December 13, 2017, the Debtor and certain members of the Ad Hoc Group and other holders of the Notes (together, the "Consenting Creditors") became parties to a restructuring agreement (the "Restructuring Agreement"), primarily agreeing to equitize the 2023 Notes and to amend the 2021 Notes.

D. The Scheme

Under the terms of the Scheme, all of the Debtor's outstanding 2023 Notes will be exchanged (the "Exchange") for 92.5% of Avanti's then enlarged issued share capital (the "Exchange Shares"). The Exchange Shares will be allocated and issued to the Scheme Creditors on a *pro rata* basis, based on the principal amount of 2023 Notes held by each Scheme Creditor. The 2023 Notes debt-for-equity exchange under the Scheme will deleverage Avanti by approximately \$557 million in aggregate principal amount of the 2023 Notes and save approximately \$81 million in interest expense per year.

Under the Scheme, the Scheme Creditors will grant the Releases, including the Guarantor Releases. The Releases include releases of any claim or liability, whether present or future, known or unknown, prospective or contingent, against the Debtor arising directly or indirectly out of, from or in connection with, the 2023 Notes and the 2023 Indenture, including in respect of any accrued but unpaid interest, other than any claim or liability arising after the "Restructuring Effective Date" (as defined in the Scheme). The Guarantor Releases will preclude Scheme Creditors from seeking to recover under guarantees of the 2023 Notes provided by each of the Debtor's subsidiaries.

Avanti previously sought to implement certain aspects of the Restructuring under the Consent Solicitations.² The Consent Solicitations sought consents from the holders of the 2021 Notes and the 2023 Notes for the following amendments: (1) Amend the 2021 Indenture to: (a) extend the final maturity date of the 2021 Notes from October 1, 2021 to October 1, 2022; (b) change the interest rate payable on the 2021 Notes from 10% Cash Interest or 15% PIK interest to 9% cash interest or 9% PIK interest for all remaining interest periods beginning October 1, 2017; (c) eliminate the Maintenance of Minimum Consolidated LTM EBITDA covenant contained in Section 4.30 of the 2021 Indenture, which would require testing on the last day of each fiscal quarter beginning March 31, 2018 and ending March 31, 2020; (d) permit the issuance of up to \$30 million of additional Indebtedness which will rank junior to or *pari passu* with the 2021 Notes; (e) eliminate the Margin Increase payable on the 2021 Notes if the relevant Minimum Consolidated LTM EBITDA threshold was not met; and (f) permit interest payments on the 2021 Notes for all remaining interest periods beginning October 1, 2017 (but excluding the final interest payment) to be paid as PIK interest if the Debtor does not have sufficient cash to satisfy the applicable interest coupon (collectively (a)—(f), the "2021 Notes

610 Restructuring Amendments"); *610 (2) Amend the submission to jurisdiction provision of the 2023 Indenture so that each party will submit to the exclusive jurisdiction of UK Courts (the "Jurisdiction Amendment") until the Restructuring Agreement is either terminated or no longer in effect; and (3) Amend and waive certain bankruptcy-related events of default within the Indentures (the "Majority Amendments and Waiver," together with the 2021 Notes Restructuring Amendments and the Jurisdiction Amendment, the "Consent Solicitation Amendments"), to prevent the occurrence of an event of default under the Notes and related automatic acceleration of the Notes from being triggered by the filing of a petition for recognition

of the Scheme pursuant to chapter 15 of the Bankruptcy Code or by any other part of the Restructuring.

² Capitalized terms in this paragraph not otherwise defined shall have the meaning assigned to them in the Consent Solicitations or other relevant noted document.

The required consents for each of the Consent Solicitation amendments were received by February 7, 2018 from holders of 98.09% of the aggregate principal amount of the 2021 Notes, and Scheme Creditors holding 87.73% of the aggregate principal amount of the 2023 Notes. The 2021 Notes Restructuring Amendments will become effective conditional on the Restructuring Effective Date; the other Consent Solicitation Amendments have already become effective.

E. The UK Proceeding

To effectuate the Scheme, on February 15, 2018, the Debtor applied to the UK Court for permission to convene a meeting of its creditors for the purpose of considering and approving the Scheme. The UK Court considered that application at the convening hearing on February 19, 2018, and issued the Convening Order which, among other things: (i) ordered the convening of a meeting of the Scheme Creditors (*i.e.*, holders of the 2023 Notes) (the "Scheme Meeting") on March 20, 2018; (ii) ordered that notice of the Scheme, together with an explanatory statement and proxy forms for voting at the Scheme Meeting, be made available to the Scheme Creditors; and (iii) authorized the appointment of the Foreign Representative to act as a foreign representative in this Chapter 15 Case. *See Willcocks Declaration* ¶ 3. As only the Scheme Creditors, comprised of the holders of the 2023 Notes, are affected by the Scheme, the Scheme contains only one voting class.

The Debtor convened a meeting of the Scheme Creditors on March 20, 2018. At the Scheme Meeting, Scheme Creditors holding in aggregate \$547,320,350, representing 98.3% by value of the outstanding 2023 Notes, attended the Scheme Meeting either in person or by proxy and voted in favor of the Scheme. (See Second Decl. ¶ 6.) No Scheme Creditors voted against the Scheme. On March 26, 2018, the Debtor asked the UK Court to sanction the Scheme. The UK Court found that all of the requirements for sanctioning the Scheme had been satisfied, including: (a) the Debtor and Scheme complied with the applicable statutory requirements; (b) the classification of Scheme Creditors fairly represented the creditors and the majority acted in a *bona fide* manner; (c) the Scheme was one that an intelligent and honest man, acting in respect of his interest as a creditor, might reasonably approve; and (d) the UK Court had jurisdiction to sanction the Scheme. Accordingly, the UK Court sanctioned the Scheme.

F. Connection to the United States

Though the Debtor has no place of business in the US, Avanti has two main connections with this country. First, Milbank, Tweed, Hadley & McCloy LLP ("Milbank"), as counsel to the Foreign Representative and the Debtor, holds a \$100,000
 611 retainer in a non-interest bearing account *611 at JPMorgan Chase in New York (the "Retainer Account"); the funds remain in the Retainer Account and are the Debtor's property. Second, the 2023 Indenture is governed by New York law, which separately satisfies the "property in the United States" requirement for eligibility to file a chapter 15 case under section 109(a) of the Bankruptcy Code.

II. LEGAL STANDARD

A. Requirements for Recognition of a Foreign Proceeding

Section 1517(a) of the Bankruptcy Code provides that the court shall, after notice and a hearing, enter an order recognizing a foreign main

proceeding if:

- (1) such foreign proceeding for which recognition is sought is a foreign main proceeding ... within the meaning of section 1502;
- (2) the foreign representative applying for recognition is a person or body; and
- (3) the petition meets the requirements of section 1515.

[11 U.S.C. § 1517\(a\)](#). "While not explicit in this section, the foreign proceeding and the foreign representative must meet the definitional requirements set out in sections 101(23) and 101(24)." 8 COLLIER ON BANKRUPTCY ¶ 1517.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014). A foreign proceeding is a "collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." [11 U.S.C. § 101\(23\)](#) ; *see also In re ABC Learning Ctrs. Ltd.* , [445 B.R. 318](#),327 (Bankr. D. Del. 2010). A foreign representative is "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." [11 U.S.C. § 101\(24\)](#).

A foreign main proceeding "shall be recognized ... if it is pending in the country where the debtor has the center of its main interests." *Id.* § 1517(b)(1). The Bankruptcy Code presumes that "[i]n the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the center of the debtor's main interests." *Id.* § 1516(c); *see also In re Bear Stearns* , [374 B.R. 122](#), 130 (Bankr. S.D.N.Y. 2007). Case law "establishes that the presumption in favor of place of registration can

be rebutted by showing that the 'head office' functions were carried out in a jurisdiction other than where the registered office was located." 8 COLLIER ON BANKRUPTCY ¶ 1516.03; *see also Bear Stearns*, 374 B.R. at 130. To determine a debtor's center of main interests, courts look to a nonexclusive list of factors, including "the location of the debtor's headquarters; the location of those who actually manage the debtor ... ; the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013) (quoting *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006)).

The Bankruptcy Code further provides that a recognition order shall be entered if the foreign representative applying for recognition is a person or body, and that the petition meets the requirements of section 1515. 11 U.S.C. § 1517(a)(2)–(3). Section 1515 requires presentation of (1) a ⁶¹²certified copy of the decision commencing ⁶¹²the foreign proceeding and appointing the foreign representative; (2) a certificate from the foreign court affirming the existence of the proceeding and appointment of the representative; or (3) in the absence of (1) or (2), evidence which the court deems sufficient to confirm the existence of the foreign proceeding and appointment of the foreign representative. *Id.* § 1515(b). The petition must also be accompanied by a statement identifying all known foreign proceedings with respect to the debtor, 11 U.S.C. § 1515(c), and if applicable, a translation of the evidentiary materials into English. *Id.* § 1515(d).

B. Privileges Provided By Chapter 15 of the Bankruptcy Code

Upon recognition as a foreign main proceeding, section 1520(a) of the Bankruptcy Code makes (1) sections 361 and 362 (automatic stay) applicable to property of the debtor within the jurisdiction of

the US; (2) applies sections 363, 549 and 552 to any transfer of a debtor's interest in property within the US; (3) allows a foreign representative to operate a debtor's business by exercising the rights and powers of a trustee under sections 363 and 552; and (4) applies section 552 to property of the debtor within the US. 11 U.S.C. § 1520(a).

Section 1521(a) outlines the discretionary relief a court may order upon recognition. *Id.* § 1521(a). The discretion that is granted is "exceedingly broad," since a court may grant "any appropriate relief" that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors. Hon. Leif M. Clark, ANCILLARY AND OTHER CROSS-BORDER INSOLVENCY CASES UNDER CHAPTER 15 OF THE BANKRUPTCY CODE, § 7[2], at 70 (2008). "Section 1521(a)(7) authorizes the court to grant to the foreign representative the sort of relief that might be available to a trustee appointed in a full bankruptcy case," including the turnover of property belonging to the debtor. *Id.* at 73. Section 1521(a)(7), however, carves out avoidance powers under sections 547 and 548, which are only available to the trustee in a full case under another chapter. 8 COLLIER ON BANKRUPTCY ¶ 1521.02.

C. The Interplay of Section 109(a) and Chapter 15 of the Bankruptcy Code

Section 109(a) provides that "[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business or property in the United States, or a municipality, may be a debtor under this title." 11 U.S.C. § 109(a). In a controversial ruling, the Second Circuit applied the requirements of section 109(a) to eligibility to file a chapter 15 case. *See Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247 (2d Cir. 2013). Under section 109(a), as interpreted in *Barnet*, a foreign representative must show that the debtor has either (i) a domicile, (ii) a place of

business, or (iii) *property* in the United States, to be eligible to file under [11 U.S.C. § 1517](#) (emphasis added). See *Barnet*, [737 F.3d at 247](#); *In re Octaviar Admin. Pty. Ltd.*, [511 B.R. 361, 369](#) (Bankr. S.D.N.Y. 2014). Lower courts in this Circuit and elsewhere have held that a professional's retainer in a U.S. bank account satisfies the "property in the United States" requirement of section 109(a). See, e.g., *Octaviar*, [511 B.R. at 372–73](#) ("There is a line of authority that supports the fact that prepetition deposits or retainers can supply 'property' sufficient to make a foreign debtor eligible to file in the United States.") (citing *In re Cenargo Int'l PLC*, [294 B.R. 571, 603](#) (Bankr. S.D.N.Y. 2003)); see also *In re Yukos Oil Co.*, [321 B.R. 396, 401–03](#) (Bankr. S.D. Tex. 2005); ⁶¹³ *In re Global Ocean Carriers Ltd.*, [251 B.R. 31, 39](#) (Bankr. D. Del. 2000).

D. Schemes of Arrangement Satisfy the Requirement for a Collective Judicial Proceeding in a Foreign Country Under a Law Relating to Adjustment of Debt

A chapter 15 petition may be filed by a foreign representative "for recognition of a foreign proceeding" [11 U.S.C. § 1515](#). Section 101(23) of the Bankruptcy Code defines a "foreign proceeding" to mean "a collective judicial or administrative proceeding in a foreign country ... under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." *Id.* § 101(23). Schemes of arrangement under UK law have routinely been recognized as foreign proceedings in chapter 15 cases. See, e.g., *In re Metinvest B.V.*, No. 17–10130–LSS (Bankr. D. Del. Feb. 8, 2017); *In re DTK Finance (plc)*, No. 16–13521–shl (Bankr. S.D.N.Y. Jan. 18, 2017); *In re Metinvest B.V.*, No. 16–11424–LSS (Bankr. D. Del. Jun. 30, 2016); *In re Abengoa Concessions Investments Limited*, No. 16–12590–kjc (Bankr. D. Del. Dec. 6, 2016); *In re YH Limited*, No. 16–12262 (Bankr. S.D.N.Y. Sep.

8, 2016); *In re Metinvest B.V.*, No. 16–10105–LSS (Bankr. D. Del. Jan. 29, 2016); *In re OIC Run–Off Limited*, No. 15–13054–scc (Bankr. S.D.N.Y. Jan. 11, 2016); *In re Codere Finance (UK) Limited*, No. 15–13017–jig (Bankr. S.D.N.Y. Dec. 22, 2015); *In re Towergate Finance, plc*, Case No. 15–10509 (SMB) (Bankr. S.D.N.Y. Mar. 27, 2015); *In re New World Resources N.V.*, Case No. 14–12226 (SMB) (Bankr. S.D.N.Y. Sept. 9, 2014); *In re Zlomrex International Finance S.A.*, No. 13–14138 (Bankr. S.D.N.Y. Jan. 31, 2014); *In re Magyar Telecom B.V.*, No. 13–13508, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013); *In re Tokio Marine Europe Insurance Ltd.*, No. 11–13420 (MG) (Bankr. S.D.N.Y. Sept. 08, 2011); *In re Highlands Ins. Co.(U.K.)*, No. 07–13970 (MG) (Bankr. S.D.N.Y. Aug. 18, 2009); *In re Castle Holdco 4, Ltd.*, No. 09–11761 (REG) (Bankr. S.D.N.Y. May 7, 2009).

III. DISCUSSION

Section 1517(a) of the Bankruptcy Code provides that "an order recognizing a foreign proceeding shall be entered if ... (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of [section 1515](#)." [11 U.S.C. § 1517\(a\)](#). Each of the foregoing requirements is satisfied in this case, and, as explained below, the recognition and enforcement of the Scheme and Sanction Order furthers the goals of chapter 15.

A. Avanti Has Property in the United States

As a preliminary matter, a foreign representative must show that the debtor has either (i) a domicile, (ii) a place of business, or (iii) *property* in the United States, as a condition to eligibility under [11 U.S.C. § 1517](#) (emphasis added). See *Barnet* [737 F.3d at 247](#); *Octaviar*, [511 B.R. at 369](#). Here, the Debtor does not have a place of business or domicile in the United States, but the Debtor's

property within the territorial jurisdiction of the United States includes funds held by Milbank as a retainer, and the 2023 Indenture governed by New York law. Both of these satisfy the "property in the United States" requirement for eligibility under section 109(a). *See In re Berau Capital Resources Pte Ltd.*, 540 B.R. 80, 83–84 (Bankr. S.D.N.Y. 2015) (holding that foreign debtor was eligible

614 *614 to be a debtor under section 109(a) of the Bankruptcy Code because of (a) an interest in its US counsel's retainer account, and (b) intangible contract rights under a New York law governed the debt indenture).

B. The English Proceeding is a Foreign Main Proceeding

The UK Proceeding fits the definition of a "foreign proceeding" in section 101(23) of the Bankruptcy Code as a collective proceeding for the adjustment of debt supervised by a judicial authority. *See* 11 U.S.C. § 1502(3) (defining a "foreign court" as "a judicial or other authority competent to control or supervise a foreign proceeding"). Section 1516(a) of the Bankruptcy Code permits a court to presume that a foreign proceeding is a "foreign proceeding," if the decision commencing the foreign proceeding so indicates. *See* 11 U.S.C. §§ 1516(a), 1515(b)(1). The UK Proceeding is pending in a foreign country under a law that allows companies to effectuate binding compromises or arrangements, including the restructuring of liabilities owed to their members or creditors (or any class of them) (*i.e.*, Part 26 of the Companies Act) and is therefore an "adjustment of debt." *See* Angel Declaration ¶ 10.

The UK Proceeding is a judicial proceeding—it required the Convening Order to convene the Debtor's Scheme Meeting and required the Sanction Order for the Scheme to be sanctioned, each issued by the UK Court. *See id.* at ¶¶ 11–14. Here, the Convening Order authorized the appointment of the Foreign Representative as "foreign representative in any proceedings under

chapter 15 of the United States Bankruptcy Code ...". *See* Convening Order at ¶ 21. Furthermore, the Debtor is incorporated in the UK and its registered offices and headquarters are in London. *See* Willcocks Declaration ¶ 7. The Court may therefore presume that the UK constitutes the Debtor's "center of main interests." 11 U.S.C. § 1516(c).

Moreover, a significant proportion of the Debtor's existing assets are located in the UK. *See* Willcocks Declaration at ¶ 7. Given the presumption of section 1516(c) of the Bankruptcy Code and the supporting factual information presented in the Petition, the UK constitutes the Debtor's "center of main interests" and the UK Proceeding constitutes a "foreign main proceeding" under the Bankruptcy Code.

C. The Petitioner is Qualified to be the Foreign Representative

The term "foreign representative" is defined under section 101(24) of the Bankruptcy Code as:

a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

11 U.S.C. § 101(24).

The Foreign Representative in this case is an individual who has been (1) duly appointed by the Debtor's board of directors as foreign representative of the UK Proceeding, and (2) authorized by the Convening Order to act as "foreign representative." *See* Willcocks Declaration ¶ 3. Accordingly, Patrick Willcocks is a "foreign representative" as defined in the Bankruptcy Code. *See* 11 U.S.C. § 1516(a) ("If the decision [commencing the foreign proceeding] ... indicates ... that the person or body is a foreign representative, the court is entitled to so presume."); *In re Sphinx, Ltd.*, 351 B.R. 103,

⁶¹⁵ 116–17 (Bankr. S.D.N.Y. 2006), *aff'd*, ^{*615} *Krys v. Official Comm. of Unsecured Creditors of Refco Inc. (In re SphinX Ltd.)*, 371 B.R. 10 (S.D.N.Y. 2007) (holding that section 101(24) was satisfied where foreign representatives submitted a "copy of the Cayman Court's order appointing them to administer the [d]ebtors' winding up under [Cayman law] and authorizing their commencement of these chapter 15 cases ...").

D. Enforcing the Scheme, Including the Releases, as Discretionary Relief Under Sections 1507 and 1521 is Proper

Upon recognition of a foreign proceeding, section 1521(a) of the Bankruptcy Code authorizes the Court to grant "any appropriate relief" to a foreign representative "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors," provided that the interests of creditors and other interested entities are sufficiently protected. 11 U.S.C. §§ 1521(a), 1522(a). Such relief may include, but is not limited to: "(1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a) ; (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a) ; (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a) ; ... and (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." *Id.* § 1521(a).

In addition to section 1521's provisions regarding "any appropriate relief," section 1507(b) provides that a court "[i]n determining whether to provide additional assistance ... shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns."

11 U.S.C. § 1507(b) (emphasis added). These provisions embody the protections previously contained in section 304 of the Bankruptcy Court with one critical exception: the principle of comity was removed as one of the factors and elevated to the introductory paragraph. The legislative history confirms that the principle of comity was placed in the introductory language to section 1507 to emphasize its importance. *See United States v. J.A. Jones Constr. Group, LLC*, 333 B.R. 637, 638 (E.D.N.Y. 2005) (citing legislative history); *see also* Allan L. Gropper, *Current Devs. in Int'l Insolvency Law: A United States Perspective*, 15 J. BANKR. L. & PRAC. 2, Art. 3, at 3–4 (Apr. 2006) (hereinafter "Gropper") (noting that in light of the elevation of comity to the introductory paragraph of section 1507, and the legislative history of chapter 15, courts will likely consider precedent under section 304 in fashioning appropriate relief).

The interplay between the relief available under sections 1507 and 1521 is ^{*616} far from clear. *See In re Atlas Shipping A/ S*, 404 B.R. 726, 741

(Bankr. S.D.N.Y. 2009). As the court explained in *In re Rede Energia S.A.*, 515 B.R. 69 (Bankr. S.D.N.Y. 2014) :

Section 1507(b)(1) requires that additional relief only be granted if the just treatment of creditors is ensured. 11 U.S.C. § 1507(b)(1). The just treatment factor is generally satisfied upon a showing that the applicable law provides for a comprehensive procedure for the orderly and equitable distribution of [the debtor]'s assets among all of its creditors. The court in *Board of Directors of Telecom Argentina* explained that instances in which a court has held that a foreign proceeding does not satisfy this factor include where the proceeding fails to provide creditors access to information and an opportunity to be heard in a meaningful manner, which are [f]undamental requisites of due process, or where the proceeding would not recognize a creditor as a claimholder.

Id. at 95 (internal quotation marks and citations omitted).

Cases have held that in the exercise of comity that appropriate relief under section 1521 or additional assistance under section 1507 may include recognizing and enforcing a foreign plan confirmation order. *See In re U.S. Steel Canada Inc.*, 571 B.R. 600, 609 (Bankr. S.D.N.Y. 2017) ; *In re Cell C Proprietary Ltd.*, 571 B.R. 542, 551 (Bankr. S.D.N.Y. 2017) ; *In re Rede Energia S.A.*, 515 B.R. at 89.

In deciding whether to grant appropriate relief or additional assistance under chapter 15, courts are guided by principles of comity and cooperation with foreign courts. *See, e.g.*, *In re Atlas Shipping*, 404 B.R. at 738 ; *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008). The Supreme Court has held that a foreign judgment should not be challenged in the US if the foreign forum provides: "[A] full and fair trial abroad before a

court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it [is] sitting" *Hilton v. Guyot*, 159 U.S. 113, 202–03, 16 S.Ct. 139, 40 L.Ed. 95 (1895) ; *see also Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) ("Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy."); *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25, 60, 66–68 (Bankr. S.D.N.Y. 1999), *aff'd*, 275 B.R. 699 (S.D.N.Y. 2002) (concluding that comity should be accorded to foreign court orders as long as "it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated" (quoting *In re Gee*, 53 B.R. 891, 901 (Bankr. S.D.N.Y. 1985))).

The issue of granting third-party releases in chapter 11 cases is controversial. Third-party releases are permissible if creditors "consent," but what constitutes consent is the subject of conflicting decisions. For, example, Judge Bernstein in *In re SunEdison, Inc.* held that a warning in a disclosure statement indicating that the failure to object is "deemed consent" to third-party releases was insufficient to turn a creditor into a consenting creditor. 576 B.R. 453, 461 (Bankr. S.D.N.Y. 2017) ; *see also* ⁶¹⁷ *In re Washington Mut. Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011) (holding that "inaction" was not sufficient to manifest consent to support releases). Judge Bernstein's rationale was that there was no identifiable "duty to speak" on behalf of the creditors. *Id.* at 460. On that view, creditors who do not affirmatively vote to grant releases are not

bound by the releases. Other cases have found consent when a disclosure statement or voting ballot warned that a failure to vote against the plan would be deemed consent to the releases. *See e.g.*, *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217–29 (Bankr. S.D.N.Y. 2009), *aff'd*, No. 09 CIV. 1016 (LAK), 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010); *aff'd in part, rev'd in part*, 627 F.3d 496 (2d. Cir. 2010); *In re Calpine Corp.*, 2007 WL 4565223, at *10 (Bankr. S.D.N.Y. Dec. 19, 2007). It is unnecessary for the Court to weigh-in on that issue here.

In the chapter 15 context, judges in this Court have often enforced third-party releases in foreign proceedings under section 1507 of the Bankruptcy Code. *See, e.g.*, *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (recognizing and enforcing scheme of arrangement that released affiliate guarantees); *In re Towergate Fin. plc*, Case No. 15–10509–SMB (Bankr. S.D.N.Y. Mar. 27, 2015) [ECF Doc. # 16]; *In re New World Res. N.V.*, Case No. 14–12226–SMB (Bankr. S.D.N.Y. Sept. 9, 2014) [ECF Doc. # 20]; *In re Sino–Forest Corp.*, 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (enforcing foreign order containing third-party releases); *In re Magyar Telecom B.V.*, Case No. 13–13508–SHL, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013) [ECF Doc. # 26]; *In re Metcalfe & Mansfield Alt. Inv.*, 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010) (concluding that "principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.").

However, the Fifth Circuit in *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1042 (5th Cir. 2012), affirmed a bankruptcy court's decision in a chapter 15 case declining to grant comity and to enforce a Mexican court order approving a Mexican reorganization plan that released guarantees of US-based non-debtor affiliates of the Mexican

debtor's debt. *See also Sino–Forest*, 501 B.R. at 665–66. The court decided that the bankruptcy court did not abuse its discretion in refusing to enforce the order confirming the plan and releasing the guarantees. *See Vitro*, 701 F.3d at 1060.

Vitro had a number of very troubling facts that the Fifth Circuit concluded supported the bankruptcy court's exercise of discretion in refusing to enforce the plan approved by the Mexican court. Most significantly, the plan created only a single class of unsecured creditors and the necessary creditor votes to approve the plan were only achieved by counting the votes of insiders. *Id.* at 1039. Insider votes are not counted under the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(10) ("If a class is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, *determined without including any acceptance of the plan by any insider.* ") (emphasis added); *see also CIBC Bank & Trust Co. (Cayman) Ltd.*, 866 F. Supp. 1105, 1114 (S.D.N.Y. 1995) (concluding that "the Code prevents 'insiders' from voting on whether a reorganization plan will be accepted by a class of impaired creditors").

Of the approximately 75% of principal amount of unsecured debt that voted in favor of the plan in *Vitro*, over 50% of all voting claims were held by 618 intercompany *618 debt holders. *Id.* Similarly, under Mexican law only 50% in amount had to vote to approve the plan. Absent the subsidiaries' votes of intercompany debt in favor of the plan, that plan could not have been approved. *Id.*

The Fifth Circuit distinguished *Vitro* from other cases allowing third-party releases, including *Metcalfe*. Many of the same distinguishing facts are present here—the Avanti Scheme has near unanimous support (all creditors that voted cast votes in favor of the Scheme), and that support does not rely on votes by insiders.

As explained in the Angel Declaration, third-party non-debtor releases are common in schemes sanctioned under UK law, particularly for releases of affiliate guarantees of the debt that is being adjusted by the scheme. *See In re T & N Ltd and others (No 4) [2006] EWHC 1447 (Ch)* (David Richards J.) (holding that a scheme did not necessarily prohibit the alteration of third-party rights, in this case, creditors' rights to pursue asbestos claims against insurers); *Re Lehman Brothers International (Europe) (In administration) (No 2) [2009] EWCA Civ 1161* (following *T & N*, Patten LJ held (at paragraph 63) that it was "entirely logical to regard the court's jurisdiction as extending to approving a scheme which varies or releases creditors' claims against the company on terms which require them to bring into account and release rights of action against third-parties designed to recover the same loss. The release of such third-party claims is merely ancillary to the arrangement between the company and its own creditors."); *In Re La Seda de Barcelona SA [2010] EWHC 1364 (Ch)* (Proudman J applied *T & N* and *Lehman*, and concluded that a third-party subsidiary guarantor could be released pursuant to a deed of release executed on behalf of scheme creditors).

Further examples of recent schemes sanctioned by UK courts that included third-party releases include: *Re Magyar Telecom BV [2013] EWHC 3800 (Ch)* (scheme company executed a deed of covenant for each note creditor whereby scheme claims (including guarantee claims of group guarantor companies) were irrevocably released); *In the Matter of New World Resources N.V [2014] EWHC 3143 (Ch)* (scheme provided for broad release of claims arising out of finance documents, among other things, against subsidiary guarantors); *Codere Finance (UK) Limited [2015] EWHC 3778 (Ch)* (scheme creditors irrevocably waived and released scheme claims (including claims against group company guarantors) and undertook to treat the scheme claims as waived and released subject to carve-outs).

The Court concludes that schemes of arrangements sanctioned under UK law that provide third-party non-debtor guarantor releases should be recognized and enforced under chapter 15 of the Bankruptcy Code. Avanti's Scheme Creditors had a full and fair opportunity to vote on, and be heard in connection with, the Scheme. *See* Angel Declaration, ¶¶ 12, 17–18. The proceedings under UK law in the UK courts afford creditors a full and fair opportunity to be heard in a manner consistent with US due process standards. *See, e.g., Society of Lloyd's v. Reinhardt*, 402 F.3d 982, 987–88 (10th Cir. 2005).

Under UK law, for a scheme to become legally binding on the company and all creditors in the relevant class, a majority in number representing not less than 75% in value of each class of creditors must vote in favor of the scheme. *Id.* ¶ 14. Unlike chapter 11 of the Bankruptcy Code, UK law authorizing schemes of arrangement does not provide a mechanism for "cramming down" dissenting classes of creditors. *Id.* ¶ 17. In this case, the Scheme⁶¹⁹ only adjusted the claims of a single class of creditors, namely, the holder of the 2023 Notes, and they voted overwhelmingly to approve the Scheme. Under UK law, the entire accepting class is bound by the terms of the Scheme, including the Guarantor Releases.

The failure of a US bankruptcy court to enforce the Guarantor Releases could result in prejudicial treatment of creditors to the detriment of the Debtor's reorganization efforts and prevent the fair and efficient administration of the Restructuring. Principles of comity permit a US bankruptcy court to recognize and enforce the Scheme. *See In re Sino-Forest Corp.*, 501 B.R. at 665 (enforcing foreign order containing third-party releases, noting that, in the Second Circuit, "where the third-party releases are not categorically prohibited, it cannot be argued that the issuance of such releases is manifestly contrary to public policy"); *Metcalfe*, 421 B.R. at 700 ("Principles of comity in chapter 15 cases support enforcement

of the Canadian Orders in the United States whether or not the same relief could be ordered in a plenary case under chapter 11.")

IV. CONCLUSION

Recognizing the UK Proceeding (including the Scheme and Sanction Order) and enforcing the Releases of claims against the Debtor and its non-debtor subsidiaries will assist the orderly administration of the scheme of arrangement by

the UK Court and help the implementation of the Scheme for the Debtor. For the reasons explained above, the Court grants the request for recognition and enforcement of the Scheme and Sanction Order.

A separate order granting the requested relief has already been entered.

HCMP 2227/2021 & HCCW 81/2021
(HEARD TOGETHER)
[2022] HKCFI 1686

HCMP 2227/2021

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 2227 OF 2021**

IN THE MATTER of Rare Earth
Magnesium Technology Group
Holdings Limited 稀鎂科技集
團控股有限公司 (Provisional
Liquidators Appointed) (For
Restructuring Purposes Only)

and

IN THE MATTER of Sections
670, 671, 673, and 674 of the
Companies Ordinance (Cap 622)

AND

HCCW 81/2021

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES WINDING-UP PROCEEDINGS NO 81 OF 2021**

IN THE MATTER of the
Companies (Winding Up and
Miscellaneous Provisions)
Ordinance (Chapter 32)

and

IN THE MATTER of Rare Earth
Magnesium Technology Group
Holdings Limited 稀鎂科技集
團控有限公司 (Provisional
Liquidators Appointed) (For
Restructuring Purposes Only)

(HEARD TOGETHER)

Before: Hon Harris J in Court

Date of Hearing: 27 May 2022

Date of Decision: 27 May 2022

Date of Reasons for Decision: 6 June 2022

REASONS FOR DECISION

Introduction

1. I have before me:

(1) the Company's Petition seeking the Court's:

(a) sanction under *section 673* of the *Companies Ordinance* (Cap. 622) ("**Ordinance**") of a scheme of arrangement between the Company and its Scheme Creditors; and

(b) approval of certain amendments to the Scheme providing for improved recovery for the Scheme Creditors.

(2) The Petition issued by AI Global Investment SPC on 22 February 2021 to wind up the Company ("**Winding-Up Petition**"), which the Company asks me to dismiss and order that the costs are paid by the Petitioner. I deal with this in [44].

2. On 12 January 2022 I made an order for the Company to convene a meeting of its creditors to consider a proposed scheme of arrangement restructuring its debt (“**Convening Order**”). After an adjournment, the Scheme Meeting was duly convened on 1 March 2022. At the Scheme Meeting the resolution was carried by a majority in number of the Scheme Creditors present and voting, in person or by proxy, holding 79.06% of the Claims voted. Specifically, 9 out of the 10 Scheme Creditors voted for the Scheme.

3. The Scheme seeks to restructure the Company’s indebtedness in order to return the Company to a solvent going concern. A successful restructuring would give the Scheme Creditors a much higher recovery (estimated to be 100% of the principal under the Scheme’s Term Extension Option). Absent restructuring, the Company would be liquidated and the Scheme Creditors’ estimated recovery would be approximately 8.5% to 23.1%.

4. The background to the Company and the need for the Scheme are in brief as follows. The Company is a Bermuda-incorporated entity and its shares have been listed on the Main Board of The Stock Exchange of Hong Kong Limited (“**SEHK**”) since 28 January 1993. The Company is an investment holding company. The Company’s subsidiaries are principally located in Hong Kong, Mainland China, and the British Virgin Islands. The Company is also part of a wider group (“**Group**”) ultimately held by Century Sunshine Group Holdings Limited (“**Century Sunshine**”) which is an exempted company incorporated in the Cayman Islands and listed in Hong Kong (Stock Code: 509).

5. The Group’s key businesses consist of the development and production of green fertilisers, including ecological fertilisers, functional

fertilisers and general fertilisers; a with the primary production bases in the Jiangsu Province and Jiangxi Province; and the production of magnesium in the Jilin Province and Xinjiang Uyghur Autonomous Region.

6. The Company is the key operator of the magnesium alloy production business segment of the Group and indirectly owns the relevant production bases in the Mainland. Despite enjoying strong growth and profitability in the past, the Group's financial position deteriorated in 2020 due to COVID-19. The Company is at least cashflow insolvent. The Company's management accounts as of 31 December 2021 stated that the Company had net assets of HK\$1,138,523,000 and net current liabilities of HK\$613,477,000.

7. The Company's principal indebtedness arises from unsecured interest-bearing bonds issued by the Company, which are governed by Hong Kong law. As of 31 December 2021, the Company's total indebtedness was approximately HK\$852,533,000 owed to 10 Scheme Creditors. The Company is likely to go into liquidation unless its current indebtedness can be restructured. On 22 February 2021, a creditor (AI Global Investment SPC) presented a winding-up petition against the Company in Hong Kong ("**Petition**"). The Petition hearing has been adjourned to 27 May 2022 so that the Court may consider both the Scheme's progress and the Petition together.

8. Before the Petition was issued, the Company sought the appointment of soft-touch provisional liquidators ("**PLs**") in Bermuda:

- (1) On 3 July 2020, the Company filed a winding-up petition in Bermuda against itself.

(2) On 16 July 2020, the Bermuda court appointed the PLs to assist in and facilitate the Company's debt restructuring.

9. On 25 August 2020, I recognised the PLs in Hong Kong: *Re Rare Earth Magnesium Technology Group Holdings Ltd*¹.

10. To avoid liquidation and to return the Company to a solvent going concern, the Company (with the PLs' assistance) has been pursuing a debt restructuring leading to the Scheme. The Scheme seeks to discharge the Company's unsecured indebtedness, which would also entail releasing the Scheme Creditors' right to enforce guarantees granted by Century Sunshine (Clauses 1 and 2 of the Scheme). In return, the Scheme Creditors will be given a choice to choose either the Term Extension Option, the Convertible Bonds Swap Option, or a combination of both (Clause 7 of the Scheme).

11. Under the Term Extension Option, the Scheme Creditors' Claim repayment deadline will be extended for five years, during which the Scheme Creditors will be entitled to receive the Term Extension Interest, Interim Payments, and the Final Payment; and where applicable the Early Repayment and Term Extension Potential Extra Payment (Clauses 7.2 to 7.10 of the Scheme).

12. Under the Convertible Bonds Swap Option, the Scheme Creditors' Claim will be converted into Convertible Bonds which will mature in five years. The Convertible Bonds do not carry any interest and may be converted into the Conversion Shares during the conversion period. Unless previously redeemed or converted, the Company shall redeem the

¹ [2020] HKCFI 2260; [2020] HKCLC 1295.

Convertible Bonds on the maturity date at the redemption amount which shall be equal to 100% of the outstanding principal amount (Clause 7.14 of the Scheme).

13. To give additional comfort to the Scheme Creditors who choose the Term Extension Option, the following are offered to those Scheme Creditors:

(1) Century Sunshine is pursuing its own debt restructuring via the Century Sunshine Proposed Scheme. If there are surplus assets resulting from the Century Sunshine Proposed Scheme, the surplus assets are intended to be transferred to the Scheme Company for distribution to the Option A Creditors (Clause 7.11 of the Scheme).

(2) Century Sunshine will provide a corporate guarantee to the Scheme Company to guarantee the punctual payment of the Interim Payment(s) (if payable) and the Final Payment (Clause 7.12 of the Scheme).

(3) The Company's various subsidiaries will provide security interests and corporate guarantees to the Scheme Company to secure the Final Payment (Clause 7.13 of the Scheme).

14. In addition, the Scheme Creditors who have executed the Consenting Agreement will be given a consent fee in cash amounting to 3% of the principal amount of the debt owed by the Company to the Scheme Creditors (Clause 9 of the Scheme).

15. The Scheme Creditors' recovery under the Term Extension Option is estimated to be 100% of the principal, whereas in a liquidation the Scheme Creditors' recovery is estimated to be approximately 8.5% to 23.1%.

16. The Company does not need any parallel scheme of arrangement in any jurisdiction.

Relevant Principles

17. In considering whether to sanction a scheme, the Court applies some well-established principles which I recently restated in *Re China Singyes Solar Technologies Holdings Ltd*². The Court considers in particular the following:

- (1) whether the scheme is for a permissible purpose;
- (2) whether creditors who were called on to vote as a single class had sufficiently similar legal rights such that they could consult together with a view to their common interest at a single meeting;
- (3) whether the meeting was duly convened in accordance with the Court's directions;
- (4) whether creditors have been given sufficient information about the scheme to enable them to make an informed decision on whether or not to support it;
- (5) whether the necessary statutory majorities have been obtained;
- (6) whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and
- (7) in an international case, whether there is sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions.

² [2020] HKCFI 467; [2020] HKCLC 379 at [7].

18. As in *Singyes*, the Scheme is a genuine debt restructuring of a distressed company. It is also a permissible purpose to compromise via the Scheme guarantees granted by Century Sunshine (see *Re Century Sun International Ltd*³).

19. In considering whether creditors are properly classified, the test is whether creditors who are called on to vote as a single class have sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting. The relevant principles may be summarised as follows:

(1) The overarching question is whether the pre and post-scheme rights of those proposed to be included in a single class are so dissimilar as to make it impossible for them to consult with a view to their common interest. If that is the case, separate meetings must be summoned.

(2) The second principle is that it is the rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests will normally only ever arise at the sanction stage as a question for consideration.

(3) The third principle is that the court should take a broad approach to the composition of classes, so as to avoid giving unjustified veto rights to a minority group of creditors, with the result that the test for classes becomes an instrument of oppression by a minority.

(4) The fourth principle is that the court has to consider, on the one hand, the rights of the creditors in the absence of the scheme and, on the other hand, any new rights to which the creditors become entitled under the scheme. If, having carried

³ [2021] HKCFI 2928; [2021] HKCLC 1477 at [15]–[17].

out that exercise, there is a material difference between the rights of the different groups of creditors, they may, but not necessarily will, constitute different classes. Whether they do so depends on a judgment as to whether such a difference makes it impossible for the different groups to consult together with a view to their common interest.

- (5) In applying the above test, the starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed.

*See Re China Oil Gangran Energy Group Holdings Ltd*⁴.

20. The Scheme Creditors correctly voted as a single class for these reasons:

- (1) The appropriate comparator here is an insolvent liquidation because, absent the Scheme, an insolvent liquidation of the Company would be an unavoidable outcome.
- (2) The Scheme Claims are the Company's general unsecured debts.
- (3) All Scheme Creditors are given the same options for distribution under the Scheme.

21. The Convening Order has been complied with. This is explained by Mr Chi in his 2nd affirmation which confirms the circulation of the notice of the Scheme Meeting, Explanatory Statement and Scheme. The advertisement of the Scheme Meeting was duly placed in The Standard and Sing Tao Daily on 18 January 2022.

⁴ [2021] HKCFI 1592; [2021] HKCLC 911 at [15]–[16].

22. During the Scheme Meeting held on 15 February 2022, the Chairman adjourned the Scheme Meeting to 1 March 2022 in view of the impending amendments to the Scheme resulting from negotiations with a major Scheme Creditor. This was permissible. The Chairperson could validly adjourn the Scheme Meeting to allow the Scheme Creditors sufficient opportunity to consider proposed amendments to the Scheme (see *Re Peninsula and Oriental Steam Navigation Company*⁵; *aff'd The Peninsular and Oriental Steam Navigation Company v Eller and Co*⁶; *Re CIL Holdings Ltd*⁷).

23. On 23 February 2022, the Company circulated the revised Scheme to all Scheme Creditors. The adjourned Scheme Meeting on 1 March 2022 duly voted in favour of the Scheme. The requirements under *section 674(1)(b)* of the *Ordinance* that the Scheme be approved by a majority in number representing at least 75% in value of the Scheme Creditors present and voting in person or by proxy have been satisfied.

24. To satisfy the requirements of *section 671(3)* of the *Ordinance*, an explanatory statement must be sufficiently informative:

“A company is under a duty to include in the explanatory statement all the information necessary to enable the creditors to form a reasonable judgement on whether the scheme is in their best interests or not, and hence how to vote. The extent of the information required to be provided will, of course, depend on the facts of the particular case. Necessarily, the duty extends to the company providing up to date information, or an adequate explanation of why it has not done so, that will allow a creditor to contrast what is to be anticipated if the scheme is approved, and the outcome if it is not. A company is required to provide specific financial information to support its predicted outcomes, and I would normally expect it to have its views independently

⁵ [2006] EWHC 389 (Ch) at [34], [49], [54]–[55] (Warren J).

⁶ [2006] EWCA Civ 432.

⁷ (Unrep., HCMP 2799/2002, 2 April 2003) at [8]–[12] and [18] (Kwan J).

verified by an insolvency practitioner or other suitable professionals.”⁸

The Explanatory Statement satisfies these requirements.

25. The Court is slow to differ from the majority views, as it normally acts on the principle that businessmen are much better judges of what is to their commercial advantage than the court could be: *Re Allied Properties (HK) Ltd*⁹. The primary object of the Scheme is that, upon the Scheme becoming effective, the Scheme Creditors’ Claims will be discharged and in return they will be entitled to be given a cash distribution, convertible bonds or a combination of both under the terms of the Scheme. The Scheme consideration provides the Scheme Creditors with a much better return than in an insolvent liquidation of the Company. Therefore, in respect of the Scheme Creditors, the Scheme is one that an intelligent and honest person acting in accordance with his interests as a member of the class within which he voted might reasonably approve.

Transnational Cases

26. The business group of which the Company is an intermediate subsidiary carries on business in Jiangsu, Jiangxi and Jilin Provinces and the Xinjiang Uyghur Autonomous Region. The ultimate holding company is incorporated in the Cayman Islands and listed on the SEHK. The Company is incorporated in Bermuda. The debt to be compromised by the Scheme is very largely governed by Hong Kong law.

27. In transnational cases, the Court considers whether a scheme is effective in other foreign jurisdictions of practical importance because it

⁸ *Re Century Sun International Ltd*, *supra*, footnote 3 at [23].

⁹ [2020] HKCA 973; [2020] HKCLC 1549 at [37].

would not be a proper exercise of the discretion to sanction a scheme if it serves no purpose. In practice whether or not a jurisdiction is of practical importance to the efficacy of a scheme sanctioned in Hong Kong will commonly be determined by the following considerations:

- (1) Is a material amount of debt to be compromised by a scheme governed by the law of a jurisdiction other than Hong Kong?
- (2) Even if there is some doubt as to whether or not a scheme will compromise a proportion of the debt, is there any reason to think that the creditors will take action in a jurisdiction which will not recognise a scheme as compromising the debt?
- (3) The amount of the debt involved. If, for example, the amount of debt that is not governed by Hong Kong law is less than the cost of introducing a parallel scheme it makes more sense to exclude that debt from the scheme and settle it separately if it is ever pursued: *China Oil*¹⁰.

28. Although there is no parallel scheme or recognition application in any jurisdiction, the Scheme is expected to be internationally effective, in particular in Bermuda and Cayman Islands, because all the Claims are governed by Hong Kong law. As Miles J recently observed in, *Re PGS ASA*¹¹, in an English law context:

“There is no requirement for a scheme to be effective in every jurisdiction worldwide, provided that it is likely to be effective in the key jurisdictions in which the company operates or has assets. Where the governing law of the debt affected by the scheme is English law, it is inherently likely that the scheme will be recognised abroad.”

¹⁰ *Supra*, footnote 4 at [21]–[23].

¹¹ [2021] EWHC 222 (Ch) at [29] (Miles J).

29. The expectation that the discharge of Hong Kong law-governed debt effected by a Hong Kong scheme of arrangement will be recognised abroad is justified because the discharge occurs as a matter of substantive Hong Kong law. This is certainly to be expected of a jurisdiction, which applies, what is commonly known as, the Rule in *Gibbs*. The Rule in *Gibbs*¹² provides that a debt is treated as discharged if compromised in accordance with the law of the jurisdiction, which governed the instrument giving rise to the debt. As far as I am aware, at the time of this decision *Gibbs* is followed in Bermuda, Cayman Islands and the other offshore jurisdictions. If a creditor submits to the jurisdiction of a foreign insolvency process he is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency process¹³. Consequently, a scheme sanctioned by the court of an offshore jurisdiction compromising debt governed by Hong Kong law will be treated in Hong Kong as binding on a creditor, who submitted to the foreign jurisdiction. It will not bind a creditor, who did not participate in the scheme proceedings or any associated insolvency process in the foreign jurisdiction.

30. Although not material in the present case, it is common for Mainland business groups listed in Hong Kong to raise US\$ denominated debt and for the relevant agreements to be governed by United States law. A technique was established in about 2016 to compromise such debt by introducing a scheme in Hong Kong that would be recognised in the United States¹⁴. This would not be inconsistent with the Rule in *Gibbs*. As I explain in *Winsway*¹⁵:

¹² *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.

¹³ *China Oil supra* [24] referring to *China Singyes supra* [18(2)].

¹⁴ See in particular *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1; [2016] HKEC 2495.

¹⁵ *Ibid* [36].

“The second issue is answered by the Privy Council’s decision in *New Zealand Loan and Mercantile Agency Co v Morrison*¹⁶. The Privy Council held, applying *Gibbs*, that a scheme of arrangement sanctioned in England under the *Joint Stock Companies Arrangement Act 1870* did not prevent a claim being brought in Victoria in respect of a debt governed by the law of Victoria. It did, however, bind all creditors ‘*wherever the creditors may be found, whether in the United Kingdom or in the Colonies or in foreign countries; and within the jurisdiction of the English Courts, all, wherever domicile, will be bound by the result.*’¹⁷ The Scheme will, therefore, prevent action being taken within the jurisdiction of the Hong Kong courts regardless of the governing law of the debt. This is one of the principal reasons for introducing a scheme such as the present one. It will prevent action being taken in Hong Kong by a dissident creditor, which interferes with the Company’s listed status.”

31. A creditor could not take enforcement action within the United States as a consequence of recognition of the scheme under *Chapter 15* and granting by the relevant Bankruptcy Court of ancillary relief which prohibited enforcement in the United States. As the offshore jurisdictions apply the Rule in *Gibbs*, such a scheme might not be effective to compromise the debt of a creditor, who has not submitted to the jurisdiction of the Hong Kong court. Whether or not it is necessary to introduce a parallel scheme in the offshore jurisdiction will depend on the factors that I consider in [23]–[29] of *China Oil*¹⁸.

32. A scheme sanctioned in an offshore jurisdiction and recognised under *Chapter 15* in the United States will not be treated by a Hong Kong court as compromising US\$ debt. The Rule in *Gibbs* requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law¹⁹. In the insolvency context in the United States this is I understand is achieved under *Chapter 11* of

¹⁶ [1898] AC 349.

¹⁷ Lord Davey pp357–8.

¹⁸ *Supra*.

¹⁹ *In re OJSC International Bank of Azerbaijan Bakhshiyeva v Sberbank of Russia* [2018] Bus LR 1270, 1308, [158(2)] (Hildyard J).

United States Bankruptcy Code. This is explained by Glenn J (who dealt with the *Chapter 15* application in *Winsway*²⁰) in his judgment in *In re Agrokor d.d.*²¹. In pages 184 to 185 Glenn J explains the position as follows:

“The Supreme Court concluded in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an *in rem* proceeding. A single court should resolve all claims to property of the debtor, which necessarily requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an *in rem* proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors’ rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its prepetition claim. Upon confirmation of a Chapter 11 plan, section 1141 (d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan...”

33. As a matter of United States law a confirmed *Chapter 11* plan operates to discharge the existing debt of a debtor and replace it with a right to receive a distribution in accordance with the confirmed plan. This is also the effect of a sanctioned scheme. Glenn J goes on at the end of the paragraph I have quoted to refer to the same principles applying to recognition of a foreign insolvency process with the same consequences, however, it is clear from reading the judgment as a whole that recognition under *Chapter 15* does not operate as a discharge and that Glenn J acknowledges this.

34. On page 185 Glenn J introduces an objection to recognition based on the fact that some of the debt compromised by the arrangement

²⁰ *Supra*.

²¹ 591 B.R. 163 (Bankr. S.D.N.Y. 2018).

Glenn J was asked to recognise was governed by English law and the arrangement arose under Croatia's *Act of the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia*.

"From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the *Gibbs* rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fall considering the amount of prepetition debt governed by English law.²² That would be unfortunate, indeed."

35. The material distinction between *Chapter 11* and *Chapter 15* proceedings is explained on page 187:

"Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property *that is located within the territorial jurisdiction of the United States*. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. *See, e.g., Atlas Shipping*, 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor's property located **in the United States. *Id.***" (emphasis added)

²² As Chief Justice Waite said in *Gebhard*, 109 U.S. at 539, 3 S.Ct. 363, "[u]nless all parties in interest, wherever they reside, can be bound" by the arrangement which is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."

36. It is clear from this passage that recognition under *Chapter 15* operates procedurally to prevent action by a creditor against a debtor's property in the United States. Recognition does not appear as a matter of United States' law to discharge the debt. Consistent with this at page 196 Glenn J states that it is appropriate to extend comity within the territorial jurisdiction of the United States. Unlike a discharge under *Chapter 11* which purports to have worldwide effect, recognition under *Chapter 15* is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.

37. There is a distinction between a court treating a compromise as having the substantive legal effect of altering the legal rights of the parties to an agreement (the issue with which *Gibbs* is concerned) and a court within its jurisdiction recognising, pursuant to a process such as *Chapter 15*, the purported legal consequence of a foreign insolvency procedure. This is a distinction to which advisers need to be alert when dealing with transnational restructuring. A scheme in an offshore jurisdiction purporting to compromise debt governed by United States law will not be effective in Hong Kong. Recognition of the scheme under *Chapter 15* does not constitute a compromise of debt governed by United States law, which satisfies the Rule in *Gibbs*. The result is that if a company has a creditor, which did not submit to the jurisdiction of the offshore court the creditor will be able to present a petition in Hong Kong to wind up the Company and if, for example, the creditor is a bond holder whose debt is not disputed, obtain a winding up order unless the debt is settled. I note that there appears to be a surprisingly large number of Mainland business groups listed in Hong Kong, whose US\$ denominated debt has recently been subject to schemes only in offshore jurisdictions and

recognition under *Chapter 15*²³. It may be that all the creditors of these companies, which hold debt of any material value have agreed to the terms of the compromise, but if that is not the case such companies, and any that might adopt a similar model in future, will be at risk of a petition being presented against them in Hong Kong and being wound up here. An offshore scheme and *Chapter 15* recognition will not protect them.

Modification of the Scheme

38. The Company seeks to modify the Scheme terms slightly in order to accommodate SEHK's comments on the structure of the Term Extension Share Placement. The amendments are in summary as follows:

- (1) Subject to complying with the public float requirement, the Company will issue in one lot all shares under the Term Extension Share Placement, instead of five instalments as originally proposed.
- (2) The Term Extension Interest payable to the Scheme Creditors will no longer be subject to any cap; the original proposal was a 5% cap.

²³ By way of example: Hilong Holding Limited (Stock Code 1623), GCL New Energy Holdings (Stock Code: 451), MIE Holdings Corporation (Stock Code: 1555), Golden Wheel Tiandi Holdings Company Limited (Stock Code: 1232), Modern Land (China) Co., Limited (Stock Code: 1107) and E-House (China) Enterprise Holdings Limited (Stock Code: 2048). In *Winsway* the scheme was recognised because the Hong Kong proceedings to introduce a scheme were found by Glenn J to constitute “foreign non-main proceedings” as defined in the **UNCITRAL Model Law** as incorporated in *Chapter 15*, on the basis that the Company was listed on the SEHK: *supra* [37]. My understanding is that it was thought by *Winsway*'s legal advisers that the Company's COMI might be in the Mainland and, therefore, the proceedings in Hong Kong would not constitute “foreign main proceedings” and the *Chapter 15* application was framed accordingly. For obvious reasons it is unlikely that any of the Mainland companies to which I have referred have their COMI in an offshore jurisdiction or an establishment as defined in paragraph (f) of Article 2. Article 16 paragraph 3 provides that “In the absence of proof to the contrary, the debtor's registered office is presumed to be the centre of the debtor's main interests”. I would have thought that it would be apparent from evidence filed in support of an application for recognition under *Chapter 15* explaining a scheme and its background that most, if not all, of these companies do not have their COMI in the place of incorporation. As I explain in [20] of my decision in *Li Yiqing v Lamtex Holdings Limited* [2021] HKCFI 622; [2021] HKCLC 329, referring to *Creative Finance Ltd* Case No. 14-10358 (REG) 13 January 2016, my understanding is that offshore jurisdictions are not normally eligible for recognition under *Chapter 11*.

(3) The Company will have no liability for the Scheme Costs. All Scheme Costs will be settled solely from the Term Extension Share Placement Proceeds.

39. The Company seeks the Court's permission to modify the Scheme terms to meet SEHK's requirements. In this connection, the Company relies on Clause 119 of the Scheme:

"The Scheme Administrators may jointly consent for and on behalf of all concerned to any modification of or addition to the Scheme or to any condition the Court may see fit to approve or impose at any hearing of the Court to sanction or give directions in respect of the Scheme, whether in accordance with Section 670 of the Companies Ordinance or otherwise... If the Court approves a modification or addition to the Scheme without the need to convene a meeting of the Scheme Creditors to vote on the modification, such modification or addition shall be binding on the Company and the Scheme Creditors provided that no further obligations or liabilities should be imposed on the Company and that the Company should not be adversely affected by reason of such modification or addition."

40. I permit the post-Scheme Meeting modifications. The proposed modifications seek only to improve the Scheme Creditors' recovery and thus by definition would not prejudice any Scheme Creditors. Had the proposed modifications been before the Scheme Meeting, they would not have made any difference to the outcome of the Scheme Meeting. There is no question of the Court, by approving these modifications, "foisting" on the Scheme Creditors anything other than what they voted on at the Scheme Meeting. In these circumstance, allowing the proposed modifications would be entirely consistent with authority: *Re China Saite Group Co Ltd*²⁴.

²⁴ [2022] HKCFI 1128 at [8].

Determination

41. The Scheme is a legitimate debt restructuring scheme which has complied with all the statutory requirements and has received the requisite Scheme Creditors' support after exercising their independent business judgment and will achieve its intended purpose. I will, therefore, make an order sanctioning the Scheme in the form of the draft order submitted to Court, which is in conventional terms.

Listing of Schemes, recognition applications and applications to appoint Provisional Liquidators

42. Mr Look Chan Ho for the Company told me at the hearing that there appears some confusion among practitioners about the procedural and jurisdiction aspects of the current scheme practice. It will be helpful if I clarify this. As I thought had been brought to practitioners' attention, although Linda Chan J has taken over the role of Companies Judge, because of the amount of cases in the Companies List I will continue to deal with particular types of applications if my diary permits and in the first instance solicitors should approach my clerk for dates. If I am not able to deal with them I will liaise with Linda Chan J. The following matters should be referred to my Clerk in the first instance for dates and listing:

- (1) Schemes of arrangement and capital reductions;
- (2) applications to appoint provisional liquidators; and
- (3) applications for recognition and assistance of foreign provisional liquidators and liquidators.

43. I would also remind practitioners of my guidance in *Re Enice Holding Co Ltd*²⁵:

²⁵ [2018] HKCFI 1736; [2018] HKCLC 305 at [49].

“I would emphasise that the Companies Court expects solicitors to proceed as follows when acting for parties introducing schemes or capital reductions. As soon as they are instructed to proceed with a scheme or capital reduction they should approach the Companies Judge’s clerk to obtain dates, which it is reasonable to expect the company to meet. Counsel should be instructed who are available on the allocated dates and the Company should work towards those dates. The Companies Court should not be expected to fit in with the convenience of companies and solicitors should make this clear to those instructing them.”

The Winding Up Petition

44. The Company seeks an order dismissing the Winding-Up Petition. The Petitioner, who appeared today through Justin Ho did not object, but the Petitioner seeks its costs. Costs are controversial. As Recorder William Wong SC heard that substantive hearing of the Winding-Up Petition and will determine the costs of that hearing it seems to me that he should also deal with the other costs of the Petition, which I anticipate are small.

(Jonathan Harris)

Judge of the Court of First Instance
High Court

Mr Look Chan Ho, instructed by Gall, for the company (in both actions)

Mr Justin Ho, instructed by DLA Piper Hong Kong, for AI Global
Investment SPS (the creditor in HCMP 2227/2021 & the petitioner in
HCCW 81/2021)

Attendance of the Official Receiver was excused (in HCCW 81/2021)

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
In re:

MODERN LAND (CHINA) CO., LTD.,

Debtor in a Foreign Proceeding.
-----X

FOR PUBLICATION

Chapter 15

Case No. 22-10707 (MG)

**REVISED MEMORANDUM OPINION GRANTING
MOTION FOR RECOGNITION AND RELATED RELIEF**

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MARTIN GLENN
CHIEF UNITED STATES BANKRUPTCY JUDGE

This case raises the important questions of whether and when, under Chapter 15 of the Bankruptcy Code, a bankruptcy court may recognize and enforce a scheme of arrangement sanctioned by a court in the Cayman Islands, the debtor's place of incorporation, that modifies or discharges New York law governed debt. The Debtor here is a holding company for a large group of businesses, most of which are incorporated in the Cayman Islands or the British Virgin Islands ("BVI"), but that conduct most or all of their business in the People's Republic of China ("PRC"). Based on the UNCITRAL Model Law on Cross-Border Insolvency, Chapter 15 adopts the center of main interest ("COMI") concept, permitting recognition of a foreign proceeding in a debtor's center of main interest (a "foreign main proceeding") or, alternatively, recognition of a "foreign nonmain proceeding" in a place where the debtor maintains an "establishment." While the statute establishes a presumption that a debtor's COMI is its place of incorporation, the presumption can be overcome where other factors support finding the COMI to be elsewhere. Should this Debtor's Cayman sanctioned Scheme be recognized and enforced by this Court? On the facts of this case, the Court concludes the answer is yes. For the reasons explained below, this Court **GRANTS** the Motion recognizing the Cayman Proceeding as a foreign main proceeding and recognizing and enforcing the Scheme.

I. BACKGROUND

A. The Motion for Recognition and Enforcement

Pending before the Court is the *Motion for (I) Recognition of a Foreign Main Proceeding, (II) Recognition of a Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (the "Motion," ECF Doc. # 4), filed by Mr. Zhang Peng, in his capacity as the authorized foreign representative (the "Foreign Representative") of Modern Land

(China) Co., Limited (the “Debtor”). A proposed recognition order is attached to the Motion as Exhibit A. (“Proposed Recognition Order,” ECF Doc. # 4-1.) The Debtor is the subject of a foreign proceeding (the “Cayman Proceeding”) concerning a scheme of arrangement (the “Scheme” or “Cayman Scheme”) between the Debtor and certain holders of the existing notes (the “Scheme Creditors”), under section 86 of the Cayman Islands Companies Act 2022 (the “Companies Act”) and currently pending before the Grand Court of the Cayman Islands (the “Cayman Court”).

The following declarations were filed in support of the Motion: (i) a declaration of the Foreign Representative (“Peng Declaration,” ECF Doc. # 5); (ii) a declaration of the Debtor’s Cayman Islands counsel, Caroline Moran (“Ms. Moran”) (ECF Doc. # 6); and (iii) the Foreign Representative’s statements required by section 1515(c) of the Bankruptcy Code and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure (ECF Doc. # 3). The Foreign Representative also filed supplemental briefing addressing the *In the Matter of Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686 (“Rare Earth Briefing,” ECF Doc. # 12) and *In the Matter of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)*, HCMP 644/2022, [2022] HKCFI 1789 (“Global Brands Briefing,” ECF Doc. # 19.)

The objection deadline was set for June 29, 2022, at 4:00 p.m. (See ECF Doc. # 9). There were no objections filed in response to the Motion. The hearing to sanction the Scheme by the Cayman Court was scheduled for July 5, 2022, at 11:00 a.m. (Motion ¶ 34.)

On July 5, 2022, the Debtor filed a supplemental declaration of Ms. Moran addressing the hearing to sanction the Scheme. (“Supplemental Moran Declaration,” ECF Doc. # 20.) Annexed to the Supplemental Moran Declaration as Exhibit A is a report of the scheme meeting held on

June 30, 2022 (ECF Doc. # 20-1) and as Exhibit B a copy of the order sanctioning the Scheme issued by the Cayman Court (“Sanction Order,” ECF Doc. # 20-2).

A hearing on the Motion was held on July 7, 2022. At the hearing, the Court directed the Foreign Representative’s counsel to file further supplemental briefing by July 12, 2022. On July 12, 2022, the Foreign Representative filed (i) a supplemental brief (“Supplemental Brief,” ECF Doc. # 23), (ii) a second declaration by the Foreign Representative (“Supplemental Peng Declaration,” ECF Doc. # 24), and (iii) a third declaration by Ms. Moran (“Third Moran Declaration,” ECF Doc. # 25).

B. The Debtor’s Business Operations and Preexisting Capital Structure

On June 28, 2006, the Debtor was incorporated in the Cayman Islands under the Companies Act as an exempted company with limited liability. (Motion ¶ 6.) The Debtor is the ultimate holding company of a group of companies comprising the Debtor and its subsidiaries, including the following: Great Trade Technology Ltd., a holding company incorporated with limited liability in the BVI; the Modern Land HK Companies; and Jiu Yun Development Co., Ltd., a holding company incorporated with limited liability in Hong Kong (collectively with Great Trade Technology Ltd., the Modern Land HK Companies, and together with the Debtor, the “Company”), that carries out real estate investment and development in the PRC and the United States. (*Id.* ¶ 7.) The Company is a property developer focused on eco-friendly residences in the PRC with four product lines: MOMA; Modern Eminence MOMA; Modern Horizon MOMA; and Modern City MOMA. (*Id.* ¶¶ 8, 10.)

As of June 30, 2021, the Company had a contracted sales gross floor area of 2.08 million square meters and aggregate unsold gross floor area of 16.77 million square meters in the PRC.

(*Id.* ¶ 11.) During the first half of 2021, the Company purchased a total of 20 new projects with an aggregate gross floor area of 3.56 million square feet. (*Id.*)

The Debtor's shares have been listed on the Stock Exchange of Hong Kong Limited since July 12, 2013. (*Id.* ¶ 9.) As of December 31, 2021, the authorized share capital of the Debtor was \$80 million divided into eight billion ordinary shares of a par value of \$0.01 each, of which 2.79 billion of the ordinary shares were issued and fully paid.¹ (*Id.*) As of June 30, 2021, the Company's total indebtedness was \$4.32 billion, including: (i) short-term borrowings of \$972.33 million; (ii) long-term borrowings of \$1.92 billion; and (iii) bonds payable of \$1.42 billion. (*Id.* ¶ 12.) Additionally, as of June 30, 2021, the Company's contingent liabilities amounted to \$2.57 billion. (*Id.*)

As part of the Company's \$1.42 billion of bonds payable, the total principal amount outstanding under the existing notes ("Existing Notes") is \$1.34 billion. (*Id.* ¶ 13.) The Existing Notes are the subject of the Scheme with each series of notes issued by the Debtor having different maturity dates and different interest rates. (*Id.* ¶¶ 13–14.) The remaining indebtedness is not being restructured and will be unaffected by the Scheme and this Chapter 15 case. (*Id.* ¶ 14.) As of June 30, 2021, the Debtor's current assets amounted to \$12.49 billion on a consolidated basis² and these assets were located in the PRC and the United States. (*Id.* ¶ 15.) Some of the assets were pledged to secure certain banking and other facilities granted to the Company and mortgage loans granted to buyers of sold properties. (*Id.*)

¹ All dollar amounts are calculated in USD.

² As of June 30, 2021, the Company's current assets consist of the following: a) inventory of \$145.79 million; b) properties under development for sale of \$6.92 billion; c) properties held for sale of \$895 million; d) trade and other receivables of \$1.78 billion; e) amount due from related parties of \$129.27 million; f) restricted cash of \$570.69 million; and g) bank balances and cash of \$2.06 billion. (Motion ¶ 15.)

C. The Cayman Proceeding

Market concerns over the operations of Chinese property developers were intensified due to reduced lending for real estate development, the impact of COVID-19 on macroeconomic conditions, and certain negative credit events. (*Id.* ¶ 18.) These conditions led the Company to experience liquidity pressures due to limited access to external capital to refinance debt and reduced cash generated from sales. (*Id.*) The Company failed to meet two repayments arranged for October 2021 and February 2022 which constituted events of default. (*Id.*) These amounts remain unpaid. (*Id.*)

On October 26, 2021, the Debtor appointed Sidley Austin LLP as its legal advisor. (*Id.* ¶ 20.) On November 5, 2021, the Debtor appointed Houlihan Lokey (China) Limited as its financial advisor. (*Id.*) The Company commenced discussions with the ad hoc group of holders of the Existing Notes, who are advised by Kirkland & Ellis LLP. (*Id.* ¶ 19.)

On February 25, 2022, after negotiations with the ad hoc group, the Debtor entered into a restructuring support agreement (the “RSA”) with the Scheme Creditors. (*Id.* ¶ 21; *see also* Peng Decl., Ex. A.) As of May 31, 2022, certain Scheme Creditors holding \$1,083,272,000 of the Existing Notes—representing 80.75% of the aggregate outstanding principal amount of all Existing Notes—had agreed to the RSA. (Motion ¶ 24.)

On April 14, 2022, the Debtor filed a petition (the “Scheme Petition,” ECF Doc. # 6-1) with the Cayman Court commencing the Cayman Proceeding, seeking an order that (i) directed the Company to convene a meeting on the Scheme for a single class of creditors only (the “Scheme Meeting”), (ii) requested a convening hearing (the “Convening Hearing”), and (iii) sought the appointment of the Foreign Representative. (*Id.* ¶ 32.) Following the Convening Hearing on May 31, 2022, the Cayman Court entered the order (the “Convening Order”)

scheduling the Scheme Meeting for June 29, 2022, scheduling the Sanction Hearing for July 5, 2022, and appointing the Foreign Representative. (*Id.* ¶ 34; Peng Decl., Ex. B.)

The Convening Order states that Scheme Creditors will be notified properly of the Scheme Meeting and will have the opportunity to raise questions and objections to the Scheme at the Scheme Meeting and/or at the Sanction Hearing. (Motion ¶ 37; Peng Decl., Ex. B.) At the Scheme Meeting, a vote will be held to determine whether the Scheme Creditors that are present and voting in person or by proxy will approve the Scheme. (Motion ¶ 38.) If a majority of creditors representing at least seventy-five percent in value of the Scheme Creditors present and voting at the Scheme Meeting votes in favor of the scheme, the Scheme is approved.³ (*Id.*)

D. Description of the Scheme and Issuance of New Notes

The Scheme's effect will be to release the Scheme Creditors' claims related to the Existing Notes documents. (*Id.* ¶ 26.) In return, each Scheme Creditor will receive a pro rata share of the following consideration (the "Scheme Consideration"): cash consideration of \$22.916 million; and the new notes ("New Notes"), in an aggregate principal amount equal to the sum of (i) 98.3% of the outstanding principal amount of the Existing Notes held by the Scheme Creditors; and (ii) accrued and unpaid interest up to but excluding the day the restructuring becomes effective (the "Restructuring Effective Date"). (*Id.*) This will enable the Company to restructure its existing indebtedness under the Existing Notes. (*Id.* ¶ 28.) The Debtor will also be issuing the New Notes on the Restructuring Effective Date. (*Id.*)

On the Restructuring Effective Date, following the distribution of the Scheme Consideration and the issuance of the New Notes, all outstanding Existing Notes will be

³ As detailed in Section I.G., below, the Scheme Creditors voted overwhelmingly to approve the Scheme—99% in number and 94.8% in amount. No objections to the Scheme were raised either in connection with the Cayman sanction hearing or this Court's recognition hearing.

canceled and all guarantees in connection with the Existing Notes will be released. (*Id.* ¶ 29.) Additionally, the Scheme provides for releases by Scheme Creditors of any claim related to the restructuring against the Debtor and its affiliates. (*Id.* ¶ 30.) If the Scheme is approved by the requisite majorities of creditors and sanctioned by the Cayman Court with a sealed copy of the Sanction Order filed with the Cayman Islands Registrar of Companies, the Scheme will then bind all Scheme Creditors regardless of how, or if, they voted. (*Id.* ¶ 31.)

E. Rare Earth Briefing

On June 6, 2022, the High Court of the Hong Kong Special Administrative Region Court of First Instance (the “Hong Kong Court”) ruled in *In the Matter of Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686 (the “Rare Earth Opinion”). In dicta, the Rare Earth Opinion speculated that “recognition under Chapter 15 is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.” Rare Earth Opinion ¶ 36. The Rare Earth Opinion relies heavily upon this Court’s decision in *In re Agrokor d.d.*, 591 B.R. 163, 169 (Bankr. S.D.N.Y. 2018). Specifically, the Hong Kong Court points to this Court’s explanation that “Section 1520(a)(1) provides that the automatic stay will apply to all the debtor’s property *that is located within the territorial jurisdiction of the United States.*” Rare Earth Opinion ¶ 35 (citing *In re Agrokor*, 591 B.R. at 187). From this statement, the Hong Kong Court concludes that “[r]ecognition does not appear as a matter of United States’ law to discharge the debt.” *Id.* ¶ 36.

On June 17, 2022, the Debtor filed the Rare Earth Briefing noting that the Hong Kong Court’s statements principally rely on the application of United States law. (Rare Earth Briefing ¶ 8.) The Debtor notes that a federal court’s Chapter 15 order that recognizes a discharge of New York law governed debt granted in a foreign proceeding is a complete and valid discharge of that debt as a matter of United States law. (*Id.* ¶ 9.) The Debtor asserts that because the

Proposed Recognition Order recognizes a discharge to the extent granted in the foreign Cayman Proceeding, it serves as a complete and valid discharge of the Existing Notes, which are governed by New York law, as a matter of New York state law. (*Id.*)

This is a critically important issue. The Scheme in this case, and in many other scheme or restructuring plan cases, modifies or discharges existing debt and related guarantees governed by New York law, and provides for the issuance of new debt and guarantees governed by New York law. An indenture trustee will only take the actions authorized by the scheme or plan if enforceable orders have been entered by the foreign court and a Chapter 15 court.

With great respect for the Hong Kong court in *Rare Earth*, that court misinterprets this Court's earlier decision in *Agrokor*, as well as many other decisions in the United States which have recognized and enforced foreign court sanctioned schemes or restructuring plans that have modified or discharged New York law governed debt. Provided that the foreign court properly exercises jurisdiction over the foreign debtor in an insolvency proceeding, and the foreign court's procedures comport with broadly accepted due process principles, a decision of the foreign court approving a scheme or plan that modifies or discharges New York law governed debt is enforceable. Under U.S. law, that is an unremarkable proposition that has been firmly established in the U.S. at least since the Supreme Court decision in *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527 (1883), which granted international comity and enforced a Canadian scheme that discharged New York law governed debt and provided for the issuance of new debt governed by New York law. As Chief Justice Waite said in *Gebhard*, "the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries." *Id.* at 548. Chapter 15 limits a U.S. bankruptcy court's authority

to enjoin conduct outside the territorial jurisdiction of the United States, but it does not make a discharge of New York law governed debt any less controlling.

To be clear, in recognizing and enforcing the Scheme in this case, the Court concludes that the discharge of the Existing Notes and issuance of the replacement notes is binding and effective.⁴

F. The Global Brands Briefing

1. The Debtor Does Not Intend or Expect to Seek Recognition of the Scheme or any Chapter 15 Order of this Court in Hong Kong

The Court entered an order on June 27, 2022 (ECF Doc. # 18) requiring the Foreign Representative to file a supplemental brief addressing another recent Hong Kong court judgment, *In the Matter of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)*, HCMP 644/2022, [2022] HKCFI 1789 (“*Global Brands*”). The court in *Global Brands* stated that, in the future, recognition and enforcement by the Hong Kong court of schemes sanctioned in the Cayman Islands and BVI depended upon common law principles developed by Hong Kong courts that would ordinarily apply a center of main interests test rather than the place of incorporation as had been done in the past. Because the Debtor and its affiliates conduct their business in the PRC, and the Debtor’s common stock trades on the Stock Exchange of Hong Kong Limited, this Court wanted to know whether the Debtor intends to seek recognition and enforcement in Hong Kong of the Cayman Scheme and of any order of this Court recognizing and enforcing the Cayman Scheme. In short, the Foreign Representative’s answer is that the Debtor does not intend or expect to seek

⁴ What *Agrokor* discussed at length (and will not be repeated here) is that English and some commonwealth courts continue to apply the *Gibbs* Rule, based on an 1890 decision of the Court of Appeal in *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, which refuses to recognize a discharge or modification of English law governed debt approved by a court outside of England. See *Agrokor*, 591 B.R. at 192–96.

recognition and enforcement of the Scheme or this Court's order recognizing and enforcing the Scheme in Hong Kong.

Given that the Existing Notes are issued by a Cayman Islands entity and are governed by New York law, the Foreign Representative submits that the implementation and effectuation of a Cayman Islands scheme of arrangement and recognition and enforcement of the scheme under Chapter 15 of the Bankruptcy Code are all that is required to effectuate the Restructuring. (Global Brands Briefing ¶ 5.) Further, the Foreign Representative notes that the solely affected creditors, the holders of the Existing Notes, also agree with this position. (*Id.* ¶ 6.) The RSA and the Scheme documents, which were negotiated at arm's-length with sophisticated creditors represented by able counsel, do not require recognition of the Scheme in Hong Kong. (*Id.*)

2. The Scheme Can Become Effective Without Recognition in Hong Kong

According to the Foreign Representative, nothing in the RSA or in any of the Scheme documents necessitates or requires recognition and/or enforcement of the Scheme by the Hong Kong Court for the Scheme to be effective. (*Id.* ¶ 8.) Under the terms of the Scheme, once the Cayman Court sanctions the Scheme and the Sanction Order has been delivered to the Cayman Companies Registrar, the Scheme will become effective. (*Id.*) The Foreign Representative notes that the restructuring will ultimately become effective upon entry of the Sanction Order by the Cayman Court and the Proposed Recognition Order by this Court. (*Id.*) Further, the Foreign Representative argues that this Court does not need to consider whether the Scheme would be recognized and enforced in Hong Kong in making its determination whether to recognize and enforce the Scheme pursuant to section 1521 of the Bankruptcy Code. (*Id.* ¶ 9.) This argument relies on the *Agrokor* case, where this Court enforced the modification of both English law and New York law-governed debts pursuant to a Croatian insolvency proceeding, even though

jurisdictions following the *Gibbs* Rule may not have treated the modification of English law-governed debts as effective. (*Id.* ¶ 10.)

3. Global Brands is Distinguishable

The Foreign Representative believes it is unlikely that a court in Hong Kong will be asked to consider whether the Scheme is effective in Hong Kong. (*Id.* ¶ 15.) The Foreign Representative does not intend to seek relief in Hong Kong or to obtain any assets located in Hong Kong, and they argue the risk of a dissenting Scheme Creditor seeking enforcement of the Existing Notes in Hong Kong is de minimis. (*Id.*) It is, of course, for the Debtor to decide whether to seek recognition and enforcement in Hong Kong, and for Hong Kong Court to decide whether to recognize and enforce the Scheme if the issue is presented by the Debtor or any other party that has standing to raise the issue in Hong Kong.

G. The Outcome of the Cayman Proceeding

Ms. Moran notes that the Scheme Creditors overwhelmingly approved the Scheme in the required majorities. (Supp. Moran Decl. ¶ 4.) Ms. Moran states that there were 372 creditors who voted (and one creditor that abstained), with over 99% (370) of those voting to support the Scheme. (*Id.*) Further, the supporting creditors represented 94.78% (\$1,271,425,000) of the total principal amount outstanding under the Existing Notes. (*Id.*) Only two creditors voted against the Scheme representing less than 1.23% (\$16,319,000) of the total principal amount outstanding under the Existing Notes. (*Id.*)

On July 5, 2022, the Cayman Court presided over the Sanction Hearing and found that the Scheme satisfied the requisite elements to be sanctioned. (*Id.* ¶ 7.) Ms. Moran notes that no creditor raised any objection during the Sanction Hearing. (*Id.*) The Cayman Court entered the Sanction Order which sanctions and approves consummation of the Scheme and authorizes and effectuates the Scheme Restructuring. (*Id.* ¶ 8.)

H. Supplemental Briefs

A hearing on the Motion was held on July 6, 2022. (“Transcript,” ECF Doc. # 21.) The Court expressed its concerns regarding the Debtor’s COMI and, with respect to possible recognition as a foreign nonmain proceeding, whether the Debtor established that it was engaged in “non-transitory activity.” (Transcript at 45:6–24.) Counsel to the Foreign Representative filed the Supplemental Brief on July 12, 2022.

The Debtor asserts that it’s COMI is in the Cayman Islands because it is, and publicly identifies as, a Cayman-incorporated company. (Supp. Brief ¶ 1.) The Foreign Representative states that the Debtor’s historical corporate counsel is a Cayman Islands law firm, Conyers Dill & Pearman, which provided general corporate advice on the issuance of the Existing Notes. (*Id.* ¶ 2.) The offering memoranda for the Existing Notes make clear that the Debtor is a Cayman entity. (*Id.* ¶ 3.) The Debtor notes that when it first defaulted under the Existing Notes, BFAM Asian Opportunities Master Fund, LP (“BFAM,”) issued a “statutory demand” (the “Statutory Demand”) against the Debtor, threatening a winding up petition that would be filed under the laws of the Cayman Islands. (*Id.* ¶ 4.) The Statutory Demand prompted the restructuring negotiations and the RSA. (*Id.* ¶ 5.)

1. Insolvency Procedures in the Cayman Islands

The Debtor notes that liquidation of a Cayman Islands incorporated company is required to be implemented pursuant to Cayman law through insolvency practitioners appointed by the Cayman Court. (*Id.* ¶ 5 (citing Third Moran Decl. ¶¶ 16–18).) The Cayman courts generally do not recognize a non-Cayman Islands liquidation as being capable of liquidating and dissolving a Cayman Islands company. (*Id.* (citing Third Moran Decl. ¶¶ 18–23).)

The Foreign Representative notes that most of the Restructuring-related activities took place in the Cayman Islands. (Supp. Peng Decl ¶ 6.) Maples and Calder (Cayman) LLP

(“Maples”), the Debtor’s Cayman counsel since November 2021, advised the Debtor with respect to practical elements of the Restructuring during negotiations of the RSA. (Third Moran Decl. ¶ 25.) The RSA put Scheme Creditors on notice that the proceeding to sanction the Scheme would occur in the Cayman Islands. (Supp. Brief ¶ 8.) The Debtor completed each of the steps needed to sanction the Scheme by the Cayman Court. (Supp. Peng Decl. ¶ 10.) These steps included holding the Scheme Meeting in the Cayman Islands that was chaired by an individual who resides in the Cayman Islands and was engaged directly by the Debtor for the purposes of the Scheme Meeting. (Third Moran Decl. ¶ 25.) The chairman of the Scheme Meeting held proxies for the majority of the Scheme Creditors and attended and voted at the meeting in the Cayman Islands on their behalf. (*Id.*)

2. Debtor’s Arguments in Favor of Foreign Main

The Debtor relies on the Scheme Creditor’s expectations that the Debtor’s COMI is the Cayman Islands. (Supp. Brief ¶ 11.) The Debtor notes that creditor expectations were formed via the publicly available descriptions of the Debtor in (i) the offering memoranda of the Existing Notes that stated that “an insolvency proceeding relating to us, even if brought in the United States, would likely involve Cayman Islands insolvency law” and (ii) the Debtor’s press releases, pointing to the Debtor as a company “incorporated in the Cayman Islands.” (*Id.*) The Debtor notes that creditor expectations were reinforced by certain actions including: (i) BFAM’s negotiations related to the Restructuring by issuing the Statutory Demand and threatening a Cayman Islands winding up petition and (ii) the RSA contemplating an insolvency proceeding in the Cayman Islands. (*Id.*)

The Debtor notes that no Scheme Creditor—including the two Scheme Creditors that voted against the Scheme—objected to the Debtor’s COMI being in the Cayman Islands. (*Id.* ¶

12.) The Debtor argues that the consensus of those affected by the Scheme points in favor of a Cayman COMI. (*Id.*)

The Debtor notes that Cayman Islands law requires that liquidation proceedings of Cayman Islands-incorporated companies take place in the Cayman Islands under the supervision of a Cayman Islands-appointed liquidator. (*Id.* ¶ 13.) This requirement was made clear in the documents related to the issuance of the Existing Notes.⁵ (*Id.*)

The Debtor maintains its registered office in the Cayman Islands to which all communications may be addressed, and where matters such as the administration of annual filings and the payment of annual fees with the Cayman Registrar are dealt with. (*Id.* ¶ 14.) The Debtor is also required to maintain statutory registers of members (*i.e.*, shareholders), mortgages and charges, and directors in the Cayman Islands. (*Id.*)

The Debtor is also tied to the Cayman Islands by way of its asset holdings and the location of certain creditors. (*Id.* ¶ 15.) Nearly half of the Debtor’s wholly owned direct subsidiaries are Cayman entities. (*Id.*) Additionally, the Debtor identified at least 35 entities—representing a minimum of over half a billion dollars of the outstanding principal of the Existing

⁵ The Debtor’s argument is misleading. Neither the Debtor nor any of its creditors filed a winding up petition that would have resulted in the appointment by the Cayman court of one or more provisional liquidators, who are independent fiduciaries. See Cayman Companies Act §§ 94, 104. Rather, here, the Debtor filed the Scheme Petition under section 86 of the Cayman Companies Act, which does not by itself result in the appointment of JPLs. The benefit of a winding up order is that it enables the court in appropriate cases to issue a moratorium similar to our automatic stay preventing creditors from taking action to recover on their claims while the parties try to reach agreement on a scheme.

The Cayman court in this case issued the Convening Order appointing the Debtor’s president as the Foreign Representative and scheduling the Scheme Meeting. No JPLs were appointed, meaning that there was no independent fiduciary overseeing the process. The Debtor and its professionals had already negotiated the RSA and were proceeding rapidly to a consensual scheme of arrangement without the necessity of a winding up petition, JPLs and a moratorium.

In many Cayman cases where the debtor hopes to negotiate a scheme of arrangement, a winding up order and appointment of JPLs precedes the negotiation of the scheme. Such matters are often referred to as a “light touch” restructuring. See *In the Matter of Midway Resources Int’l*, Grand Court of the Cayman Islands, Cause Number: FSD 51 of 2021 (NSD) (Nicholas Segal J.) (30 March 2021), at [68] (“I am satisfied that this is an appropriate case in which the PLs should be appointed on a soft touch basis (although I would reiterate my plea to substitute ‘light-touch’ for ‘soft touch’, since the latter expression has always seemed to me to bring with it associations of someone being duped and defrauded!”).

Notes—that are domiciled in the Cayman Islands. (*Id.*) But it is undisputed that despite its domicile in the Cayman Islands, the Debtor and its affiliates are managed and conduct their business in the PRC.

Finally, the Debtor’s restructuring activities have been centralized in the Cayman Islands and undertaken by Cayman Islands actors. (*Id.* ¶ 16.) These activities include: (i) Maples advising the Debtor on all aspects of the Restructuring, including the terms of the RSA, the Practice Statement Letter, the Explanatory Statement, and all Cayman Court documents; (ii) preparing for and appearing at hearings in front of the Cayman Court in the Cayman Islands; (iii) the convening of the Scheme Meeting by the Cayman Court; and (iv) the Scheme Meeting, which was chaired by an individual who resides in the Cayman Islands, was engaged directly by the Debtor for the purposes of the Scheme Meeting, and who held proxies for the majority of the Scheme Creditors and attended and voted at the Scheme Meeting in the Cayman Islands on their behalf. (*Id.*) The Debtor notes that its board of directors did not host meetings that were physically located in the Cayman Islands during the restructuring due to international travel restrictions and changes in business practices resulting from the COVID-19 pandemic. (*Id.*)

The Debtor also argues that it was not necessary for its Cayman counsel or its Scheme Chairperson to wrest control of the Debtor from its previously existing management or take possession of its property like a joint provisional liquidator (“JPL”). (*Id.*) The Debtor asserts that such activities are not required or appropriate in a consensual scheme of arrangement. (*Id.*) A scheme of arrangement, by its nature, is driven by negotiation and compromises between a company and its creditors. (*Id.*) The Debtor argues that holding scheme chairpersons to the same standard as a JPL would create a perverse incentive for companies to enter into liquidations rather than a value maximizing, consensual resolution with their creditors via a scheme of

arrangement.⁶ (*Id.*) The Debtor argues that this would dictate that the restructuring activities in liquidations, but not schemes, would merit recognition under Chapter 15. (*Id.*)

3. Foreign Nonmain Arguments

The Debtor asserts that it has substantial connections to the Caymans including issuing debt and holding assets in the Caymans, retaining counsel and employing professionals in the Caymans, and holding itself as an entity that could only be liquidated effectively in the Caymans. (*Id.* ¶ 19.) The Debtor argues that this is sufficient to find that the Debtor has non-transitory business connections with the Caymans. (*Id.*) The Debtor notes that its maintenance of a registered office in the Cayman Islands, compliance with the corporate formalities required to maintain its status as a Cayman entity, and representations to creditors that it is a Cayman-incorporated entity also support finding non-transitory connections with the Caymans. (*Id.*)

The Debtor also argues that the alternative to recognition of the Cayman Proceeding is to potentially deny the Debtor the ability to implement a consensual restructuring and force the Debtor into a Cayman liquidation. (*Id.* ¶ 20.) The Debtor argues that it would leave all parties in a worse position. (*Id.*)

II. LEGAL STANDARD

A. **Foreign Main Proceeding**

To obtain recognition, the foreign proceeding must be either a foreign main or foreign nonmain proceeding. 11 U.S.C. § 1517(a)(1). Under section 1502(4) of the Bankruptcy Code, the term “foreign main proceeding” means “a foreign proceeding pending in the country where

⁶ Ms. Moran notes that a company would seek the appointment of JPLs and avail of the stay afforded by section 97(1) of the Companies Act to facilitate a restructuring if: (a) there were issues with the propriety of actions taken by management, with a view to suspending the powers of the directors and/or (b) the scheme of arrangement was contentious including where there is a risk that minority creditor(s) might seek to frustrate the restructuring through the presentation of a winding up petition. (Third Moran Decl. ¶ 7.)

the debtor has the center of its main interests.” 11 U.S.C. § 1502(4); *see, e.g., In re Ocean Rig UDW Inc.*, 570 B.R. 687, 702 (Bankr. S.D.N.Y. 2017) (recognizing foreign main proceeding); *In re Suntech Power Holdings Co.*, 520 B.R. 399, 416–17 (Bankr. S.D.N.Y. 2014) (recognizing foreign main proceeding); *see also Morning Mist Holdings Ltd. v. Kryz (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 138 (2d Cir. 2013) (hereinafter “*Fairfield Sentry*”) (affirming recognition of foreign main proceeding). A Chapter 15 debtor’s COMI is determined as of the filing date of the Chapter 15 petition, without regard to the debtor’s historic operational activity. *See Fairfield Sentry*, 714 F.3d at 137 (“[A] debtor’s COMI should be determined based on its activities at or around the time the chapter 15 petition is filed, as the statutory text suggests.”).

The Bankruptcy Code establishes that “[i]n the absence of evidence to the contrary, the debtor’s registered office . . . is presumed to be the center of the debtor’s main interests.” 11 U.S.C. § 1516(c). However, this presumption can be overcome. *See, e.g. ABC Learning*, 445 B.R. 318, 328 (Bankr. D. Del. 2010); *aff’d*, 728 F.3d 301 (3d Cir. 2013) (stating that “the COMI presumption may be overcome particularly in the case of a ‘letterbox’ company not carrying out any business” in the country where its registered office is located); *In re Basis-Yield Alpha Fund (Master)*, 381 B.R. 37, 51–54 (Bankr. S.D.N.Y. 2008) (concluding that the absence of objections to COMI were not binding; the court must make an independent determination of COMI).

Courts consider several additional factors to determine whether the COMI presumption has been overcome, including: “the location of the debtor’s headquarters; the location of those who actually manage the debtor . . . the location of the debtor’s primary assets; the location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.” *In re Sphinx, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006). In *Sphinx*, this court explained that these factors

should not be applied “mechanically”; rather, “they should be viewed in light of Chapter 15’s emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor’s value.” *Id.*; *see also Fairfield Sentry*, 714 F.3d at 137 (explaining that “consideration of these specific factors is neither required nor dispositive” and warning against mechanical application). The *SphinX* court also noted that “because their money is ultimately at stake, one generally should defer . . . to the creditors’ acquiescence in or support of a proposed COMI.” 351 B.R. at 117.

The Second Circuit and other courts often examine whether a Chapter 15 debtor’s COMI would have been ascertainable to interested third parties, finding “the relevant principle is that the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties. Among other factors that may be considered are the location of headquarters, decision-makers, assets, creditors, and the law applicable to most disputes.” *Fairfield Sentry*, 714 F.3d at 130. As the Second Circuit explained, by examining factors “in the public domain,” courts are readily able to determine whether a debtor’s COMI is in fact “regular and ascertainable [and] not easily subject to tactical removal.” *Id.* at 136–37; *see also In re British Am. Ins. Co.*, 425 B.R. 884, 912 (Bankr. S.D. Fla. 2010) (“The location of a debtor’s COMI should be readily ascertainable by third parties.”); *In re Betcorp Ltd.*, 400 B.R. 266, 289 (Bankr. D. Nev. 2009) (looking to ascertainability of COMI by creditors).

If a debtor’s COMI has “shifted” prior to filing its Chapter 15 petition, courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith. *See Fairfield Sentry*, 714 F.3d at 138 (concluding that “a court may look at the period between the commencement of the foreign proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith The factors that a court may consider in

the analysis are not limited and may include the debtor's liquidation activities"). Courts ask whether there is evidence pointing to any "insider exploitation, untoward manipulation, [and] overt thwarting of third-party expectations" that would support denying recognition. *Id.*; see also *Ocean Rig*, 570 B.R. at 687 (granting recognition of foreign main proceeding where debtors shifted COMI from jurisdiction that only provided a liquidation option to jurisdiction that permitted reorganization, taking steps to shift COMI beginning one year before the foreign filing and where notice was given to creditors throughout the process of shifting COMI). The court in *Suntech* noted how "[A] debtor's COMI is determined as of the time of the filing of the Chapter 15 petition," but, "[t]o offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." 520 B.R. at 416. Various factors could be relevant, such as "the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *Id.*

In *Suntech*, the debtor's presumptive COMI was the Cayman Islands, where it was incorporated, however, the Cayman Islands was not its actual COMI when the Foreign Proceeding was commenced. *Id.* Notably, the *Suntech* debtor did not conduct any activities in the Cayman Islands, and maintained its principal executive offices in Wuxi, China from where it managed the Suntech Group. *Id.* So, the issue was whether the debtor's COMI should be measured at the time of the commencement of the Chapter 15 case or when the Foreign Proceeding was commenced. *Id.* But in *Suntech*, the Cayman Court appointed JPLs and

authorized them to exercise a host of additional powers (including acts on behalf of the debtor, possession of its property and collect all debts, dealing with all questions relating to or affecting the assets or the restructuring etc.) *Id.* at 417–18. The JPLs assumed control of the debtor’s affairs, met with employees and creditors, opened a bank account in the Cayman Islands funded with transfers from one of the debtor’s other accounts, and filed claims. *Id.* The *Suntech* court found the debtor’s COMI on the date of the commencement of the chapter 15 case was the Cayman Islands and the JPLs did not manipulate the debtor’s COMI in bad faith. *Id.* Therefore, the court overruled a creditor’s objection to finding the debtor’s COMI to be in the Cayman Islands.

The *Suntech* court’s analysis and conclusion that COMI was in the Cayman Islands was consistent with the Second Circuit’s analysis in *Fairfield Sentry*. In both cases, court-appointed fiduciaries assumed substantial control over the debtors’ liquidation (in the case of *Fairfield Sentry*) and scheme proceeding (in the case of *Suntech*). So, the question is whether the absence of court-supervised fiduciaries, such as JPLs, requires a different result in finding COMI in the Cayman Islands in this case given that no JPLs were appointed. While this would be an easier case if JPLs had been appointed, the Court concludes that the Cayman court’s supervision of the Debtor’s Scheme Proceeding, in light of the other factors present here, is enough for the Court to conclude that the Debtor’s COMI for the proceeding involving the single class of Existing Note holders was in the Cayman Islands.⁷

⁷ It would be ironic if a scheme proceeding, following the appointment of JPLs in a contentious case where JPLs were needed to facilitate agreement between the debtor and its creditors, was recognized as a foreign main proceeding, but in a case such as this one where the Debtor and its professionals successfully negotiated the RSA with overwhelming creditor support without the need to file a winding up petition and the appointment of JPLs before obtaining sanction of the Scheme could not be recognized as a foreign main proceeding.

B. Foreign Nonmain Proceeding

The Foreign Representative’s counsel argues, in the alternative, that the Scheme Proceeding satisfies the requirements to be a foreign nonmain proceeding. Recognition and enforcement can be granted as discretionary relief under sections 1507 and 1521 of the Bankruptcy Code even in a nonmain proceeding. The Court concludes that the Scheme Proceeding was not a foreign nonmain proceeding.

Courts recognize a foreign proceeding as a “foreign nonmain proceeding” if “the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.” 11 U.S.C. § 1517(b)(2). Section 1502(2) defines “[e]stablishment” as “any place of operations where the debtor carries out a nontransitory economic activity.” 11 U.S.C. § 1502(2); *see also In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 70 (Bankr. S.D.N.Y. 2011), *aff’d* 474 B.R. 88 (S.D.N.Y. 2012) (“*Millennium Glob. F*”). Additionally, courts have required proof of more than a “mail-drop presence” to satisfy the establishment requirement. *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 277 (Bankr. S.D.N.Y. 2019) (“*Constellation F*”) (citation omitted). Due to the “paucity of U.S. authority” on this question, the court in *Millennium Glob.* I cited a “persuasive” English law holding that the presence of an asset and minimal management or organization can create a debtor establishment. 458 B.R. at 84–85 (citing *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005)).

Whether the debtor has an “establishment” in a country is determined at the time of filing the Chapter 15 petition. *See Beveridge v. Vidunas (In re O’Reilly)*, 598 B.R. 784, 803 (Bankr. W.D. Pa. 2019). Several factors “contribute to identifying an establishment: the economic impact of the debtor’s operations on the market, the maintenance of a ‘minimum level of

organization’ for a period of time, and the objective appearance to creditors whether the debtor has a local presence.” *Millennium Glob. I*, 458 B.R. at 32. See *In re Creative Fin., Ltd.*, 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016) (citing *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007)) (finding that an “establishment” requires a “showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property.”) This is evidenced by engagement of “local counsel and commitment of capital to local banks.” *Millennium Glob. I*, 458 B.R. at 86–67. See also *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1028 (5th Cir. 2010) (If a foreign “bankruptcy proceeding and associated debts [themselves] . . . demonstrate an establishment . . . [t]here would be no reason to define establishment as engaging in a nontransitory economic activity. The petition for recognition would simply require evidence of the existence of the foreign proceeding.”); *Rozhkov v. Pirogova (In re Pirogova)*, 612 B.R. 475, 484 (S.D.N.Y. 2020) (finding that a foreign insolvency proceeding on its own cannot suffice to count as nontransitory economic activity in support of recognition as a foreign nonmain proceeding.)

III. DISCUSSION

For the reasons outlined below, the Court **GRANTS** the Motion for recognition of the Cayman Proceeding as a foreign main proceeding. The Court does not explicitly address the following aspects of the Motion because they are uncontroversial and satisfied by the uncontested facts: (i) whether the Debtor meets the eligibility requirements under section 109(a) of the Bankruptcy Code; (ii) whether the Cayman Proceeding is a foreign proceeding as defined in section 101(23) of the Bankruptcy Code; (iii) whether the Cayman Proceeding has been commenced by a duly authorized foreign representative; (iv) whether the Scheme Petition meets the requirements of section 1515 of the Bankruptcy Code; (v) whether the Debtor is entitled to

additional relief under section 1521 of the Bankruptcy Code; (vi) whether the Scheme is procedurally fair; (vii) whether the interests of creditors and other interested parties are sufficiently protected; (viii) whether the Foreign Representative is entitled to additional relief under section 1507 of the Bankruptcy Code; and (ix) whether recognition of the foreign proceeding is contrary to the public policy of the United States.

A. Recognition is Not Warranted as a Foreign Nonmain Proceeding.

The Court finds that recognition of the Cayman Proceeding as a foreign nonmain proceeding is not warranted because recognition would be inconsistent with the goals of foreign nonmain proceedings. Further, neither the bankruptcy proceeding itself nor the Debtor's bookkeeping activities constitute nontransitory economic activity, and the Debtor does not otherwise affect the local marketplace in the Cayman Islands.

1. Recognition as a Nonmain Proceeding Would Be Inconsistent with the Goals of UNCITRAL Model Law

The Court declines to recognize the Cayman Proceeding as a foreign nonmain proceeding because such a recognition would not comport with the stated goals of foreign nonmain proceedings. The UNCITRAL Model Law on Cross-Border Insolvency explains that in a foreign nonmain proceeding, "the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding." UNITED NATIONS, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, 12 (2014) (the "GUIDE"). The GUIDE further explains that "[u]nlike 'foreign main proceeding,' there is no presumption with respect to the determination of establishment . . . [t]he commencement of insolvency proceedings, the existence of debts, and the presence alone of goods in isolation, of bank accounts, or of property would not in principle

satisfy the definition of establishment.” *Id.* at 47. These provisions support the administration of a restructuring proceeding by a single foreign court.

In the present case, the Cayman Scheme pertains to the Existing Notes held by the Scheme Creditors. (Motion ¶ 13.) The language of the UNCITRAL Model Law on Cross-Border Insolvency therefore requires, for the purposes of recognition of the Cayman Proceeding as a foreign nonmain proceeding, that the Existing Notes be assets in the Cayman Islands. However, this Court is not persuaded that the Existing Notes are assets within the meaning of Article 23, subsection 2 of the Model Law. As the GUIDE explains, “the existence of debts . . . would not in principle satisfy the definition of establishment.” GUIDE at 47.

2. There is Insufficient Evidence to Support a Finding of Nontransitory Economic Activity in the Caymans

The Cayman restructuring cannot itself constitute nontransitory economic activity to support recognition as a foreign nonmain proceeding. In *Lavie v. Ran*, 406 B.R. 277, 286–87 (S.D. Tex. 2009), the bankruptcy court explained that if “the proceeding and associated debts alone could suffice to demonstrate an establishment, it would essentially rule out the possibility that any proceeding would fall into the . . . category of proceedings that are neither foreign main nor foreign nonmain. But, this third category was clearly envisioned by the drafters.” Further, in *In re Pirogova*, 612 B.R. at 484, the court cited *Ran* and agreed that if “a foreign trustee could merely point to a foreign bankruptcy itself, which is subject to a recognition petition, as evidence of an establishment, the statutory requirements for recognition would be pointless.” The court in *Pirogova* denied recognition of a foreign nonmain proceeding despite the Debtor’s ownership of an apartment in Russia, her Russian utility bills, her vehicles in Russia, and her Russian yacht club membership, as well as the debtor’s ongoing bankruptcy proceeding in Russia. *Id.* at 480.

In the present case, the Debtor’s connections to the Cayman economy are far more tenuous than those discussed in *Pirogova*. The Debtor maintains a registered office in the Cayman Islands to which all communications may be addressed or served, and where the administration of annual filings and the payment of annual fees are registered. (Supp. Brief ¶ 1.) The Debtor also initiated the restructuring proceeding in its country of incorporation, the Cayman Islands. (*Id.*) However, the Debtor has been unable to point to any additional connections to the Cayman Islands that might constitute nontransitory economic activity, and therefore falls well short of the standards set in *Ran* and *Pirogova*.

3. The Debtor’s Business Activities Have No Local Effect on the Marketplace

The court explained the standard for nontransitory economic activity in *In re Creative Fin., Ltd.*, 543 B.R. at 520–21. There, the court explained that recognition required “a showing of a *local effect on the marketplace*, more than mere incorporation and record-keeping and more than just the maintenance of property.” *Id.* at 520 (emphasis added). In that case, the debtor, a foreign exchange trading business, was organized under the laws of the BVI, and admittedly engaged in bad-faith actions to pursue a restructuring proceeding there. *Id.* at 513. Nevertheless, the tenuous nature of the connection between the debtor’s business activities and the BVI marketplace supported the court’s denial of recognition as a foreign nonmain proceeding. *Id.* at 521.

In the present case, despite the absence of apparent bad faith, the Debtor similarly has a negligible effect on the local marketplace. The Debtor is a Cayman-incorporated investor and developer in real-estate that carries out its business in the PRC and maintains its books and records in the Cayman Islands. (*Id.* ¶¶ 6–7, 64.) However, the Debtor has not provided the Court evidence of “more than mere incorporation and record-keeping and more than just the

maintenance of property.” *In re Creative Fin., Ltd.*, 543 B.R. at 520. The failure to engage the local economy excludes the Debtor from a foreign nonmain classification.

B. Recognition Is Warranted as a Foreign Main Proceeding

The Court recognizes the Debtor’s COMI in the Cayman Islands. Section 1516(c) provides that “[i]n the absence of evidence to the contrary, the debtor’s registered office . . . is presumed to be the center of the debtor’s main interest.” 11 U.S.C. § 1516(c). Given the evidence in this case, the Court considers the totality of the circumstances before it, including the goals of Chapter 15, the Scheme Creditors’ expectations and intentions, the judicial role in the Cayman Scheme, the function of the Cayman Scheme Chairperson, the insolvency activities in the Caymans, Cayman choice of law principles and the Debtor’s good-faith petition for recognition of the Cayman Proceeding. Each of these factors function together to support a finding of COMI in the Cayman Islands.

1. Recognition as a Foreign Main Proceeding is Consistent with the Goals of Chapter 15

Recognition of the Cayman proceeding as a foreign main proceeding would comport with the goals of Chapter 15. In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 126, *aff’d*, 389 B.R. 325 (S.D.N.Y. 2008), the court explained that:

Unique to the Bankruptcy Code, Chapter 15 contains a statement of purpose: “[t]he purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency,” with the express objectives of cooperation between United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor’s assets; and the facilitation of the rescue of financially troubled businesses. 11 U.S.C. § 1501(a)(1)–(5); *In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006), *aff’d*, 371 B.R. 10 (S.D.N.Y. 2007).

Chapter 15 contemplates cooperation between American and foreign bankruptcy courts, as well as facilitating protection for the Debtor in this case before the Court.

The Second Circuit has recognized that “[t]he absence of a statutory definition for a term that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation.” *Fairfield Sentry*, 714 F.2d at 138.

Here, the Debtor argues that denial of recognition of the Debtor’s COMI in the Cayman Islands may leave the Debtor “with the alternative of converting a highly consensual Scheme into a Cayman liquidation in an effort to obtain such chapter 15 recognition at a later date.” (Supp. Brief ¶ 23.) The Debtor also contends that this “would not maximize the value of the Debtor’s assets, as it would divert additional funds towards an entirely new insolvency process in an effort to potentially achieve the relief requested” in the Motion. (*Id.*) Such an outcome would clearly diverge from Chapter 15’s stated goal of maximizing the value of the debtor’s assets, as well as facilitating the rescue of a financially troubled business. Further, recognition of the Cayman Proceeding would promote cooperation between the American and Cayman courts, by helping facilitate the Cayman Proceeding and maximizing the chances of a successful reorganization.

2. Recognition of this Proceeding is Consistent with Creditors’ Expectations

The Scheme Creditors’ expectations that their loan agreements would be governed by Cayman law supports recognition of COMI in the Cayman Islands. (Supp. Brief ¶ 11.) When determining a Debtor’s COMI, “creditor expectations can be evaluated through examination of the public documents and information available to guide creditor understanding of the nature and risks of their investments.” *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 228 (Bankr. S.D.N.Y. 2017); *see also Constellation I*, 600 B.R. at 274 (listing cases in which offering

memoranda and indentures were evaluated for purposes of determining creditors' expectations). Here, this expectation was reasonable considering the publicly available descriptions of the Debtor as a Cayman company in (i) the offering memoranda of the Existing Notes that stated that "an insolvency proceeding relating to us, even if brought in the United States, would likely involve Cayman Islands insolvency law" and (ii) the Debtor's press releases, pointing to the Debtor as a company "incorporated in the Cayman Islands." (Supp. Brief ¶ 11.)

The Debtor's actions reinforced these expectations, particularly the fact that (i) BFAM initiated negotiations related to the Restructuring by issuing the Statutory Demand and threatening a Cayman Islands winding up petition and (ii) the RSA contemplated an insolvency proceeding in the Cayman Islands. (*Id.*) It is incontrovertible that the Scheme Creditors understood that the Debtor is a Cayman Islands company and expected that its debts would be restructured pursuant to the law of the Cayman Islands if a restructuring became necessary. (*Id.*) See *In re Ascot Fund Ltd.*, 603 B.R. 271, 283 (Bankr. S.D.N.Y. 2019) (finding COMI in the Caymans, in part, because "[f]rom the Ascot Fund investors' point of view, and as a matter of fact and law, they invested in a Cayman fund and their rights were to be determined under Cayman law.")

In *In re SPhinX, Ltd.*, 351 B.R. at 117, the Court explained that "[v]arious factors, singly or combined, could be relevant" to a COMI determination. The factors are not meant to be applied "mechanically," but rather, "viewed in light of chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value." *Id.* The *SPhinX* court reasoned that "because their money is ultimately at stake, one generally should defer, therefore, to the creditors' acquiescence in or support of a proposed COMI." *Id.* In *SPhinx*, ultimately, the Court found that COMI was outside of the Caymans, but

the concept remains, when a Court considers COMI factors, the protection of the creditors' interests is paramount. *Id.*

The decision in *In re Serviços de Petróleo Constellation S.A.* (“*Constellation II*”) also underscores how “Courts in the Second Circuit also look to the expectations of creditors with regard to the location of a debtor’s COMI.” 613 B.R. 497 (Bankr. S.D.N.Y. 2019) (finding COMI in Luxembourg, in part, because the creditors’ expectations of the location of the insolvency proceeding); see *In re Chiang*, 437 B.R. 397 (Bankr. C.D. Cal. 2010) (noting how “the location of the COMI is an objective determination based on the viewpoint of third parties (usually creditors)”); see also *In re Codere Finance 2(UK) Ltd.*, Case No. 20-12151 (MG), (Bankr. S.D.N.Y. Oct. 9, 2020) (“*Codere* Transcript,” ECF Doc. # 13 at 21:17–23:6) (concluding that COMI in the UK was supported by lack of objections, overwhelming support of the scheme, no evidence of exploitation or untoward manipulation or thwarting of third-party expectations, and interests of creditors and other interested parties sufficiently protected).

In *In re Oi Brasil Holdings*, 578 B.R. at 226–229, the court considered whether, having initially recognized Brazil as the Debtor’s COMI, subsequent events caused the COMI to shift to the Netherlands. To evaluate whether the COMI had shifted, the court considered creditor expectations, concluding “that purchasers of the notes understood that they were investing in Brazilian-based businesses, and [the debtor’s] place of incorporation, or for that matter its very existence, was immaterial to their decision to purchase their notes.” *Id.* at 229. It was notable in this case that “the [noteholders] had no legitimate expectation that the Austrian courts would play any role in the determination or payment.” *Id.* at 226; see also *In re Olinda Star Ltd.*, 614 B.R. 28, 44 (Bankr. S.D.N.Y. 2020) (holding third party and creditors’ expectations weigh in

favor of finding COMI); *Constellation II*, 613 B.R. at 508 (noting “[c]ourts in the Second Circuit also look to the expectations of creditors with regard to the location of a Debtor’s COMI.”)

In the present case, the Scheme Creditors made loans to Modern Land, a Cayman-incorporated holding company that carries out the business of real estate development in the PRC. (Motion ¶¶ 6–7.) Given the statutory presumption included in section 1516(c) of the Bankruptcy Code, the creditors could reasonably have concluded that the Debtor’s registered office in the Cayman Islands was its COMI, subjecting it to the Cayman Companies Act, and in turn subjecting the creditors’ agreements with the Debtor to Cayman law. Further, “nearly half of the Debtor’s wholly owned subsidiaries are Cayman entities.” (Supp. Brief ¶ 7.) Given the proclivity of Courts in the Second Circuit to consider creditor expectations when making a COMI determination, therefore, this factor supports a finding of the Cayman Islands being the Debtor’s COMI.

The creditor expectations in this case are further evidenced by the overwhelming creditor support. Not one Scheme Creditor objected to the Debtor’s COMI being located in the Cayman Islands, including the two dissenting Scheme Creditors that voted against the Scheme. (Supp. Brief ¶ 12.) Over 99% in number of the Scheme Creditors present and voting at the Scheme Meeting, representing approximately 95% in value of the outstanding principal of the Existing Notes, voted in favor of the Scheme. (*Id.*, Supp. Moran Decl. ¶ 4.) In this case, definitive creditor expectations and overwhelming creditor support solidify a finding of COMI in the Cayman Islands.

3. The Judicial Role in the Cayman Scheme is Prevalent in this Case

Another factor supporting COMI being in the Cayman Islands is the ongoing restructuring proceeding itself. In *In re Suntech Power Holdings Co.*, 520 B.R. at 418, a

Cayman-incorporated holding company primarily conducting business in China filed for Chapter 15, seeking recognition. Over creditors' objections, this Court found COMI in the Cayman at the time of the filing, while acknowledging that COMI had been in China prior to the filing. *Id.* The *Suntech* court discussed at length the role of the JPLs, who conducted much of the Debtor's business from the Cayman Islands following the petition. *Id.*

In the present case, unlike in *Suntech*, there are no objections to recognition as a foreign main proceeding. The Scheme Creditors in this case overwhelmingly approved the Scheme. (Motion ¶ 65.) Modern Land is not subject to the control of JPLs, but there were no issues about the propriety if any actions by management, and the Debtor and its professionals successfully negotiated an RSA with very broad creditor support. (Third Moran Decl. ¶ 7.) There was no need for the appointment of JPLs. (Supp. Brief ¶ 16.)

Furthermore, the Debtor in this case identifies itself as a Cayman-incorporated company in press releases and in official memoranda. (*Id.* ¶ 1.) The Debtor maintains its registered office in the Cayman Islands, and maintains a statutory register of members (i.e. shareholders), mortgages, charges, and directors in the Cayman Islands. (*Id.*) The Debtor's historical corporate counsel, who additionally advised the Debtor on the issuance of the Existing Notes, is a law firm located in the Cayman Islands. (*Id.* ¶ 2.) The offering memoranda for the Existing Notes indicated in several places that, if needed, the Debtor would initiate an insolvency proceeding in the Cayman Islands. (*Id.* ¶ 3.) Lastly, the first demand upon the Debtor following its initial default under the Existing Notes threatened a winding up petition pursuant to the laws of the Cayman Islands. (*Id.* ¶ 4.)

The RSA expressly requires a Cayman Islands scheme of arrangement, and approximately 80.75% of the aggregate principal outstanding amount of all Existing Notes

acceded to the RSA. (*Id.* ¶ 5.) No Scheme Creditors objected to the Debtor’s COMI being located in the Cayman Islands, and 99% in number of the Scheme Creditors present and voting at the Scheme Meeting representing approximately 95% in value of the outstanding principal of the Existing Notes, voted in favor of the Scheme. (*Id.* ¶ 12.)

Cayman law further provides that only the Cayman Court can conduct an effective liquidation of a Cayman Islands-incorporated company. (Third Moran Decl. ¶ 16.) The Debtors assert that, pursuant to Cayman law, a suit against a member of the Debtor’s board of directors would require the application of Cayman law, even if such director did not live in the Cayman Islands. (*Id.* ¶ 24.) Next, nearly half of the Debtor’s direct wholly owned subsidiaries are Cayman entities. (Supp. Brief ¶ 7.) The Debtor further identified at least 35 entities—representing a minimum of over half a billion dollars of the outstanding principal of the Existing Notes—that are domiciled in the Cayman Islands. (*Id.*)

The Debtor asserts, importantly, that as of the time of the filing of the Chapter 15 petition, the restructuring efforts were the Debtor’s “primary business activity . . . to ensure the Debtor’s survival.” (*Id.* ¶ 8.) The “vast majority of Restructuring-related activities took place in the Caymans,” and the Debtor’s Cayman counsel advised the Debtor as a matter of Cayman Islands law. (*Id.*) For example, the Scheme Meeting took place in the Cayman Islands, the Scheme Meeting was presided over by a Cayman Islands resident, and the chairman of the meeting held proxies for the majority of the Scheme Creditors and attended and voted at the meeting in the Cayman Islands on their behalf. (*Id.*) The Debtor’s Cayman counsel also appeared at both hearings before the Cayman Court to obtain permission to convene the Scheme Meeting and to sanction the Scheme. (Third Moran Decl. ¶ 25.) The Scheme received the support of Scheme Creditors representing approximately 95% of the value of the Existing Notes.

(Supp. Brief ¶ 9.) Given the strong support for the Scheme, the fact that the restructuring was the primary business activity of the Debtor at the time of the filing of the Chapter 15, the ongoing activities pertaining to the restructuring itself support recognition of the Cayman Islands as the Debtor's COMI in the present case.

Further, the fact that the Debtor is an exempted company does not jeopardize its ability to have a COMI in the Cayman Islands. The Debtor was incorporated in the Cayman Islands under the Companies Act as an exempted company with limited liability. (Motion ¶ 6.) While the Debtor's exempted company status places certain limitations upon its operations in the Cayman Islands, this Court has held that exempted companies can have a Cayman COMI. In *Ocean Rig*, 570 B.R. at 705, this Court held that “[i]t also does not matter that [the debtor] is classified as ‘exempted’ under the Cayman Companies Law, even though ‘exempted’ company status appears to limit that company’s activities in the Cayman Islands . . . [w]hile exempted companies are prohibited from *trading* in the Cayman Islands, except in furtherance of their business outside the Cayman Islands, they may still be *managed* from there.” The *Ocean Rig* Court subsequently concluded that the Cayman Islands was indeed the debtor's COMI, and recognized the foreign main proceeding. *Id.* at 707. Therefore, in the present case, the Debtor's status as an exempted company does not jeopardize its COMI in the Cayman Islands.

4. Choice of Law Principles Support a Finding of COMI in the Cayman Islands

When conducting a COMI analysis, Courts in this Circuit additionally consider the jurisdiction whose law would apply to most disputes. *Olinda Star*, 614 B.R. at 43. “[T]his factor weighs in favor of a COMI in” the jurisdiction whose law applies. *Id.* at 44; *see also Constellation I*, 600 B.R. at 280 (stating that “because Parent/Constellation is a Luxembourg incorporated entity, that depends upon Luxembourg law for its existence and its corporate

operations, the Court found that Luxembourg law should be considered the law that applies to *most* of Parent/Constellation’s disputes”). In the present case, the Foreign Representative explained that the Debtor, as a Cayman-incorporated company, “depends on Cayman Islands law for its existence and is subject to Cayman Islands laws and regulations.” (Supp. Brief ¶ 13.) The Foreign Representative further explained that the requirements of Cayman law were “made clear in the documents related to the issuance of the Existing Notes.” (*Id.*) While the Existing Notes as governed by New York law, the Cayman Islands is the jurisdiction whose law would apply to most disputes over corporate actions that may arise in the Cayman Proceeding, this factor supports finding a COMI in the Cayman Islands. And, to the extent that any New York law issues arose concerning the Existing Notes, the Second Circuit explained in *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005), that “[w]e have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding.”

The Scheme Creditors here include only holders of Existing Notes. The Debtor’s capital structure includes substantial debt governed by Hon Kong law. The Court has no reason to address the COMI of any insolvency or scheme proceeding involving creditors with claims other than holders of the Existing Notes. Creditor expectations in such a case could point to COMI somewhere other than the Cayman Islands.

5. The Debtors Seek Recognition in Good Faith

Many of the cases in which courts have denied recognition of a foreign main proceeding in a debtor’s country of incorporation involved instances of bad faith, which are not present in the Debtor’s petition for recognition. For example, in *Creative Finance*, the court found that the debtor’s principal “and his associates—and hence the Debtors—were guilty of bad faith in

numerous respects.” 543 B.R. at 513. Among other transgressions, the debtors in *Creative Finance* sought to manipulate a liquidator, ignored important inquiries, and sought to deny a disfavored creditor the opportunity to benefit from the proceeding. *Id.* In contrast, in *Fairfield Sentry Ltd.*, 440 B.R. at 64-65, the Court held that “[t]here being no showing of bad faith on the part of the BVI Liquidators, and given that the [d]ebtors are incorporated in and maintain their registered offices in the BVI, the Court finds it more compelling that the [d]ebtor’s COMI lies in the BVI.” *See also Codere* Transcript at 20:1–21:25 (reasoning that “the lack of objections and the overwhelming support for the scheme of arrangement in this case suggests that there has not been insider exploitation, untoward manipulation, overt thwarting of third-party expectations. . . . Those sorts of things could evidence bad faith COMI manipulation.”).

SPhinX was even more explicit in its consideration of the Debtor’s bad faith as the basis for rejecting recognition. There, the Bankruptcy Court explained that “a primary basis for the Petition, and the investors’ tacit consent to the Cayman Islands proceedings as foreign main proceedings, is improper . . . this litigation strategy [seeking to frustrate a settlement agreement by exploiting the automatic stay] appears to be the only reason for their request for recognition.” *In re SPhinX*, 351 B.R. at 121. The *SPhinX* Court therefore rejected a finding of COMI supporting recognition of a foreign main proceeding, and instead proceeded to consider the existence of a foreign nonmain proceeding not subject to the debtor’s bad faith. *Id.*

In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, the court denied recognition of a Cayman scheme proceeding seeking to restructure an open-end investment firm as either a foreign main or nonmain proceeding. 374 B.R. at 126. The *Bear Stearns* court emphasized the Debtor’s operational history, considering the location of its employees, managers, books and records, and liquid assets. *Id.* at 130. The court therefore

denied recognition of COMI in the Cayman Islands because the United States, not the Cayman Islands, was “the place where the Funds conduct the administration of their interests on a regular basis.” *Id.* However, *Fairfield Sentry* subsequently clarified that:

A court may look at the period between the commencement of the foreign proceeding and the filing of the chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith, but there is no support for [the] contention that a debtor’s entire operational history should be considered. The factors that a court may consider in this analysis are not limited and may include the debtor’s liquidation activities.

714 F.3d at 138.

The *Fairfield Sentry* court also emphasized that “[t]here was no finding of bad-faith COMI manipulation.” *Id.* at 139. In the present case, like in *Fairfield Sentry*, the Debtor is a holding company with subsidiaries that conduct business around the world. (Motion ¶ 7.) The Debtor is similarly engaged in a restructuring proceeding pursuant to the laws of its country of incorporation. (*Id.* ¶ 21.) The *Fairfield Sentry* court explained that “[it] matters that the inquiry under Section 1517 is whether a foreign proceeding ‘is pending in the country where the debtor has the center of its main interests.’ 11 U.S.C. §1517(b)(1) (emphasis added).” 714 F.3d at 134. The same is true in this case too.

In *In re Ran*, 390 B.R. 257 (Bankr. S.D. Tex. 2008), the bankruptcy court denied recognition of an Israeli bankruptcy proceeding as either a foreign main or nonmain proceeding. On remand from the district court, the bankruptcy court “decline[d] to make findings on whether or not Lavie [a trustee overseeing the bankruptcy] acted in bad faith.” *Id.* at 298. However, the court explained that “[b]y citing favorably to *In re SPhinX*, . . . in its order of remand, the district court suggests that a foreign representative’s bad faith motive in seeking recognition of a foreign proceeding may appropriately be considered in determining the location of a debtor’s center of

main interests.” *Id.* at 297. Indeed, despite the court’s distaste for making findings based upon the debtor’s apparent bad faith, the court nevertheless devoted an entire section of its analysis to the foreign representative’s motive. *Id.* at 295. So, while the presence of bad faith did not play an explicit role in the court’s decision in *Ran*, the questionable motivations of the foreign representative clearly informed the court’s analysis.

In the present case, the Debtor has not engaged in COMI-shifting behavior, nor has it sought to deceive the Court or the Scheme Creditors in its pursuit of a Cayman restructuring. Instead, as discussed above, the Debtor seeks recognition of a proceeding under Cayman law, a fact which the Scheme Creditors likely factored into their decision to conduct business with the Debtor in the first place.⁸ Given the absence of COMI-shifting and the Debtor’s good-faith petition for recognition under chapter 15, this factor supports recognition of COMI in the Cayman Islands.

IV. CONCLUSION

For the reasons explained above, the Court **FINDS** that the Cayman Islands is the Debtor’s COMI. All other requirements for recognition have been satisfied.

⁸ *See Suntech*, 520 B.R. at 418:

Nor does the evidence support a finding that the Debtor’s creditors would have expected it to restructure its businesses in China. The Debtor’s largest creditor group was the Noteholders. The Indenture was governed by New York law and the parties to the Indenture submitted to the non-exclusive jurisdiction of the New York state and federal courts. In addition, when the representatives . . . who held approximately 50% of the debt, met with the Debtor’s representatives, they urged the Cayman Islands as the most logical restructuring venue. The Debtor was incorporated in the Cayman Islands and the Cayman Islands employed a predictable, flexible and cost effective method for dealing with restructuring.

Therefore, the Court recognizes the Cayman Proceeding as a foreign main proceeding. Additionally, the Court, in the exercise of discretion, recognizes and enforces the Cayman Scheme.

A separate order will be entered granting the requested relief.

Dated: July 22, 2022
New York, New York

Martin Glenn
MARTIN GLENN
Chief United States Bankruptcy Judge

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 21-2946 & 21-2954

IN RE:

JOSEPH C. SHEEHAN,

Debtor.

JOSEPH C. SHEEHAN,

Plaintiff-Appellant,

v.

BRECCIA UNLIMITED COMPANY, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 1:20-cv-05282 & 1:20-cv-05283 — **Andrea R. Wood**, *Judge*.

ARGUED MAY 25, 2022 — DECIDED SEPTEMBER 7, 2022

Before RIPPLE, ROVNER, and KIRSCH, *Circuit Judges*.

ROVNER, *Circuit Judge*. Joseph Sheehan, an Illinois resident,
would like the bankruptcy court in Illinois to enforce that

court's stay against his Irish creditors. Those creditors, who are residents of Ireland, seek to sell Sheehan's Irish property to recoup their loss on loans made in Ireland, and on which Sheehan defaulted in Ireland. The bankruptcy court determined it had no personal jurisdiction over the foreign defendants and granted their motions to dismiss. The district court on appeal affirmed the orders of the bankruptcy court, and we affirm that court's judgment.

I.

Joseph Sheehan is a retired surgeon who emigrated from Ireland several decades ago and currently lives in Winfield, Illinois. In 2006, Sheehan obtained loans from an Irish bank to buy interest in Blackrock Hospital Limited, an Irish medical company (the "Blackrock Shares"), and also to purchase personal real estate located in Ballyheigue, Ireland (the "Ballyheigue property"). In 2008, he obtained additional loans to pay for more Blackrock Shares. Both loans were secured by the Blackrock Shares themselves. Sheehan defaulted on both loans in 2010. In 2014, defendant-appellee Breccia Unlimited Company ("Breccia"), an Irish entity that also owned shares in Blackrock Hospital Limited, acquired the loans—both the loans secured by the Blackrock Shares and the Irish bank's interest in the Ballyheigue property mortgage—and proceeded to take steps to foreclose on the underlying collateral. Breccia is a private unlimited company incorporated under the laws of Ireland and maintains its principal place of business in Dublin. Sheehan sued to prevent those foreclosure efforts in Irish courts, but in July 2019, an Irish appellate court found in Breccia's favor and gave the company authorization to enforce its security interest in the Blackrock Shares and the Ballyheigue property

with the aid of an Irish receiver. The Irish Supreme Court declined to disturb that final judgment. Subsequently, in December 2019, Breccia registered the Blackrock Shares in its name and appointed a receiver, defendant-appellee Damien Murran, to take possession of the Ballyheigue property, secure it, market it, and sell it. Murran is an Irish citizen who resides in Ireland and is an employee of defendant-appellee, RSM Ireland Business Advisory Limited (“RSM Ireland”). RSM Ireland is an Ireland limited liability company.¹ On March 5, 2020, Breccia appointed Murran as the receiver for the Ballyheigue Property as well. Murran accepted the receivership on March 23, 2020.

On March 12, 2020, Sheehan filed a petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois. Under the rules of the United States Bankruptcy Code, Sheehan’s bankruptcy filing triggered an automatic stay applicable to “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C.

¹ Sheehan alleges that RSM Ireland holds itself out as having a presence and capabilities within the United States, and specifically in Chicago, as part of a global RSM network. RSM Ireland, on the other hand, describes itself as an Irish limited liability company which is part of a network of other companies trading as RSM. According to RSM Ireland, and as noted on the website, “Each member of the RSM network is an independent accounting and advisory firm each of which practices in its own right. The RSM network is not itself a separate legal entity of any description in any jurisdiction.” <https://www.rsm.global/ireland/offices>. RSM Ireland does not conduct and is not related to any business in the United States. Sheehan has not provided any factual or legal authority for the bare assertion that an independent company affiliated with a network of other independent companies can be considered to be doing business in any jurisdiction in which any company in the network operates.

§ 362 (a)(3). On the same day that Sheehan filed his bankruptcy petition, he notified the Irish receiver, Murran, that he had commenced bankruptcy proceedings, and that the automatic stay barred any efforts by the receiver to exercise control over the Blackrock Shares. Several days later, on March 18, he provided the same notice to Breccia, but this time noted that the stay applied not only to the Blackrock Shares, but also to “any other property owned by Dr. Sheehan.” App. 80.² Nevertheless, Breccia, having prevailed in the Irish courts, continued, through the receiver, to take the necessary steps toward sale of the collateral securing the loans on which Sheehan had defaulted. For example, on March 13, 2020, Murran entered into a contract with defendant-appellee, Irish Agricultural Development Company Unlimited (“IADC”) for the sale of the Blackrock Shares.³ Like the other two companies, IADC is incorporated in Ireland, maintains its principal

² References to “App.” refer to the Appendix of Plaintiff-Appellant Joseph C. Sheehan, volumes I and II, located at R. 19-1 & 19-2 in the appellate docket.

³ Breccia maintains that the sale occurred before Breccia’s Irish counsel received any notification regarding Sheehan’s bankruptcy, which according to Breccia occurred when Sheehan’s counsel contacted Breccia’s counsel on March 18, 2020. *See* App. 79–81. Nevertheless, Sheehan’s counsel sent notice of the bankruptcy filing to Murran’s counsel on March 12, 2020 via e-mail, (*See* App. 56–58). We can assume, therefore, that Murran’s counsel had notice of the bankruptcy filing when Murran entered into the contract with IADC, even if Breccia did not. In any event, the timing of the transaction does not have any bearing on the outcome of this proceeding.

We also note that, as of February 24, 2020, the Irish courts were still issuing post-decision rulings, including an injunction to prevent Sheehan from disposing of his assets in Ireland, which may have affected the timing of the receiver’s sales.

place of business in Ireland, and has no operations in the United States.

On March 25, 2020, Murran accepted an appointment as receiver for the Ballyheigue property, but Sheehan did not become aware of the Ballyheigue property receivership until April 7, 2020, when the receiver informed Sheehan that the receivership of the property had commenced, the locks had been changed, and the receivership intended to sell the property and apply the proceeds toward the discharge of Sheehan's debts. Six days later, on April 13, 2020, Sheehan filed the underlying adversary complaint in the United States bankruptcy court, alleging that Breccia, IADC, the receiver Murran, and Murran's employer, RSM Ireland, improperly exercised control over the property of his bankruptcy estate in violation of the Bankruptcy Code's automatic stay provision. In his complaint, he requested the return of the Blackrock Shares and the Ballyheigue Property to the bankruptcy estate, an order compelling the defendant-appellees to comply with the automatic stay, and an award of damages for their willful violation of the automatic stay.

Sheehan initially e-mailed the defendants to request that they accept service of process of the complaint through their Irish attorneys. The defendants did not do so, but rather argued *inter alia* in support of their subsequent motions to dismiss that the email notice Sheehan had provided was not sufficient process under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention"). On June 12, two months after Sheehan filed his adversary complaint, and one month after the defendants filed their motions

to dismiss, Sheehan formally served Murran, RSM, and IADC. He formally served Breccia on June 16.

On May 13, thirty days after Sheehan filed his complaint, Breccia and IADC together moved to dismiss the adversary proceeding, and Murran and RSM Ireland jointly did the same. Both motions sought dismissal of the adversary complaint under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction, and 12(b)(5) for insufficient service of process.⁴ In addition, Murran and RSM Ireland argued that the doctrine of *forum non conveniens* dictated dismissal. In response, and as an alternative to denial of the motions to dismiss, Sheehan requested discovery related to the matters set forth in the declarations attached to the defendants' motions to dismiss. The bankruptcy court granted both motions to dismiss (in separate orders), finding that the bankruptcy court lacked personal jurisdiction over the Irish defendants, as none of the defendants conducted any activity related to the adversary claims in the United States, and the only link between the defendants and the forum was the fact that Sheehan lived in Illinois. The bankruptcy court also concluded that Sheehan's e-mail service to the defendant-appellees was ineffective under the Hague Service Convention. In its order granting Murran and RSM Ireland's motion to dismiss, the bankruptcy court also held that the doctrine of *forum non conveniens* provided an additional basis for dismissal. Sheehan appealed to the district court which confirmed that the bankruptcy court lacked personal jurisdiction over any defendant. Additionally, the district court concluded that "all of the facts that [Sheehan] wished to investigate through jurisdictional

⁴ The Federal Rules of Civil Procedure apply in an adversary proceeding in bankruptcy court. *See* Fed. R. Bankr. P. 7012(b).

discovery either do not involve [the defendants'] suit-related conduct or concern their contacts with Sheehan regarding the Blackrock Shares or the Ballyheigue Property," and thus the bankruptcy court had not abused its discretion in denying discovery *sub silentio*. App. 637, 651. Having found that the bankruptcy court lacked personal jurisdiction over the defendants, the district court did not reach the questions of service of process or *forum non conveniens*.

II.

We review the judgment of the district court using the same standard of review with which the district court reviewed the bankruptcy court's ruling. *Wiese v. Cmty. Bank of Cent. Wis.*, 552 F.3d 584, 588 (7th Cir. 2009). Specifically, we review a district court's dismissal for lack of subject matter jurisdiction de novo, while reviewing findings of fact considered in determining jurisdiction only for clear error. *City of Chicago ex rel. Rosenberg v. Redflex Traffic Sys., Inc.*, 884 F.3d 798, 802 (7th Cir. 2018); *see also Illinois Ins. Guar. Fund v. Becerra*, 33 F.4th 916, 922 (7th Cir. 2022) ("Subject-matter jurisdiction sometimes depends on disputed factual issues, and we review for clear error a district court's findings on jurisdictional facts.").

A. Personal jurisdiction

An assessment of jurisdiction is the starting point of every case in federal court. In this case, it happens to be the ending point as well. The bankruptcy court is a court of limited jurisdiction and receives its jurisdictional mandate in a statutory grant of power. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995) (listing the statutory sources of a bankruptcy court's jurisdiction). And of course, as the Federal Rules of Bankruptcy

Procedure remind us, all jurisdiction is ultimately subject to constitutional constraints. Fed. R. Bankr. P. 7004(f) (“If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule ... is effective to establish personal jurisdiction over the person of any defendant ...”). Specifically, due process requires that out-of-forum defendants must have “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Wash. Off. of Unemp’t Comp. & Placement*, 326 U.S. 310, 316 (1945).⁵

When a defendant moves to dismiss a complaint for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), the plaintiff bears the burden of demonstrating that jurisdiction exists. *Purdue Res. Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003). At this stage of the proceedings, however, Sheehan was only required to make a prima facie showing that the defendants had the necessary minimum contacts. *Durukan Am., L.L.C. v. Rain Trading, Inc.*, 787 F.3d 1161, 1163–64 (7th Cir. 2015); *Felland v. Clifton*, 682 F.3d 665, 672 (7th Cir. 2012). As with a Rule 12(b)(6) motion, the

⁵ Because Congress has authorized broad, nationwide service of process through Federal Rule of Bankruptcy Procedure 7004(d), personal jurisdiction disputes in bankruptcy proceedings generally implicate the Due Process Clause of the Fifth Amendment. See *Diamond Mortg. Corp. of Illinois v. Sugar*, 913 F.2d 1233, 1244 (7th Cir. 1990). By contrast, questions of personal jurisdiction in other contexts generally implicate the Due Process Clause of the Fourteenth Amendment, as Congress has directed that federal courts ordinarily follow state law in determining personal jurisdiction requirements. See *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (citing Fed. R. Civ. P. 4(k)(1)(A)).

Court must “accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff” when evaluating personal jurisdiction. *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007).

Because Sheehan attempts to link personal jurisdiction over the defendants to the bankruptcy court’s *in rem* jurisdiction, we will begin with a brief look at a bankruptcy court’s jurisdiction over property. A bankruptcy court has *in rem* jurisdiction over all of the property in a debtor’s estate, which includes all property “wherever located and by whomever held.” 11 U.S.C. § 541(a); 28 U.S.C. § 1334(e)(1); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004). The filing of a bankruptcy petition triggers an automatic stay prohibiting any attempts to exercise control over any property of the estate. 11 U.S.C. § 362(a)(3). Prohibitions on such attempts, however, cannot be enforced if a court does not have personal jurisdiction over the party holding the property. *Hood*, 541 U.S. at 448 (“Because the court’s jurisdiction is premised on the res, however, a nonparticipating creditor cannot be subjected to personal liability.”); *Freeman v. Alderson*, 119 U.S. 185, 188 (1886) (“The state has jurisdiction over property within its limits owned by non-residents, and may therefore subject it to the payment of demands against them of its own citizens. ... If the non-resident possesses no property in the state, there is nothing upon which its tribunals can act.”).

Sheehan spends many pages of his brief focusing on the *in rem* jurisdictional powers of the bankruptcy court. There is no need to convince this court that the bankruptcy court had jurisdiction over any property in Sheehan’s estate, however, as this point was conceded by all parties and recognized by both

courts below. In pursuit of his *in rem*-focused argument, Sheehan asserts conclusively that “[t]he Blackrock Shares and the Ballyheigue Property are property of the Debtor’s bankruptcy estate.” Sheehan Brief at 16. The accuracy of this statement is far from clear given the Irish court’s judgment against Sheehan in a suit in Ireland.⁶ For purposes of these proceedings, however, the defendants are willing to concede that Sheehan held some kind of interest in the Blackrock Shares and Ballyheigue property at the time he filed his bankruptcy petition, and we will do the same. But the court’s ability to assert control over any property in Sheehan’s estate located in Ireland depends on whether the court has personal jurisdiction over the Irish citizens and entities holding that property.

Sheehan’s *in rem*-linked theory relies on the legal fiction that property of a bankruptcy estate “regardless of actual

⁶ Sheehan asserts that as of the date that he petitioned for bankruptcy, March 12, 2020, he still owned the Blackrock Shares (or as he states, “a 28% equity interest in Blackrock Hospital Limited”) and that Breccia had only asserted a security interest in those shares. Sheehan Brief at 3. The defendants explain that on July 31, 2019, the Court of Appeal of Ireland entered judgment in favor of Breccia and against Sheehan and lifted the injunction that had previously prevented Breccia from realizing on its collateral. In 2019, Breccia registered the Blackrock Shares in its own name and appointed a receiver to sell them. The original Irish lending bank acquired legal title to the Ballyheigue property in 2006 when it extended the mortgage to Sheehan, and Breccia acquired that title when it purchased the mortgage in 2014. Although questions certainly remain about what interest Sheehan retained in these assets, we need not resolve this matter because even if Sheehan retained any interest in the Blackrock Shares and Ballyheigue property, and the bankruptcy court had jurisdiction over the disputed assets by means of its power of *in rem* jurisdiction over the property of Sheehan’s estate, it did not have personal jurisdiction over any of the defendants holding that property.

location—is *legally* located within the jurisdictional boundaries of the district in which the court sits.” Sheehan Brief at 22 (quoting *In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998) (emphasis in original)). According to Sheehan’s argument, because the Irish property was subject to the legal fiction of being in Illinois, all of the defendants’ actions to seize and sell that property must also have occurred (fictionally) in Illinois. And because all of the defendant’s actions occurred (fictionally) in Illinois, the defendants must have minimum contacts with Illinois. Sheehan has not asserted any authority for this theory linking personal jurisdiction to *in rem* jurisdiction, and it is no wonder that he has not. If a court could connect any person to estate property in this way there would be no need for an assessment of specific personal jurisdiction in bankruptcy cases. All actions would occur where the *res* was fictionally located, which, by definition, is wherever the bankruptcy court sits. Sheehan cannot bootstrap the personal jurisdiction claim in this circular manner, and we must look further to see whether the court had personal jurisdiction over the defendants.

A court can have either general or specific personal jurisdiction over a party. Neither party asserts that the court has general jurisdiction over the defendant-appellees, as none are “at home” in the jurisdiction either by being incorporated in Illinois or having a principal place of business there. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 924 (2011). All defendant-appellees are Irish citizens or Irish businesses and conduct their business operations in Ireland.

Thus we turn to the only applicable question of jurisdiction—whether the bankruptcy court had specific personal jurisdiction over the defendants. Specific personal jurisdiction depends on “an affiliation between the forum and the

underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017) (cleaned up).

This court has enumerated the requirements for specific personal jurisdiction as follows: first, defendants must have purposefully directed their activities at the forum state or purposefully availed themselves of the privilege of conducting business in the forum; second, the alleged injury must arise out of or relate to the defendants' forum-related activities; and third, any exercise of personal jurisdiction must comport with traditional notions of fair play and substantial justice. *Rogers v. City of Hobart, Ind.*, 996 F.3d 812, 819 (7th Cir. 2021); *Tamburo v. Dworkin*, 601 F.3d 693, 702 (7th Cir. 2010).

Within the framework of those three requirements, the Supreme Court and this court have given more specific guidance on what it means to have purposefully directed activity at a forum or availed oneself of the privileges of a forum. That guidance informs us that our assessment of personal jurisdiction must focus on the acts and activities of the defendant. *Walden v. Fiore*, 571 U.S. 277, 284 (2014); *NBA Properties, Inc. v. HANWJH*, No. 21-2909, 2022 WL 3367823, at *4 (7th Cir. Aug. 16, 2022). The relationship between the defendant and the forum "must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden*, 571 U.S. at 284 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) (emphasis in both opinions); see also *Asahi Metal Indus. Co. v. Superior Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 109 (1987) ("Jurisdiction is proper ... where the contacts proximately result from actions by the defendant *himself* that create a substantial connection with the forum State.") (emphasis in original)

(internal citations omitted); *Rogers*, 996 F.3d at 820 (“[A] defendant’s relationship to the forum state must arise out of contacts that the defendant *himself* creates with the forum State.”) (internal citations omitted) (emphasis in original).

This means that specific personal jurisdiction cannot depend solely on the actions of the plaintiff or third parties. *Walden*, 571 U.S. at 284. Moreover, the defendants’ minimum contacts must be with the forum itself and not merely with a person who resides there. *Id.* at 285. Said another way, “the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant’s conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.” *Id.* at 285. “Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the ‘random, fortuitous, or attenuated’ contacts he makes by interacting with other persons affiliated with the State.” *Walden*, 571 U.S. at 286 (quoting *Burger King*, 471 U.S. at 475); *see also NBA Properties*, 2022 WL 3367823, at *7 (“The question is not whether the plaintiff purchased enough goods to subject the defendant to personal jurisdiction. The focus is whether [the defendant] purposefully directed its conduct at Illinois.”).

This focus on a defendant’s activities means that it is not enough that the defendant took some action that ultimately had an effect on the plaintiff in the forum. “The question is not whether the plaintiff experienced a particular injury or effect in the forum state but whether the defendant’s conduct connects him with the forum in a meaningful way.” *Rogers*, 996 F.3d at 819. A “meaningful way” is one in which defendants “purposefully directed” their actions at the forum. *Id.* This is true even if the defendant could have foreseen the

effect on the plaintiff—that is, that the plaintiff would be harmed in the forum. *Burger King Corp.*, 471 U.S. at 474; *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 943 (7th Cir. 2000). The Supreme Court’s precedents make clear “that it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment.” *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 883 (2011). Thus, for example, “a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.” *Asahi Metal Indus.*, 480 U.S. at 112. Likewise liquidating property in Ireland after receiving permission from an Irish court to do so is not activity directed toward Illinois merely because it might have an effect on a resident and citizen of Illinois.

We can see the difference between actions that are purposefully directed at a forum and those that are not, by juxtaposing two Supreme Court cases addressing personal jurisdiction. In *Calder v. Jones*, 465 U.S. 783 (1984), a reporter and editor, both of whom were based in Florida, published an allegedly libelous magazine article that was widely circulated in California. The Court found that the California court had jurisdiction over the defendants not only because their actions had an effect in California—that is, damage to the plaintiff’s reputation—but also because the defendants had created ample contacts with California—they reached into California by telephoning and relying on California sources, they wrote the story about the plaintiff’s activities in California, and they published it in a magazine that was widely circulated in that state. *Id.* at 788–89. The Court noted that the defendants engaged in activities that were purposefully “calculated to cause

injury to [the] respondent in California.” *Id.* at 791. In short, although the Court did comment on the effect the defendants’ actions had on the plaintiff in California, its primary assessment was of the various contacts the defendants had with the forum state itself, “focus[ing] on the relationship among the defendant, the forum, and the litigation.” *Calder*, 465 U.S. at 788 (internal citation omitted). As the Supreme Court later explained regarding its holding in *Calder*,

Although we recognized that the defendants’ activities “focused” on the plaintiff, our jurisdictional inquiry “focused on ‘the relationship among the defendant, the forum, and the litigation.’” *Calder*, 465 U.S. at 788. Specifically, we examined the various contacts the defendants had created with California (and not just with the plaintiff) by writing the allegedly libelous story. We found those forum contacts to be ample.

Walden, 571 U.S. at 287 (cleaned up).

The *Walden* court went on to explain that mere injury to a forum resident, even if predictable, is not a sufficient connection to the forum. *Id.* at 290. “The crux of *Calder* was that the reputation-based ‘effects’ of the alleged libel connected the defendants to California, not just to the plaintiff.” *Id.* at 287.

The *Walden* court distinguished the facts in *Calder* from those in the case before it and held that a Georgia police officer in a Georgia airport who questioned and searched Nevada travelers, seized their cash, and allegedly filed a false probable cause affidavit to support that seizure, could not be successfully haled into a Nevada court as a defendant even if

the officer must have known that his actions would cause harm to the Nevada plaintiffs in their home state. The Court compared the two cases and found that, unlike the reporter in *Calder*, the officer in *Walden* never travelled to Nevada, conducted activities therein, contacted anyone in Nevada, sent anything to anyone in Nevada, or otherwise aimed his activity at Nevada. *Walden*, 571 U.S. at 289.

Similarly, this court has concluded that when a plaintiff is injured by acts that a defendant commits entirely within one forum (in this case, Ireland), the fact that the plaintiff suffers the negative effects of those acts in his home forum (in this case, Illinois) does not confer personal jurisdiction over the defendant in the latter forum. See *Mobile Anesthesiologists Chicago, L.L.C. v. Anesthesia Assocs. of Houston Metroplex*, 623 F.3d 440, 444 (7th Cir. 2010). In *Mobile Anesthesiologists*, a medical anesthesia business in Houston created a website in Houston with a similar name to one registered to Mobile Anesthesiologists Chicago. The Houston defendant continued to use the website even after receiving a cease and desist letter from the plaintiff Chicago company, which the plaintiffs maintained constituted actual knowledge that the plaintiff was suffering a harm in Illinois. Nevertheless, we noted that the Supreme Court in *Calder* made clear “that a defendant’s intentional tort creates the requisite minimum contacts with a state only when the defendant expressly aims its actions at the state with the knowledge that they would cause harm to the plaintiff there.” *Id.* at 445. In other words, harm to a plaintiff in the forum state is by itself insufficient. *Id.* at 447. The *Mobile Anesthesiologists* opinion emphasized the requirement that the defendants “expressly aim[]” their conduct at the forum state. *Id.* at 445–46. Thus, this court concluded, although the Houston doctor created and maintained a website that was

certainly accessible in the forum state of Illinois, he did not aim his services or other actions there. The doctor was not licensed to practice in Illinois, his website had only a Houston-area phone number, and contained an invitation to doctors in the greater Houston area to contract with him for services. *Id.* at 446. We have summed up this case and the rest of our specific personal jurisdiction cases by noting that our focus is on the deliberate actions of the defendants and whether they target or direct themselves toward the forum state. *Advanced Tactical Ordnance Sys., L.L.C. v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014).

In short, “‘express aiming’ remains the crucial requirement when a plaintiff seeks to establish personal jurisdiction under *Calder*.” *Mobile Anesthesiologists Chicago*, 623 F.3d at 445–46. In this case, the defendants’ acts in Ireland may indeed have had an effect upon Sheehan in Illinois, but none of the defendants “intentionally direct[ed]” or “expressly aim[ed]” the alleged wrongdoing (exerting control over and liquidating collateral) at Sheehan, let alone at Illinois. *Walden*, 571 U.S. at 289 (“Petitioner’s actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections.”); *Mobile Anesthesiologists Chicago*, 623 F.3d at 445 (“[A] defendant’s intentional tort creates the requisite minimum contacts with a state only when the defendant expressly aims its actions at the state with the knowledge that they would cause harm to the plaintiff there.”). The Irish defendants directed their activity at Irish property located in Ireland and which served as collateral for a loan made by an Irish bank, in accordance with the permission of an Irish court after several years of litigation resolving disputes over ownership of the property. None of the defendants did anything to reach

out to the United States and affiliate themselves with the United States or Illinois. The only connection between the defendant's suit-related conduct and the United States is Sheehan's residence in Illinois and his unilateral act of filing for Chapter 11 bankruptcy in Illinois. Specific personal jurisdiction cannot be based on the plaintiff's mere presence in the forum or on the "unilateral activity" of a plaintiff. *Walden*, 571 U.S. at 285–86. As an aside, it is worth noting that the genesis of this case came from Sheehan's acts when he reached out to Ireland to request financing from an Irish bank to purchase Irish property. The defendants were on the path to liquidating the collateral for that financing when Sheehan filed for bankruptcy in Illinois. Long before Sheehan filed for bankruptcy in Illinois, the defendants had litigated in Irish courts their right to liquidate the collateral, and they had already put into place a receivership to do just that. Had Sheehan never filed for bankruptcy in Illinois (or had he filed in any other state), the defendants would have proceeded just as they did. *See Walden*, 571 U.S. at 290. They cannot, therefore, have been aiming their conduct at Illinois.

Moreover, the fact that the defendants could have foreseen that their conduct would effect Sheehan in Illinois was insufficient to establish personal jurisdiction. *See Walden*, 571 U.S. at 289. Thus Sheehan's unilateral act of sending notice to the defendants of the bankruptcy proceedings in Illinois and the effect of the automatic stay, did not create minimum contacts. "To find express aiming based solely on the defendant's receipt of [a] letter [informing the defendants of the harm in the forum state] would make any defendant accused of an intentional tort subject to personal jurisdiction in the plaintiff's home state as soon as the defendant learns what that state is. *Calder* requires more." *Mobile Anesthesiologists*, 623 F.3d at 447.

Despite the clear guidance from *Walden*, *Calder*, and *Mobile Anesthesiologists*, Sheehan cites to three bankruptcy cases from out-of-circuit bankruptcy courts (all pre-dating *Walden*) which Sheehan interprets to require this court to find that the court in this case had personal jurisdiction over the defendants.⁷ We need not spend much time differentiating these cases from the one before us or ruling on the propriety of the holdings, as our charge is to follow the dictates of the Supreme Court and this circuit which instruct that the defendants' contacts with the bankruptcy court here were insufficient to establish jurisdiction.

We also find that the alleged injury to Sheehan did not arise out of defendants' forum-related activities. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021). All of the acts taken by the defendants to assert control and ownership over the Irish property occurred in Ireland. *See, e.g., Philos Techs., Inc. v. Philos & D, Inc.*, 802 F.3d 905, 915 (7th Cir. 2015) (even an informational business trip to Illinois did not turn a primarily Korean business deal into one with jurisdictional contacts in Illinois). Moreover, the few letters that Breccia sent to Sheehan announcing the receivership and start of the liquidation of Sheehan's collateral for defaulted loans were nothing more than ministerial actions taken in light of the Irish court's disposition of the litigation in Ireland. They

⁷ *In re Probulk Inc.*, 407 B.R. 56 (Bankr. S.D.N.Y. 2009); *In re Chiles Power Supply Co.*, 264 B.R. 533 (Bankr. W.D. Mo. 2001); *In re Lykes Bros. S.S. Co.*, 207 B.R. 282 (Bankr. M.D. Fla. 1997).

do not constitute taking aim at Illinois, and were far from sufficient to create minimum contacts with Illinois.

Given our conclusion that none of the defendants had minimum contacts with the United States, we need not determine whether exercising personal jurisdiction would “violate traditional notions of fair play and substantial justice.” *Int’l Shoe*, 326 U.S. at 316; *Rogers*, 996 F.3d at 819.

B. Discovery

As an alternative to a denial of the motion to dismiss, Sheehan asked the bankruptcy court to allow discovery relating to the testimony in the declarations submitted in support of the defendants’ motions to dismiss. The bankruptcy court granted the motions to dismiss based on its finding that it lacked personal jurisdiction over the defendants and based on Sheehan’s failure of service under the Hague Service Convention. The bankruptcy court did not specifically address Sheehan’s alternative request for discovery. Like district courts, bankruptcy courts have wide discretion on matters of discovery. *See, e.g., USA Gymnastics v. Liberty Ins. Underwriters, Inc.*, 27 F.4th 499, 514 (7th Cir. 2022). We therefore review for abuse of discretion only, and grant great deference to, a bankruptcy court’s decision to disallow discovery. *Fields v. City of Chicago*, 981 F.3d 534, 551 (7th Cir. 2020). A plaintiff must be able to establish “a colorable or prima facie showing of personal jurisdiction before discovery should be permitted.” *Cent. States*, 230 F.3d at 946. In addition to the heavy weight of a bankruptcy court’s discretion, there is a further thumb on the scale weighing against discovery in this case: “[f]oreign nationals usually should not be subjected to extensive discovery in order to determine whether personal jurisdiction over them exists.” *GCIU-Emp. Ret. Fund v. Goldfarb*

Corp., 565 F.3d 1018, 1026 (7th Cir. 2009) (quoting *Cent. States*, 230 F.3d at 946).

The district court noted that the bankruptcy court had not abused its discretion as “all of the facts that [Sheehan] wishes to investigate through jurisdictional discovery either do not involve Appellees’ suit-related conduct or concern their contacts with Sheehan regarding the Blackrock Shares or the Ballyheigue Property.” App. 637, 651. We agree with the district court. Sheehan’s requests appear to be unrelated to the adversary proceeding before the bankruptcy court in this case or are so bare and unsupported that to grant discovery would be to allow a fishing expedition. “[A] district court does not abuse its discretion in denying additional discovery where the request was based on nothing more than mere speculation and would amount to a fishing expedition.” *Helping Hand Caregivers, Ltd. v. Darden Restaurants, Inc.*, 900 F.3d 884, 890 (7th Cir. 2018) (internal quotations omitted). Nor is a plaintiff entitled to discovery to establish essentially speculative allegations necessary to personal jurisdiction. *Viahart L.L.C. v. Partnerships & Unincorporated Ass’ns Identified on Schedule “A”*, No. 19 CV 8181, 2022 WL 1004412, at *3 (N.D. Ill. Apr. 4, 2022) (“[A] court should deny a plaintiff’s request [for discovery] if it’s based on only unsupported assertions of personal jurisdiction or appears frivolous.”); *Rovanco Piping Sys., Inc. v. Perma-Pipe Int’l Holdings, Inc.*, No. 21 C 3522, 2022 WL 683690, at *4 (N.D. Ill. Mar. 8, 2022) (“A plaintiff may not rely on bare, attenuated, or unsupported assertions of jurisdiction to justify discovery.”) (internal citations omitted). The bankruptcy judge considered the motion to dismiss and an extensive record with attached exhibits which included declarations from Sheehan, Murran, a representative of Breccia, and an Irish solicitor opining on the extraterritorial effect of a foreign

bankruptcy filing in Ireland; extensive correspondence between counsel for the parties; documents pertaining to the bankruptcy and receivership in Ireland; and a multitude of other exhibits. The bankruptcy court was in the best position to assess whether further discovery on the issues raised by Sheehan could reveal facts, which, if true, might alter its decision on the court's personal jurisdiction over the defendants. Given our review of the record below, and the bankruptcy court's holding on personal jurisdiction, we see no signs that the bankruptcy court abused its discretion in denying the requested discovery (or that the district court erred in sustaining the bankruptcy court's decision).

Because we hold that the bankruptcy court had no jurisdiction over the defendants, we need not address the issues of proper service or *forum non conveniens*.

The judgment of the district court is AFFIRMED.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In Re: Talas Qais Abdulmunem Al
Zawawi

TALAS QAIS ABDULMUNEM AL
ZAWAWI,

Appellant,

v.

Case No: 6:21-cv-894-GAP

COLIN DISS,
HANNAH DAVIE and
MICHAEL LEEDS

Appellees.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court without oral argument on appeal from the United States Bankruptcy Court for the Middle District of Florida (“Bankruptcy Court”). That court entered an order granting recognition of a foreign insolvency proceeding on May 5, 2021 (“Order”) (Doc. 10-21), which is the subject of this appeal.¹ With the parties’ briefing complete (Docs. 14, 22, 27), the matter is ripe for disposition.

¹ The Bankruptcy Court supplemented its Order with a memorandum opinion on August 30, 2021. *See* Doc. 11-1.

I. Background

After Talal Qais Abdulmunem Al Zawawi (“Al Zawawi”) got divorced, a court in the United Kingdom ordered him to pay £24 million to his former wife. Doc. 10–12 ¶¶ 3–5. Al Zawawi, a citizen and resident of Oman, *see* Doc. 10–7 at 2; Doc. 10–8 at 10, refused to pay, so he was adjudged bankrupt under English law. *See* Doc. 10–12 ¶ 9. Appellees are joint trustees in the English bankruptcy proceeding. Doc. 10–12 ¶ 10.

This cross-border bankruptcy made its way to Orlando because Appellees sought, among other things, discovery related to assets purportedly held by Al Zawawi in the Middle District of Florida. Doc. 10–12 ¶¶ 21–24, 26. Al Zawawi owns shares in a Curaçaoan entity that wholly owns a web of Florida corporations based in Winter Park, Florida.² Doc. 15–1 at 20–21. And at the time of the recognition proceedings, Al Zawawi served as a director of those Florida corporations,³ which collectively own around \$94 million of real estate in the area.⁴

² The Bankruptcy Court took judicial notice of the fact that the Florida corporations all listed an address in Winter Park, Florida, as their principal place of business. Doc. 11–1 at 3.

³ This fact was presented by Appellees’ counsel during the Bankruptcy Court’s recognition hearing. Doc. 15–1 at 13. The Bankruptcy Court also took judicial notice of such. Doc. 11–1 at 3.

⁴ The parties do not dispute the value of the real estate owned by the Florida corporations. But Appellees seek discovery beyond that pot of real estate. They want information concerning, for instance, assets that Al Zawawi transferred to his brother shortly before the start of the English bankruptcy proceeding; assets in the United States that may have been acquired

Appellees thus petitioned the Bankruptcy Court for the Middle District of Florida for an order recognizing the English bankruptcy proceeding under Chapter 15 of the United States Bankruptcy Code,⁵ which was granted. *See* Docs. 10-21 & 11-1.

On appeal, Al Zawawi raises two issues. The first is whether Appellees had to show that Al Zawawi qualified as a “debtor” under Section 109(a) to obtain the recognition order. Section 1517 directs courts to “recogniz[e] a foreign proceeding” if three elements are met. 11 U.S.C. § 1517(a). Al Zawawi does not dispute that those elements were met, but asserts that Appellees had to satisfy a requirement otherwise absent from Section 1517: that Al Zawawi had “property in the United States” under Section 109(a). In other words, Al Zawawi claims that Section 109(a) imposes a threshold requirement for all Chapter 15 recognition proceedings.

Second, if Section 109(a) applies, Al Zawawi disputes that Appellees met their burden of showing that he qualified as a “debtor” under that section. However, since the Court concludes that compliance with Section 109(a) is not a

using Al Zawawi’s funds; and causes of action held by Al Zawawi under United States law. Doc. 10-12 ¶¶ 21-24, 26. Appellees’ ultimate goal is to recover assets for the English proceeding. Doc. 10-12 ¶ 21.

⁵ All chapters and sections referenced herein refer to the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

prerequisite to obtaining recognition under Chapter 15, this issue becomes moot.

II. Legal Standard

Since the issue here involves a question of law, the Court exercises *de novo* review. *See In re Horne*, 876 F.3d 1076, 1080 (11th Cir. 2017) (citation omitted).

To interpret the Bankruptcy Code, the Court relies on “the traditional standards of statutory construction.” *In re Tennyson*, 611 F.3d 873, 877 (11th Cir. 2010). The Court begins with “the language of the statute itself.” *Id.* (citation omitted). “We assume that Congress used the words in a statute as they are commonly and ordinarily understood, and we read the statute to give full effect to each of its provisions.” *Id.* (citation omitted). To do so, the Court must not “look at one word or term in isolation, but instead . . . look to the entire statutory context.” *Id.* (citation omitted). The Eleventh Circuit has instructed courts to consider extrinsic materials only if: “(1) the statute’s language is ambiguous; (2) applying it according to its plain meaning would lead to an absurd result; or (3) there is clear evidence of contrary legislative intent.” *Id.* (citation omitted).

III. Analysis

a. Chapter 15 and Recognition under Section 1517

Chapter 15 is a measure of comity. *See, e.g.*, 11 U.S.C. § 1501; *see generally In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1044 (5th Cir. 2012) (characterizing “comity” as “a principal objective” of Chapter 15 (citation omitted)). It not only authorizes

bankruptcy courts to aid foreign bodies in the administration of foreign insolvency proceedings, but in some cases forces them to do so. *See, e.g.*, 11 U.S.C. §§ 1507, 1509, 1519-1521.

Once a foreign insolvency proceeding has been commenced, a “foreign representative”⁶ may petition a United States bankruptcy court for an order recognizing the proceeding. *See* 11 U.S.C. § 1515.

With a recognition order, Chapter 15 gives a bankruptcy court the power to “grant any appropriate relief” requested by the foreign representative that is “necessary to effectuate the purpose of th[e] chapter and protect the assets of the debtor or the interests of the creditors.” 11 U.S.C. § 1521(a). That includes staying litigation and executions; suspending transfer rights; “entrusting the administration . . . of all or part of the debtor’s assets within the . . . United States to the foreign representative”; and, most pertinent here, “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.” 11 U.S.C. § 1521(a).

Section 1517(a) sets forth just three conditions for recognition, none of

⁶ A “foreign representative” is “[a] person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding.” 11 U.S.C. § 101(24).

which involve an assessment of the foreign debtor's contacts with the United States. *See* 11 U.S.C. § 1517(a). That section provides:

Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding *shall* be entered if —

- (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
- (2) the foreign representative applying for recognition is a person or body; and
- (3) the petition meets the [administrative] requirements of section 1515.

11 U.S.C. § 1517(a) (emphasis added).

Nonetheless, Al Zawawi claims that the requirements in Section 1517(a) are not exhaustive. He points to sections 109 and 103 of the Bankruptcy Code. Section 109(a) provides that “[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.” 11 U.S.C. § 109(a). And Section 103(a) directs courts to apply Section 109 to cases under Chapter 15. *See* 11 U.S.C. § 103(a) (“Except as provided for in section 1161 of this title, . . . this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.”). Therefore, Al Zawawi asserts, a foreign representative seeking recognition must show that the foreign debtor “resides or has a domicile,

a place of business, or property in the United States.” 11 U.S.C. § 109(a).⁷

But Al Zawawi misconstrues the application of Section 109(a). Section 1517 unambiguously provides the sole requirements for recognition. Recognition is not premised upon a foreign debtor having a domicile, residence, place of business, or property in the United States. *C.f. Jaffe v. Samsung Elecs. Co., Ltd.*, 737 F.3d 14, 24 (4th Cir. 2013) (“If the [recognition] petition meets the requirements listed in § 1517, the court *must* enter an order granting recognition of the foreign proceeding.” (emphasis in original)); *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 306 (3d Cir. 2013) (“Chapter 15 . . . mandat[es] recognition when a foreign proceeding meets Section 1517 recognition requirements.” (citation omitted)).⁸

That Chapter 15 contains the term “debtor” does not change the outcome here. Although “debtor” is defined at the start of the Bankruptcy Code, *see* 11 U.S.C. § 101(13), Chapter 15 provides its own, alternate definition for “debtor.” *See*

⁷ In this case, property is the issue. Al Zawawi is neither a domiciliary nor a resident of the United States, and he has no place of business in this country. So, under Al Zawawi’s theory, the only bar preventing Appellees from obtaining recognition under Chapter 15 is Al Zawawi’s purported lack of “property in the United States.” 11 U.S.C. § 109(a).

⁸ To be sure, a foreign debtor’s contacts are relevant. *See In re British Amer. Ins. Co. Ltd.*, 488 B.R. 205, 213 (Bankr. S.D. Fla. 2013) (citation omitted). But the statute looks to contacts with the foreign jurisdiction, not with the United States. *See id.* (remarking that the “recognition procedure . . . reflects a policy determination by UNCITRAL and Congress that [a bankruptcy] [c]ourt should not assist a representative of a foreign action unless the debtor has a sufficient presence in the country in which the foreign action is taking place” (citation omitted)). Indeed, a prerequisite for recognition is that the foreign proceeding be “pending in the country where the debtor has the center of its main interests,” 11 U.S.C. § 1502(4), or “where the debtor has an establishment.” 11 U.S.C. § 1502(5); *see* 11 U.S.C. § 1517.

11 U.S.C. § 1502(1) (“For the purposes of this chapter, the term . . . ‘debtor’ means an entity that is the subject of a foreign proceeding”). That definition controls and is plainly consistent with the purposes of Chapter 15.⁹

b. Other Statutory Provisions Confirm that Recognition is Not Predicated on Section 109(a)

The Court need not look beyond Section 1517. *See, e.g., In re Guillen*, 972 F.3d 1221, 1226 (11th Cir. 2020) (suggesting that when “a plain, nonabsurd meaning [comes] in[to] view,” a court is not required to sail further into the horizon (citation omitted)). But numerous provisions cited by the parties further indicate that recognition is a concept that lies beyond Section 109(a)’s reach. *C.f. In re Tennyson*, 611 F.3d at 877 (recognizing the import of “statutory context” (citation and internal quotation marks omitted)).

Start with Section 1528, which provides that “[a]fter recognition of a foreign main proceeding, a case under another chapter of this title may be commenced *only if the debtor has assets in the United States.*” 11 U.S.C. § 1528 (emphasis added). If Section 109(a) created a threshold requirement to Chapter 15 as Al Zawawi suggests, Congress would have had little, if any, need to qualify Section 1528 in this manner.

⁹ The legislative history for Chapter 15 bolsters this point. *See* H.R. Rep. No. 109–31, pt. 1, at 107, *reprinted in* 2005 U.S.C.C.A.N. 88, 170 (2005) (noting that the term “debtor” takes on a “special definition” in Chapter 15 – provided in Section 1502 – and such “[wa]s necessary to eliminate the need to refer repeatedly to ‘the same debtor as in the foreign proceeding’”).

Moreover, part of the venue statute for Chapter 15 cases, 28 U.S.C. § 1410, would be rendered superfluous if Section 109(a) applied a threshold bar to recognition. In a chapter 15 case, venue lies in the district:

- (1) in which the debtor has its principal place of business or principal assets in the United States;
- (2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding in a Federal or State court; or
- (3) in a case other than those specified in paragraph (1) or (2), in which venue will be consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative.

28 U.S.C. § 1410. Congress thus expressly contemplated the prospect that a foreign debtor might not satisfy the qualifications required of a traditional debtor under Section 109(a).¹⁰ Any other interpretation could render subsections (2) and (3) meaningless.

The Bankruptcy Court also noted that even Section 109 suggests that subsection (a) is limited in scope. Subsections (b) through (g)¹¹ of Section 109 further detail who “may be a debtor” under Chapters 7, 9, 11, 12, and 13. But there

¹⁰ The venue statute for plenary cases under title 11 underscores this conclusion. It provides in part that a case may be commenced in the district of the debtor’s “domicile, residence, principal place of business in the United States, or principal assets in the United States.” 28 U.S.C. § 1408(1).

¹¹ Subsection (h) generally mandates that individual debtors seek credit counseling services before they become a “debtor” under title 11. *See* 11 U.S.C. § 109(h). It carries no apparent relevance at the recognition stage.

is no mention of Chapter 15, further weakening Al Zawawi's purported interpretation.

c. Legislative History Underscores the Validity of Appellees' Position

The legislative history behind Chapter 15 bolsters the conclusion that recognition is not tethered to Section 109(a). The relevant House Report plainly states that "[t]he requirements of [Section 1517] . . . are all that must be fulfilled to attain recognition." H.R. Rep. No. 109-31, pt. 1, at 113. And the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross Border Insolvency – which is persuasive authority¹² – emphasizes a similar point. *See* U.N. Comm'n on Int'l Trade Law, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, ¶ 151 (2014) ("The Model Law makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the proceeding satisfies the requirements of article 15 and article 6 is not relevant, recognition should follow in accordance with article 17.").

d. *In re Barnet* Does Not Alter the Court's Conclusion

Al Zawawi rests much of his argument on *In re Barnet*, 737 F.3d 238 (2d Cir. 2013), wherein the Second Circuit held that Section 109(a) applies to a debtor

¹² The legislative history indicates that Congress relied on an earlier version of the Guide when drafting Chapter 15.

under Chapter 15. *See id.* at 247.

Although there are few decisions from outside the Second Circuit on the topic of whether Section 109(a) applies in the recognition context, courts have reached differing conclusions. *Compare In re Forge Grp. Power Pty Ltd.*, No. 17-cv-024045, 2018 WL 827913, at *6–12 (N.D. Cal. Feb. 12, 2018) (adopting the reasoning set forth in *Barnet*), with *In re MMX Sudeste Mineração S.A.*, No. 17-16113, 2017 Bankr. LEXIS 4663, at *1-2 (Bankr. S.D. Fla. Nov. 7, 2017) (declining to follow *Barnet*), and *In re Bemarmara Consulting A.S.*, No. 13-13037, Doc. 38 at 8–9 (Bankr. D. Del. Dec. 23, 2013) (same). *C.f. In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 612 (Bankr. S.D.N.Y. 2018) (describing *Barnet* as “a controversial ruling”).

And it is telling that even those bound by *Barnet* do not require much to satisfy Section 109(a). *See e.g., In re B.C.I. Fins. Pty Ltd.*, 583 B.R. 288, 293–96 (Bankr. S.D.N.Y. 2018) (finding that attorney retainers deposited by foreign debtors in the United States for the alleged sole purpose of satisfying Section 109(a) – and, thereafter, obtaining discovery – were sufficient to satisfy Section 109(a)’s “property” requirement). *C.f. Forge Power Grp. Pty Ltd.*, 2018 WL 827913, at *12 (concluding that an attorney retainer satisfied Section 109(a), even though such was “deposited for the express purpose of retaining counsel in the United States for Chapter 15 proceedings” (citations omitted)).

The Eleventh Circuit’s analysis in *In re Goerg*, 844 F.2d 1562 (11th Cir. 1988)

suggests that, if presented with today's question, the Eleventh Circuit would decline to follow *Barnet*. Chapter 15 is centered atop the premise (and promise) of ancillary assistance, and its text makes such clear. *C.f. In re Guillen*, 972 F.3d at 1227 (“We seek to construe statutes, not isolated provisions.” (citation and internal quotation marks omitted)). Geared toward the efficient, effective, and just administration of cross-border insolvencies, *see* 11 U.S.C. § 1501(a), Chapter 15 would provide illusory relief if, as argued, foreign representatives had to marshal evidence of Section 109(a)'s requirements just to access bankruptcy machinery.¹³ The Eleventh Circuit held as much in a similar context. *See Goerg*, 844 F.2d at 1568 (“Because the focus is on making United States processes available in aid of foreign proceedings, not actual bankruptcy administration, it would make little sense to require that the subject of the foreign proceeding qualify as a ‘debtor’ under United States bankruptcy law.” (citations omitted)).

¹³ Al Zawawi contends that jurisdictional concerns would arise if Section 109(a) was not grafted to Chapter 15. At the recognition stage, however, those concerns are unwarranted; bankruptcy courts exercise “limited *in rem* jurisdiction” over “property located within the United States” in chapter 15 proceedings. *In re JSC BTA Bank*, 434 B.R. 334, 345 (Bankr. S.D.N.Y. 2010); *see also British Amer. Ins. Co. Ltd.*, 488 B.R. at 224–27.

IV. Conclusion

Comity lies at the heart of Chapter 15. And recognition is a critical component thereof – for a foreign representative, recognition serves as the door to much of our nation’s judicial system. Limiting recognition to proceedings involving foreign debtors that qualify as “debtors” under the Bankruptcy Code is simply inconsistent with the express language and fundamental purpose of Chapter 15. Accordingly, as the Bankruptcy Court recognized, Section 109(a) cannot be applied in the manner suggested by Al Zawawi.¹⁴ The Bankruptcy Court’s Order is therefore **AFFIRMED**. The Clerk is hereby **ORDERED** to enter judgment for Appellees and thereafter close the case.

DONE and **ORDERED** in Chambers, Orlando, Florida on February 28, 2022.




 GREGORY A. PRESNELL
 UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
 Unrepresented Party

¹⁴ Contrary to Al Zawawi’s suggestion, this case is far from a fishing expedition. As the Bankruptcy Court noted, it appears that Al Zawawi owns property in Central Florida. Post-recognition discovery will allow Appellees to confirm this fact and pursue avenues consistent with the administration of the foreign proceeding.

41. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS

(concluded 2 July 2019)

The Contracting Parties to the present Convention,

Desiring to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation,

Believing that such co-operation can be enhanced through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments,

Convinced that such enhanced judicial co-operation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*,

Have resolved to conclude this Convention to this effect and have agreed upon the following provisions –

CHAPTER I – SCOPE AND DEFINITIONS

Article 1

Scope

1. This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.
2. This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

Article 2

Exclusions from scope

1. This Convention shall not apply to the following matters –
 - (a) the status and legal capacity of natural persons;
 - (b) maintenance obligations;

- (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
- (d) wills and succession;
- (e) insolvency, composition, resolution of financial institutions, and analogous matters;
- (f) the carriage of passengers and goods;
- (g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average;
- (h) liability for nuclear damage;
- (i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;
- (j) the validity of entries in public registers;
- (k) defamation;
- (l) privacy;
- (m) intellectual property;
- (n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;
- (o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;
- (p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin;
- (q) sovereign debt restructuring through unilateral State measures.

2. A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3. This Convention shall not apply to arbitration and related proceedings.

4. A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

5. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
Definitions

1. In this Convention –
 - (a) “defendant” means a person against whom the claim or counterclaim was brought in the State of origin;
 - (b) “judgment” means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.
2. An entity or person other than a natural person shall be considered to be habitually resident in the State –
 - (a) where it has its statutory seat;
 - (b) under the law of which it was incorporated or formed;
 - (c) where it has its central administration; or
 - (d) where it has its principal place of business.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4
General provisions

1. A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
4. Recognition or enforcement may be postponed or refused if the judgment referred to under paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 5
Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –

- (a) the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;
- (b) the natural person against whom recognition or enforcement is sought had their principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;
- (c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;
- (d) the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;
- (e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
- (f) the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;
- (g) the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with
 - (i) the agreement of the parties, or
 - (ii) the law applicable to the contract, in the absence of an agreed place of performance, unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;
- (h) the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated;
- (i) the judgment ruled against the defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*;
- (j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;
- (k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –
 - (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or
 - (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;

- (l) the judgment ruled on a counterclaim –
 - (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or
 - (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;
- (m) the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.

For the purposes of this sub-paragraph, an “exclusive choice of court agreement” means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts.

2. If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee’s contract of employment –

- (a) paragraph 1(e) applies only if the consent was addressed to the court, orally or in writing;
- (b) paragraph 1(f), (g) and (m) do not apply.

3. Paragraph 1 does not apply to a judgment that ruled on a residential lease of immovable property (tenancy) or ruled on the registration of immovable property. Such a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated.

Article 6

Exclusive basis for recognition and enforcement

Notwithstanding Article 5, a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin.

Article 7

Refusal of recognition and enforcement

1. Recognition or enforcement may be refused if –
 - (a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –
 - (i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
 - (ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
 - (b) the judgment was obtained by fraud;

- (c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;
- (d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin;
- (e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or
- (f) the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

2. Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

- (a) the court of the requested State was seised before the court of origin; and
- (b) there is a close connection between the dispute and the requested State.

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

Article 8 *Preliminary questions*

1. A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

Article 9 *Severability*

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

Article 10 *Damages*

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 11

Judicial settlements (transactions judiciaires)

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Article 12

Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –
 - (a) a complete and certified copy of the judgment;
 - (b) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - (c) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
 - (d) in the case referred to in Article 11, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.
3. An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.
4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 13

Procedure

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court of the requested State shall act expeditiously.
2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 14
Costs of proceedings

1. No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given by a court of another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.
2. An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 or of the law of the State where proceedings have been instituted, shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.
3. A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

Article 15
Recognition and enforcement under national law

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

CHAPTER III – GENERAL CLAUSES

Article 16
Transitional provision

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention had effect between that State and the requested State.

Article 17
Declarations limiting recognition and enforcement

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

Article 18
Declarations with respect to specific matters

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
2. With regard to that matter, the Convention shall not apply –
 - (a) in the Contracting State that made the declaration;

- (b) in other Contracting States, where recognition or enforcement of a judgment given by a court of a Contracting State that made the declaration is sought.

Article 19

Declarations with respect to judgments pertaining to a State

1. A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

- (a) that State, or a natural person acting for that State; or
- (b) a government agency of that State, or a natural person acting for such a government agency.

The State making such a declaration shall ensure that the declaration is no broader than necessary and that the exclusion from scope is clearly and precisely defined. The declaration shall not distinguish between judgments where the State, a government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin.

2. Recognition or enforcement of a judgment given by a court of a State that made a declaration pursuant to paragraph 1 may be refused if the judgment arose from proceedings to which either the State that made the declaration or the requested State, one of their government agencies or a natural person acting for either of them is a party, to the same extent as specified in the declaration.

Article 20

Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 21

Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for review of the operation of this Convention, including any declarations, and shall report to the Council on General Affairs and Policy.

Article 22

Non-unified legal systems

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –

- (a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
- (b) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

- (c) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit;
- (d) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.

2. Notwithstanding paragraph 1, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

4. This Article shall not apply to Regional Economic Integration Organisations.

Article 23

Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention.

3. This Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that treaty.

4. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Member State of the Regional Economic Integration Organisation where –

- (a) the rules were adopted before this Convention was concluded; or
- (b) the rules were adopted after this Convention was concluded, to the extent that they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

CHAPTER IV – FINAL CLAUSES

Article 24

Signature, ratification, acceptance, approval or accession

1. This Convention shall be open for signature by all States.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention shall be open for accession by all States.
4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 25

Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may declare that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration shall state expressly the territorial units to which the Convention applies.
2. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.
3. This Article shall not apply to Regional Economic Integration Organisations.

Article 26

Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.
3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 27(1) that its Member States will not be Parties to this Convention.
4. Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation.

Article 27

Regional Economic Integration Organisation as a Contracting Party without its Member States

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a “Contracting State” or “State” in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 28 *Entry into force*

1. This Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24.

2. Thereafter this Convention shall enter into force –

- (a) for each State subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29(2) with respect to that State;
- (b) for a territorial unit to which this Convention has been extended in accordance with Article 25 after the Convention has entered into force for the State making the declaration, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 29 *Establishment of relations pursuant to the Convention*

1. This Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with paragraph 2 or 3. In the absence of such a notification, the Convention has effect between two Contracting States from the first day of the month following the expiration of the period during which notifications may be made.

2. A Contracting State may notify the depositary, within 12 months after the date of the notification by the depositary referred to in Article 32(a), that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to this Convention.

3. A State may notify the depositary, upon the deposit of its instrument pursuant to Article 24(4), that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to this Convention.

4. A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification.

Article 30 *Declarations*

1. Declarations referred to in Articles 14, 17, 18, 19 and 25 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2. Declarations, modifications and withdrawals shall be notified to the depositary.

3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months following the date on which the notification is received by the depositary.

5. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.

Article 31 *Denunciation*

1. A Contracting State to this Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 32 *Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded to this Convention in accordance with Articles 24, 26 and 27 of the following –

- (a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 24, 26 and 27;
- (b) the date on which this Convention enters into force in accordance with Article 28;
- (c) the notifications, declarations, modifications and withdrawals referred to in Articles 26, 27, 29 and 30; and
- (d) the denunciations referred to in Article 31.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 2nd day of July 2019, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the time of its Twenty-Second Session and to each of the other States which have participated in that Session.

37. CONVENTION ON CHOICE OF COURT AGREEMENTS¹

(Concluded 30 June 2005)

The States Parties to the present Convention,
Desiring to promote international trade and investment through enhanced judicial co-operation,
Believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,
Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,
Have resolved to conclude this Convention and have agreed upon the following provisions –

CHAPTER I – SCOPE AND DEFINITIONS

Article 1 Scope

- (1) This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.
- (2) For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.
- (3) For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

Article 2 Exclusions from scope

- (1) This Convention shall not apply to exclusive choice of court agreements –
 - a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;
 - b) relating to contracts of employment, including collective agreements.
- (2) This Convention shall not apply to the following matters –
 - a) the status and legal capacity of natural persons;
 - b) maintenance obligations;
 - c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
 - d) wills and succession;
 - e) insolvency, composition and analogous matters;
 - f) the carriage of passengers and goods;
 - g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;

¹ This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions” or under the “Choice of Court Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court* (ISBN 978-9-40000-053-7, Intersentia, Antwerp, 2010, 871 pp.).

- h) anti-trust (competition) matters;
 - i) liability for nuclear damage;
 - j) claims for personal injury brought by or on behalf of natural persons;
 - k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
 - l) rights *in rem* in immovable property, and tenancies of immovable property;
 - m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
 - n) the validity of intellectual property rights other than copyright and related rights;
 - o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;
 - p) the validity of entries in public registers.
- (3) Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.
- (4) This Convention shall not apply to arbitration and related proceedings.
- (5) Proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.
- (6) Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3 Exclusive choice of court agreements

For the purposes of this Convention –

- a) “exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
- b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;
- c) an exclusive choice of court agreement must be concluded or documented –
 - i) in writing; or
 - ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
- d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 4 Other definitions

- (1) In this Convention, “judgment” means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.
- (2) For the purposes of this Convention, an entity or person other than a natural person shall be considered to be resident in the State –
 - a) where it has its statutory seat;
 - b) under whose law it was incorporated or formed;
 - c) where it has its central administration; or
 - d) where it has its principal place of business.

CHAPTER II – JURISDICTION

Article 5

Jurisdiction of the chosen court

- (1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
- (2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.
- (3) The preceding paragraphs shall not affect rules –
 - a) on jurisdiction related to subject matter or to the value of the claim;
 - b) on the internal allocation of jurisdiction among the courts of a Contracting State.However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6

Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –

- a) the agreement is null and void under the law of the State of the chosen court;
- b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
- c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
- d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
- e) the chosen court has decided not to hear the case.

Article 7

Interim measures of protection

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.

CHAPTER III – RECOGNITION AND ENFORCEMENT

Article 8

Recognition and enforcement

- (1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
- (2) Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
- (3) A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
- (4) Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A

refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

- (5) This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

Article 9 Refusal of recognition or enforcement

Recognition or enforcement may be refused if –

- a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
- b) a party lacked the capacity to conclude the agreement under the law of the requested State;
- c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
 - i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
 - ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
- d) the judgment was obtained by fraud in connection with a matter of procedure;
- e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;
- f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Article 10 Preliminary questions

- (1) Where a matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.
- (2) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 2.
- (3) However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where –
 - a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State under the law of which the intellectual property right arose; or
 - b) proceedings concerning the validity of the intellectual property right are pending in that State.
- (4) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded pursuant to a declaration made by the requested State under Article 21.

Article 11 Damages

- (1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
- (2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 12
Judicial settlements (*transactions judiciaires*)

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Article 13
Documents to be produced

- (1) The party seeking recognition or applying for enforcement shall produce –
 - a) a complete and certified copy of the judgment;
 - b) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;
 - c) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
 - e) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
- (2) If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.
- (3) An application for recognition or enforcement may be accompanied by a document, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.
- (4) If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14
Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

Article 15
Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

CHAPTER IV – GENERAL CLAUSES

Article 16
Transitional provisions

- (1) This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.
- (2) This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised.

Article 17
Contracts of insurance and reinsurance

- (1) Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply.
- (2) Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of –
 - a) a matter to which this Convention does not apply; or
 - b) an award of damages to which Article 11 might apply.

Article 18
No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille.

Article 19
Declarations limiting jurisdiction

A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

Article 20
Declarations limiting recognition and enforcement

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

Article 21
Declarations with respect to specific matters

- (1) Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
- (2) With regard to that matter, the Convention shall not apply –
 - a) in the Contracting State that made the declaration;
 - b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Article 22
Reciprocal declarations on non-exclusive choice of court agreements

- (1) A Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph c), and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement).

- (2) Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognised and enforced under this Convention, if –
- a) the court of origin was designated in a non-exclusive choice of court agreement;
 - b) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor a proceeding pending between the same parties in any other such court on the same cause of action; and
 - c) the court of origin was the court first seised.

Article 23 Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 24 Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

- a) review of the operation of this Convention, including any declarations; and
- b) consideration of whether any amendments to this Convention are desirable.

Article 25 Non-unified legal systems

- (1) In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –
- a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
 - b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;
 - c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
 - d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.
- (2) Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.
- (3) A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.
- (4) This Article shall not apply to a Regional Economic Integration Organisation.

Article 26 Relationship with other international instruments

- (1) This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.
- (2) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.
- (3) This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty

- concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.
- (4) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.
 - (5) This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.
 - (6) This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention –
 - a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;
 - b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

CHAPTER V – FINAL CLAUSES

Article 27

Signature, ratification, acceptance, approval or accession

- (1) This Convention is open for signature by all States.
- (2) This Convention is subject to ratification, acceptance or approval by the signatory States.
- (3) This Convention is open for accession by all States.
- (4) Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 28

Declarations with respect to non-unified legal systems

- (1) If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
- (2) A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
- (3) If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.
- (4) This Article shall not apply to a Regional Economic Integration Organisation.

Article 29

Regional Economic Integration Organisations

- (1) A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.
- (2) The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its

Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

- (3) For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 30 that its Member States will not be Parties to this Convention.
- (4) Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 30

Accession by a Regional Economic Integration Organisation without its Member States

- (1) At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.
- (2) In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 31

Entry into force

- (1) This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27.
- (2) Thereafter this Convention shall enter into force –
 - a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
 - b) for a territorial unit to which this Convention has been extended in accordance with Article 28, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 32

Declarations

- (1) Declarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.
- (2) Declarations, modifications and withdrawals shall be notified to the depositary.
- (3) A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.
- (4) A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.
- (5) A declaration under Articles 19, 20, 21 and 26 shall not apply to exclusive choice of court agreements concluded before it takes effect.

Article 33

Denunciation

- (1) This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.
- (2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer

period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 34
Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 27, 29 and 30 of the following –

- a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 27, 29 and 30;
- b) the date on which this Convention enters into force in accordance with Article 31;
- c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles 19, 20, 21, 22, 26, 28, 29 and 30;
- d) the denunciations referred to in Article 33.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on 30 June 2005, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Twentieth Session and to each State which participated in that Session.



Michaelmas Term

[2012] UKSC 46

On appeal from: [2010] EWCA Civ 895; [2011] EWCA Civ 971

JUDGMENT

**Rubin and another (Respondents) v Eurofinance SA
and others (Appellants)**

**New Cap Reinsurance Corporation (In
Liquidation) and another (Respondents/Cross
Appellants) v A E Grant and others as Members of
Lloyd's Syndicate 991 for the 1997 Year of Account
and another (Appellants/Cross Respondents)**

before

**Lord Walker
Lord Mance
Lord Clarke
Lord Sumption
Lord Collins**

JUDGMENT GIVEN ON

24 October 2012

Heard on 21, 22, 23 and 24 May 2012

Appellant
Marcus Staff

(Instructed by Brown
Rudnick LLP)

Appellant
Robin Knowles QC
Blair Leahy
(Instructed by Edwards
Wildman Palmer UK
LLP)

Intervener
Pushpinder Saini QC
Adrian Briggs
Shaheed Fatima
Ian Fletcher
Stephen Robins
(Instructed by Taylor
Wessing)

Respondent
Robin Dicker QC
Tom Smith

(Instructed by Chadbourne
& Parke LLP)

Respondent
Gabriel Moss QC
Barry Isaacs QC
(Instructed by Mayer
Brown International LLP)

Intervener
Michael Driscoll QC
Rosanna Foscett

(Instructed by Wilsons
Solicitors LLP & Wedlake
Bell LLP)

LORD COLLINS (with whom Lord Walker and Lord Sumption agree)

I Introduction

The appeals

1. There are two appeals before the court: *Rubin v Eurofinance SA* (“*Rubin*”) and *New Cap Reinsurance Corp Ltd v Grant* (“*New Cap*”). These appeals raise an important and novel issue in international insolvency law. The issue is whether, and if so, in what circumstances, an order or judgment of a foreign court (on these appeals the United States Bankruptcy Court for the Southern District of New York, and the New South Wales Supreme Court) in proceedings to adjust or set aside prior transactions, eg preferences or transactions at an undervalue (“avoidance proceedings”), will be recognised and enforced in England. The appeals also raise the question whether enforcement may be effected through the international assistance provisions of the UNCITRAL Model Law (implemented by the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (“CBIR”)), which applies generally, or the assistance provisions of section 426 of the Insolvency Act 1986, which applies to a limited number of countries, including Australia.

2. In *Rubin* a judgment of the US Federal Bankruptcy Court for the Southern District of New York (“the US Bankruptcy Court”) in default of appearance for about US\$10m under State and Federal law in respect of fraudulent conveyances and transfers was enforced in England at common law. In *New Cap* (in which the Court of Appeal was bound by the prior decision in *Rubin*) a default judgment of the New South Wales Supreme Court, Equity Division, for about US\$8m in respect of unfair preferences under Australian law was enforced under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (“the 1933 Act”), and, alternatively, pursuant to powers under section 426 of the Insolvency Act 1986.

3. In each of the appeals it was accepted or found that the party against whom they were given was neither present (nor, for the purposes of the 1933 Act, resident) in the foreign country nor submitted to its jurisdiction (which are the relevant conditions for enforceability at common law and under the 1933 Act), but that those conditions did not apply to judgments or orders in foreign insolvency proceedings.

4. In addition to the arguments on these two appeals, the court has had the great benefit of written submissions on behalf of parties to proceedings pending in

Gibraltar. Those proceedings are to enforce default judgments entered by the US Bankruptcy Court for some \$247m in respect of alleged preferential payments to companies in the British Virgin Islands and Cayman Islands arising out of the notorious Ponzi scheme operated by Mr Bernard Madoff.

5. It has been necessary to emphasise that the judgments in all three matters were in default of appearance, because if the judgment debtors had appeared and defended the proceedings in the foreign courts, the issues on these appeals would not have arisen. The reason is that the judgments would have been enforceable on the basis of the defendants' submission to the jurisdiction of the foreign court. Enforcement would have been at common law, or, in the *New Cap* case either under the common law, or under the 1933 Act which substantially reproduces the common law principles - there is a subsidiary issue on this appeal as to whether the 1933 Act applies to judgments in insolvency proceedings, dealt with in section IX below.

6. Under the common law a court of a foreign country has jurisdiction to give a judgment in personam where (among other cases) the judgment debtor was present in the foreign country when the proceedings were instituted, or submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings. In the case of the 1933 Act the foreign court is deemed to have jurisdiction where the judgment debtor submitted to the jurisdiction by voluntarily appearing in the proceedings otherwise than for the purpose (inter alia) of contesting the jurisdiction; or where the judgment debtor was resident at the time when the proceedings were instituted, or being a body corporate had an office or place of business there: section 4(2)(a)(i),(iv).

The Dicey Rule

7. The general principle has been referred to on these appeals, by reference to the common law rule set out in *Dicey, Morris & Collins, Conflict of Laws* (14th edition, 2006), as "Dicey's Rule 36." This was only by way of shorthand, because the rules in the 1933 Act are not quite identical, and in any event has been purely for convenience, because the Rule has no standing beyond the case law at common law which it seeks to re-state. What was Rule 36 now appears (incorporating some changes which are not material on this appeal) as Rule 43 in the new 15th edition, and I shall refer to it as "the Dicey Rule." So far as relevant, Rule 43 (*Dicey, Morris and Collins, Conflict of Laws*, 15th ed, 2012, para 14R-054) states:

"a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement

or recognition as against the person against whom it was given in the following cases:

First Case—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.

Second Case—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

Third Case—If the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

Fourth Case—If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.”

8. The first edition of *Dicey* in 1896 stated (Rule 80) that the foreign court would have jurisdiction if “the defendant was resident [or present?]” in the foreign country “so as to have the benefit, and be under the protection, of the laws thereof.” By the 6th edition in 1949 the formula was repeated by Professor Wortley (Rule 68) but without the doubt about presence as a basis of jurisdiction. In the 8th edition in 1958 Dr (later Professor) Clive Parry removed the phrase (then Rule 189) about the benefit and protection of the foreign country’s laws. The Rule, subsequently edited by Dr Morris and then by Professor Kahn-Freund, remained in that form until the decision in *Adams v Cape Industries plc* [1990] Ch 433 (CA), which established that presence in the foreign jurisdiction, as opposed to residence, was a sufficient basis for the recognition of foreign judgments. Then, edited by myself and later by Professor Briggs, the Rule took substantially its present form in the 12th edition in 1993.

9. The theoretical basis for the enforcement of foreign judgments at common law is that they are enforced on the basis of a principle that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained: *Williams v Jones* (1845) 13 M & W 628, 633 per Parke B; *Godard v Gray* (1870) LR 6 QB 139, 147, per Blackburn J; *Adams v Cape Industries plc* [1990] Ch 433, 513; *Owens Bank Ltd v Bracco*

[1992] 2 AC 443, 484, per Lord Bridge of Harwich. As Blackburn J said in *Godard v Gray*, this was based on the mode of pleading an action on a foreign judgment in debt, and not merely as evidence of the obligation to pay the underlying liability: LR 6 QB 139, 150. But this is a purely theoretical and historical basis for the enforcement of foreign judgments at common law. It does not apply to enforcement under statute, and makes no practical difference to the analysis, nor, in my judgment, to the issues on these appeals.

10. Consequently, if the judgments in issue on the appeals are regarded as judgments in personam within the *Dicey* Rule, then they will only be enforced in England at common law if the judgment debtors were present (or, if the 1933 Act applies, resident) in the foreign country when the proceedings were commenced, or if they submitted to its jurisdiction. It is common ground that the judgment debtors were not present or resident, respectively, in the United States or in Australia, although there is an issue as to whether the New Cap defendants submitted to the jurisdiction of the Australian court, which is dealt with in section VIII below.

Insolvency proceedings and the international dimension

11. There are some general remarks to be made. First, from as early as the mid-18th century the English courts have recognised the effect of foreign personal bankruptcies declared under the law of the domicile: *Solomons v Ross* (1764) 1 H Bl 131n, where Dutch merchants were declared bankrupt in Amsterdam, and the Dutch curator was held entitled to recover an English debt in priority to an English creditor of the merchants who had attached the debt after the bankruptcy: see Nadelmann, *Conflict of Laws: International and Interstate* (1972), p 273; Blom-Cooper, *Bankruptcy in Private International Law* (1954), pp 107-108.

12. In *Galbraith v Grimshaw* [1910] AC 508 Lord Dunedin said that there should be only one universal process of the distribution of a bankrupt's property and that, where such a process was pending elsewhere, the English courts should not allow steps to be taken in its jurisdiction which would interfere with that process (p 513):

“Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution.”

13. Second, in the case of corporations the English courts have exercised a winding up jurisdiction which is wider than that which at common law they have accorded to foreign courts. The court exercises jurisdiction to wind up a foreign company if there is a sufficient connection between the company and England, there are persons who would benefit from the making of a winding up order, and there are persons interested in the distribution of assets of the company who are persons over whom the court can exercise jurisdiction: see *Dicey*, 15th ed, para 30R-036. But as regards foreign liquidations, the general rule is that the English court recognises at common law only the authority of a liquidator appointed under the law of the place of incorporation (*Dicey*, 15th ed, para 30R-100). That is in contrast to the modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000) (“the EC Insolvency Regulation”) and the Model Law, which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties). It is ultimately derived from the civil law concept of a trader’s domicile, and was adopted in substance in the draft EEC Convention of 1980 as a definition of the debtor’s centre of administration: see Report by M Lemontey on the draft EEC Bankruptcy Convention, Bulletin of the European Communities, Supp 2/82, p 58; American Law Institute, *Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases* (2012), Principle 13, pp 83 et seq.

14. Third, it is not only in recent times that there have been large insolvency proceedings with significant cross-border implications. Even before then there were the Russian Bank cases in the 1930s (arising out of the nationalisation and dissolution of the banks by the Soviet Government) and the *Barcelona Traction* case in the 1940s and 1950s (see *In re Barcelona Traction, Light and Power Co Ltd (second phase) (Belgium v Spain)* [1970] ICJ Rep 69), but there is no doubt that today international co-operation in cross-border insolvencies has become a pressing need. It is only necessary to recall the bankruptcies or liquidations of Bank of Credit and Commerce International, Maxwell Communications, or Lehman Brothers, each with international businesses, assets in many countries, and potentially competing creditors in different countries with different laws. There is not only a need to balance all these interests but also to provide swift and effective remedies to combat the use of cross-border transfers of assets to evade and to defraud creditors.

15. Fourth, there is no international unanimity or significant harmonisation on the details of insolvency law, because to a large extent insolvency law reflects national public policy, for example as regards priorities or as regards the conditions for the application of avoidance provisions: “the process of collection of assets will include, for example, the use of powers to set aside voidable

dispositions, which may differ very considerably from those in the English statutory scheme”: *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852, para 19, per Lord Hoffmann.

16. Fifth, there has been a trend, but only a trend, to what is called universalism, that is, the “administration of multinational insolvencies by a leading court applying a single bankruptcy law”: Westbrook, “A Global Solution to Multinational Default” (2000) 98 Mich L Rev 2276, 2277. What has emerged is what is called by specialists “modified universalism.”

17. The meaning of the expression “universalism” has undergone a change since the time it was first used in the 19th century, and it later came to be contrasted with the “doctrine of unity.” In 1834 Story referred to the theory that assignments under bankrupt or insolvent laws were, and ought to be, of universal operation to transfer movable property, in whatever country it might be situate, and concluded that there was great wisdom in adopting the rule that an assignment in bankruptcy should operate as a complete and valid transfer of all his movable property abroad, as well as at home, and for a country to prefer an attaching domestic creditor to a foreign assignee or to foreign creditors could “hardly be deemed consistent with the general comity of nations ... [T]he true rule is, to follow out the lead of the general principle that makes the law of the owner’s domicile conclusive upon the disposition of his personal property,” citing *Solomons v Ross* as supporting that doctrine: *Story, Commentaries on the Conflict of Laws*, 1st ed (1834), pp 340-341, para 406.

18. Professor Cheshire, in his first edition (Cheshire, *Private International Law*, 1935, pp 375-376), said that although English law “neglects the doctrine of unity it recognizes the doctrine of universality.” What he meant was that English law was committed to separate independent bankruptcies in countries where the assets were situate, rather than one bankruptcy in the country of the domicile (the doctrine of unity), but also accepted the title of the foreign trustee to English movables provided that no bankruptcy proceedings had begun within England (universality). He cited *Solomons v Ross* for this proposition:

“The English Courts ... have consistently applied the doctrine of universality, according to which they hold that all *movable* property, no matter where it may be situated at the time of the assignment by the foreign law, passes to the trustee.”

19. In *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852, para 30, Lord Hoffmann said:

“The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution.”

and in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508, para 16 he said, speaking for the Privy Council:

“The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated ...”

20. The US Bankruptcy Court accepted in *Re Maxwell Communication Corp*, 170 BR 800 (Bankr SDNY 1994) that the United States courts have adopted modified universalism as the approach to international insolvency:

“... the United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors.”

II International co-operation and assistance

21. Jurisdiction in international bankruptcy has been the subject of multilateral international instruments at least since the Montevideo Treaty on International Commercial Law of 1889, Title X, although bilateral treaties go back much further, and the subject of international recognition and co-operation in insolvency was the subject of early discussion by the International Law Association (1879),

the Institut de droit international (1888-1912) and the Hague Conference on Private International Law (1904): Nadelmann, *op. cit.* pp 299 *et seq.*

22. In more modern times, the European Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention) was concluded under the auspices of the Council of Europe in 1990, but never came into force. The European Community/Union initiative took 40 years to come to fruition. In 1960 the European Community embarked on a project for a Bankruptcy Convention, which resulted in a draft Convention in 1980, to which there was significant opposition. But the project was renewed in 1989, and this led to the tabling of a draft Convention in 1995, which provided that it would only come into force when signed by all 15 of the then member states. The United Kingdom, however, alone of the states, did not sign the Convention (for political reasons), and it never came into force. In 1999 the project was re-launched as a Council Regulation, which resulted in the EC Insolvency Regulation in 2000.

23. The United Nations Commission on International Trade Law (“UNCITRAL”) adopted a Model Law on cross-border insolvency in 1997. The Model Law was adopted following initiatives in the 1980s by the International Bar Association and later by INSOL International (the International Association of Restructuring, Insolvency and Bankruptcy Professionals). In 1993 UNCITRAL adopted a resolution to investigate the feasibility of harmonised rules of cross-border insolvencies. In 1994 an expert committee was assembled consisting of members of INSOL and representatives of the UNCITRAL Secretariat, and following a series of reports and drafts, UNCITRAL adopted the Model Law in May 1997. The Model Law provides for a wide range of assistance to foreign courts and office-holders. It has been implemented by 19 countries and territories, including the United States and Great Britain (although by some states only on the basis of reciprocity). It was not enacted into law in Great Britain until 2006, by the CBIR.

24. Apart from the EC Insolvency Regulation, none of these instruments deals expressly with the enforcement of judgments in insolvency proceedings. The question whether the Model Law does so by implication will be considered below in section IV.

25. Consequently, there are four main methods under English law for assisting insolvency proceedings in other jurisdictions, two of which are part of regionally or internationally agreed schemes. First, section 426 of the Insolvency Act 1986 provides a statutory power to assist corporate as well as personal insolvency proceedings in countries specified in the Act or designated for that purpose by the Secretary of State. All the countries to which it currently applies are common law countries or countries sharing a common legal tradition with England. They

include Australia: the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123).

26. Second, the EC Insolvency Regulation applies to insolvency proceedings in respect of debtors with their centres of main interests (COMI) within the European Union (excluding Denmark). The EC Insolvency Regulation has no role in the present appeal because none of the debtors has its centre of main interests in the European Union.

27. Third, the CBIR came into force on 4 April 2006, implementing the Model Law. The CBIR supplement the common law, but do not supersede it. Article 7 of the Model Law provides: “Nothing in this Law limits the power of a court or British insolvency officeholder to provide additional assistance to a foreign representative under other laws of Great Britain”.

28. Article 23 of the Model Law allows avoidance claims to be made by foreign representatives under the Insolvency Act 1986, and the CBIR apply to preferences after they came into force on 4 April 2006. The UNCITRAL Guide to Enactment (to which resort may be had for the purposes of interpretation of the CBIR) also emphasises that the Model Law enables enacting states to make available to foreign insolvency proceedings the type of relief which would be available in the case of a domestic insolvency (*UNCITRAL Legislative Guide on Insolvency Law* (2005), Annex III, Ch IV, p 311, para 20(b)):

“The Model Law presents to enacting states the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in the national law.”

29. Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element. The underlying principle has been stated in different ways: “recognition ... carries with it the active assistance of the court”: *In re African Farms Ltd* [1906] TS 373, 377; “This court ... will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under ch 11”: *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117.

30. In *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said:

“In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention ... It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other’s jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.”

31. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign officeholder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there.

32. An early case of recognition was *Solomons v Ross* 1 H B1 131n, where, as I have said, the bankruptcy was in Holland, and the bankrupts were Dutch merchants declared bankrupt in Amsterdam, and the Dutch curator was held entitled to recover an English debt: see also *Bergerem v Marsh* (1921) B&CR 195 (English member of Belgian firm submitted to Belgian bankruptcy proceedings: movable property in England vested in Belgian trustee).

33. One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; *cf In re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship Cornelis Verolme* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corp* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state owned enterprise in Mainland insolvency). Cases of judicial assistance in the traditional sense include *In re Impex Services Worldwide Ltd* [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company.

34. Cases involving remittal of assets from England to a foreign office-holder include *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 (Luxembourg liquidation of Luxembourg company); and *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 (the view of Lord Hoffmann and Lord Walker) (Australian liquidation of Australian insurance company); and *In re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft* [2009] EWHC 2099 (Ch), [2010] BCC 667 (Swiss liquidation of Swiss company).

III The Cambridge Gas and HIH decisions

35. The opinion of Lord Hoffmann, speaking for the Privy Council, in *Cambridge Gas Transportation Corp'n v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508 (“*Cambridge Gas*”) and his speech in the House of Lords in *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 (“*HIH*”) have played such a major role in the decisions of the Court of Appeal and in the arguments of the parties on these appeals that it is appropriate to put them in context at this point.

Cambridge Gas

36. The broad facts of *Cambridge Gas* were these. In 1997 a shipping business was initiated by a Swiss businessman, Mr Giovanni Mahler. The investors borrowed \$300m on the New York bond market and the business bought five gas transport vessels. The venture was a failure, and ended with a Chapter 11 proceeding in the US Bankruptcy Court in New York. The question for the Privy Council on appeal from the Isle of Man was whether an order of the New York court was entitled to implementation in the Isle of Man.

37. The corporate structure of the business was that the investors owned, directly or indirectly, a Bahamian company called Vela Energy Holdings Ltd (“Vela”). Vela owned (through an intermediate Bahamian holding company) Cambridge Gas, a Cayman Islands company.

38. Cambridge Gas owned directly or indirectly about 70% of the shares of Navigator Holdings plc (“Navigator”), an Isle of Man company. Navigator owned all the shares of an Isle of Man company which in turn owned companies which each owned one ship.

39. In 2003 Navigator petitioned the US Bankruptcy Court for relief under Chapter 11 of the US Bankruptcy Code, which allows insolvent companies, under

supervision of the court and under cover of a moratorium, to negotiate a plan of reorganisation with their creditors. The petition was initiated by the investor interests, who proposed a plan to sell the ships nominally by auction but in fact to the previous investors, but the bondholders did not accept this and proposed their own plan under which the assets of Navigator would be vested in the creditors and the equity interests of the previous investors would be extinguished. The judge rejected the investors' plan and approved the creditors' plan.

40. The mechanism which the plan used to vest the assets in the creditors was to vest the shares in Navigator in their representatives, ie, the creditors' committee. That would enable them to control the shipping companies and implement the plan. The plan provided that upon entry of the confirmation order title to all the common stock of Navigator would vest in the creditors' committee to enable it to implement the plan. The order of the New York court confirming the plan recorded the intention of the court to send a letter of request to the Manx court asking for assistance in giving effect to "the plan and confirmation order" and such a letter was sent. The committee of creditors then petitioned the Manx court for an order vesting the shares in their representatives.

41. At this point it is necessary to emphasise two features of the case. The first feature is that Navigator was an Isle of Man company and 70% of its common stock was owned directly or indirectly by Cambridge Gas. Under the normal principles of the conflict of laws the shares would have been situate in the Isle of Man: *Dicey*, 15th ed, para 22-045. That is why Lord Hoffmann said, at para 6, that the New York court was aware that the order vesting title to the common stock of Navigator in the creditors' committee could not automatically have effect under the law of the Isle of Man; and also why he accepted (paras 12-13) that if the judgment were a judgment in rem it could not affect title to shares in the Isle of Man.

42. The second feature which it is necessary to emphasise is that Cambridge Gas was a Cayman Islands company which (as held by the Manx courts) had not submitted to the jurisdiction of the US Bankruptcy Court. Lord Hoffmann said, at para 8, that the position that Cambridge Gas had not submitted to the jurisdiction of the US Bankruptcy Court bore little relation to economic reality since the New York proceedings had been conducted on the basis that the contest was between rival plans put forward by the shareholders and the creditors; Vela, the parent company of Cambridge Gas, participated in the Chapter 11 proceedings; and they had been instituted by Navigator. Consequently the claim by Cambridge Gas that it had not submitted was highly technical, but there was no appeal from the decisions of the Manx courts that it had not submitted. But Lord Hoffmann also accepted that if the order of the US Bankruptcy Court were to be regarded as a judgment in personam it would not be entitled to recognition or enforcement in the Isle of Man

because “the New York court had no personal jurisdiction over Cambridge [Gas]”: para 10.

43. Nevertheless the Privy Council held that the plan could be carried into effect in the Isle of Man. The reasoning was as follows: first, if the judgment had to be classified as in personam or in rem the appeal would have to be allowed, but bankruptcy proceedings did not fall into either category:

“[13] ... Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.

[14] The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. ...

[15] ... [B]ankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them. Of course, as Brightman LJ pointed out in *In re Lines Bros Ltd* [1983] Ch 1, 20, it may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy proceedings or directed to be determined by ordinary action. But these again are incidental procedural matters and not central to the purpose of the proceedings.”

44. Second, the principle of universality underlay the common law principles of judicial assistance in international insolvency, and those principles were sufficient to confer jurisdiction on the Manx court to assist, by doing whatever it could have done in the case of a domestic insolvency: paras 21-22. Third, exactly the same result could have been achieved by a scheme under the Isle of Man Companies Act 1931. Fourth, it was no objection to implementation of the plan in the Isle of Man that the shares in Navigator belonged to a person (Cambridge Gas) which was not a party to the bankruptcy proceedings for these reasons, at para 26:

“... [A] share is the measure of the shareholder’s interest in the company: a bundle of rights against the company and the other shareholders. As against the outside world, that bundle of rights is an item of property a chose in action. But as between the shareholder and the company itself, the shareholder’s rights may be varied or extinguished by the mechanisms provided by the articles of association or the Companies Act. One of those mechanisms is the scheme of arrangement under section 152 [of the Isle of Man Companies Act 1931]. As a shareholder Cambridge is bound by the transactions into which the company has entered, including a plan under Chapter 11 or a scheme under section 152.”

45. At this point it is necessary to point out that the opinion in *Cambridge Gas* does not articulate any reason for holding that, in the eyes of the Manx court, the US Bankruptcy Court had international jurisdiction in either of two relevant senses.

46. The first sense is the jurisdiction of the US Bankruptcy Court in relation to the Chapter 11 proceedings themselves. The entity which was in Chapter 11 was Navigator. The English courts exercise a wider jurisdiction in bankruptcy and (especially) in winding up than they recognise in foreign courts. At common law, the foreign court which is recognised as having jurisdiction in personal bankruptcy is the court of the bankrupt’s domicile or the court to which the bankrupt submitted (*Dicey*, 15th ed, para 31R-059) and the foreign court with corresponding jurisdiction over corporations is the court of the place of incorporation (*Dicey*, 15th ed, para 30R-100). Under United States law the US Bankruptcy Court has jurisdiction over a “debtor”, and such a debtor must reside or have a domicile or place of business, or property in the United States. From the standpoint of English law, the US Bankruptcy Court had international jurisdiction because although Navigator was not incorporated in the United States, it had submitted to the jurisdiction by initiating the proceedings.

47. The second sense in which international jurisdiction is relevant is the jurisdiction over the third party, Cambridge Gas, and its shares in Navigator. Cambridge Gas was not incorporated in the United States, and it was held by the Isle of Man courts that it had not submitted to the jurisdiction of the US Bankruptcy Court (and this was, as I have said, accepted with evident reluctance by the Privy Council). The property which was the subject of the order of the US Bankruptcy Court was shares in an Isle of Man company. Consequently the property dealt with by the US Bankruptcy Court was situate, by Manx rules of the conflict of laws, in the Isle of Man, and the shareholder relationship was governed by Manx law.

48. *Cambridge Gas* was the subject of brief comment a few months later by the Privy Council in *Pattni v Ali* [2006] UKPC 51, [2007] 2 AC 85. The decision in that case was simply that a Kenyan judgment deciding that A was bound to sell shares in a Manx company to B was entitled to recognition in the Isle of Man. It resulted in an order in personam against a person subject to the jurisdiction of the Kenyan court, and was not a judgment in rem against property in the Isle of Man and outside the jurisdiction of the Kenyan court, because the fact that a judicial determination determines or relates to the existence of property rights between parties does not in itself mean that it is in rem. Lord Mance, speaking for the Board, said, at para 23:

“In *Cambridge Gas* ... the Board touched on the concepts of in personam and in rem proceedings, but held that the bankruptcy order with which it was concerned fell into neither category. Its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established.”

HIH

49. The decision in *HIH* does not deal with foreign judgments. *HIH* concerned four Australian insurance companies which were being wound up in Australia and in respect of which provisional liquidators had been appointed in England. The question was whether the English court had power to direct remission of assets collected in England to Australia, notwithstanding that there were differences between the English and Australian statutory regimes for distribution which meant that some creditors would benefit from remission whilst some creditors would be worse off. The House of Lords unanimously directed that remission should take place, but the reasons differed.

50. The reasoning of the majority (Lord Scott of Foscote and Lord Neuberger of Abbotsbury, with Lord Phillips of Worth Matravers agreeing)) was based exclusively on the statutory power to assist foreign insolvency proceedings under section 426 of the Insolvency Act 1986, but Lord Hoffmann (with whom Lord Walker agreed) also considered that such a power existed at common law.

51. Lord Hoffmann characterised the principle of universality as a principle of English private international law that, where possible, there should be a unitary insolvency proceeding in the courts of the insolvent's domicile which receives worldwide recognition and which should apply universally to all the bankrupt's assets, at para 6:

“Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.”

52. Other parts of Lord Hoffmann’s speech have already been quoted above, and it is only necessary for present purposes to recall that he said that (a) “the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme” (at para 19) and (b) that the purpose of the principle of universality was to ensure that the debtor’s assets were distributed under one scheme of distribution, and that the principle required that English courts should co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution: para 30.

Subsequent treatment of Cambridge Gas

53. The decision in *Cambridge Gas* was not applied by the Supreme Court of Ireland in *In re Flightlease (Ireland) Ltd* [2012] IESC 12 (to which I shall revert) and has been subject to academic criticism. Professor Briggs has expressed the view ((2006) 77 BYIL 575, 581) that

“the decision in [*Cambridge Gas*] is wrong, for it requires a Manx court to give effect to a confiscation order made by a foreign court of property belonging to a person who was not subject to the personal jurisdiction of the foreign court. That a Manx court could have done so itself is nothing to the point.”

I shall return to the question whether it was correctly decided.

IV The cases before the court and the issues

Rubin

54. Eurofinance SA is a company incorporated in the British Virgin Islands. It was established by Adrian Roman, the second appellant on the *Rubin* appeal. Eurofinance SA settled “The Consumers Trust” (“TCT”) under a deed of trust made in 2002 under English law, with trustees resident in England, of whom two were accountants and two were solicitors.

55. TCT was established to carry on a sales promotion scheme in the USA and Canada. The class of beneficiaries was made up of persons who had successfully participated in the scheme by claiming validly in certain sales promotions owned and operated by Eurofinance SA. The trustees were to hold the capital and income of TCT for the beneficiaries and subject thereto for Eurofinance SA as beneficiary in default. The promotion, known as the Cashable Voucher Programme, was entered into with participating merchants in the United States and Canada who, when they sold products or services to their customers, offered those customers a cashable voucher comprising a rebate of up to 100% of the purchase price for the product or service. Under the terms of the voucher the rebate was to be paid to customers in three years’ time provided that certain conditions were followed by the customer involving the completion by the customer of both memory and comprehension tests.

56. The participating merchants paid TCT 15% of the face value of each cashable voucher issued by the merchant during a week. TCT retained 40% of the payments received (ie 6% of the face value of each cashable voucher). About one half of the 60% balance received from merchants was paid to Eurofinance SA (and so effectively to Adrian Roman) and the remainder was paid to others involved in the operation of the programme, such as solicitors, accountants and US lawyers. From about 2002 Adrian Roman’s sons, Nicholas Roman and Justin Roman, each began to receive about 2%. The trustees maintained bank accounts in the USA and Canada where the payments they had received from merchants were kept.

57. Since the trustees only retained 6% of the face value of the issued vouchers, the success of the scheme necessarily involved the consumers either forgetting to redeem the vouchers or being unsuccessful in navigating the process required to be followed in order to obtain payment. When the scheme folded in 2005 the trustees held nearly US\$10m in bank accounts in the United States and Canada.

58. By about 2005 TCT's business ceased after the Attorney General of Missouri brought proceedings under Missouri's consumer protection legislation which resulted in a settlement involving a payment by the trustees of US\$1,650,000 and US\$200,000 in costs.

59. When it became clear that further proceedings were likely to be brought by Attorneys General in other states, that the number of consumer claims would increase, and that TCT would not have sufficient funds to meet all the valid claims of its beneficiaries, in November 2005 Adrian Roman caused Eurofinance to apply for the appointment by the High Court of the respondents on the *Rubin* appeal, David Rubin and Henry Lan, as receivers of TCT for the purposes of causing TCT then to obtain protection under Chapter 11 of Title 11 of the United States Code ("Chapter 11"). The English court was told that Chapter 11 reorganisation proceedings would result in an automatic stay of proceedings against TCT, would enable the receivers to reject unprofitable or burdensome executory contracts, and might result in the recovery as preferential payments of sums paid to consumers and to the Missouri Attorney General.

60. In November 2005 the respondents were appointed as receivers by order of Lewison J, and in the following month, the respondents and the trustees then caused TCT to present a voluntary petition to the US Bankruptcy Court for relief under Chapter 11. TCT was placed into Chapter 11 proceedings in New York as virtually all of its 60,000 creditors were located in the United States or Canada as were its assets. As a matter of United States bankruptcy law, TCT could be the subject matter of a petition for relief under Chapter 11 as a debtor. This is because a trust such as TCT is treated under Chapter 11 as a separate legal entity under the classification of a "business trust".

61. A joint plan of liquidation for TCT was prepared, and in September 2007 Lewison J ordered that the respondents (as receivers) be at liberty to seek approval of the plan from the US Bankruptcy Court. Under the terms of the plan the respondents were appointed legal representatives of TCT and given the power to commence, prosecute and resolve all causes of action against potential defendants including the appellants. The US Bankruptcy Court approved the plan in October 2007, and appointed the respondents as "foreign representatives" of the debtor to make application to the Chancery Division in London for recognition of the Chapter 11 proceedings as a foreign main proceeding under the CBIR; and to seek aid, assistance and co-operation from the High Court in connection with the Chapter 11 proceedings, and, in particular to seek the High Court's assistance and co-operation in the prosecution of litigation which might be commenced in the US Bankruptcy Court including "the enforcement of judgments of this court that may be obtained against persons and entities residing or owning property in Great Britain ..."

62. In December 2007 proceedings were commenced in the US Bankruptcy Court by the issue of a complaint against a number of defendants including the appellants. These claims fall within the category of “adversary proceedings” under the US bankruptcy legislation, and I will use this term to refer to them. The adversary proceedings comprised a number of claims including causes of action arising under the US Bankruptcy Code, which related to funds received by TCT from merchants which were paid out to the defendants (including the appellants), or to amounts transferred to the defendants within one year prior to the commencement of the TCT bankruptcy case including the appellants.

63. The defendants were the appellants and other parties involved with the programme. The appellants were served personally with the complaint commencing the adversary proceedings but did not defend, or participate, in the adversary proceedings, although it appears from a judgment of the US Bankruptcy Court that Eurofinance SA had filed a notice of appearance in the main Chapter 11 proceedings (Order of 22 July 2008, paras 42-43).

64. On 22 July 2008 default and summary judgment was entered against the appellants in the adversary proceedings by the US Bankruptcy Court. The US Bankruptcy Court entered a judgment against the appellants on the ten counts of the complaint.

65. In November 2008 the respondents applied as foreign representatives to the Chancery Division for, inter alia, (a) an order that the Chapter 11 proceedings be recognised as a “foreign main proceeding” (b) an order that the respondents be recognised as “foreign representatives” within the meaning of article 2(j) of the Model Law in relation to those proceedings; and (c) an order that the US Bankruptcy Court’s judgment be enforced as a judgment of the English court in accordance with CPR Pts 70 and 73.

66. Nicholas Strauss QC, sitting as a deputy judge of the Chancery Division, recognised the Chapter 11 proceedings (including the adversary proceedings) as foreign main proceedings, and the respondents as foreign representatives, but refused to enforce the judgments in the adversary proceedings because (a) at common law the English court will not enforce a judgment in personam contrary to the normal jurisdictional rules for foreign judgments; and (b) there was nothing in CBIR, articles 21(e) (realisation of assets) and 25 (judicial co-operation), which justified the enforcement of judgments in insolvency proceedings.

67. At first instance the respondents sought to enforce the entirety of the US Bankruptcy Court’s judgment, but before the Court of Appeal they sought an order for the enforcement of those parts of the judgment which were based on state or

federal avoidance laws, including fraudulent conveyance under State Fraudulent Conveyance Laws, and under federal law, namely fraudulent transfers under section 548(a) of 11 USC; liability of transferees of avoided transfers under section 550; fraudulent transfers under section 548(b) and liability of transferees of avoided transfers under section 550.

68. The Court of Appeal (Ward and Wilson LJ and Henderson J) allowed an appeal, and held that the judgment was enforceable: [2010] EWCA Civ 895, [2011] Ch 133.

New Cap

69. In the *New Cap* appeal the appellants are members of Lloyd's Syndicate Number 991 ("the Syndicate") for the 1997 and 1998 years of account. The respondents are a reinsurance company ("New Cap") and its liquidator, a partner in Ernst & Young in Sydney.

70. New Cap is an Australian company, which was licensed as an insurance company in Australia under the Australian Corporations Act 2001 (Cth) ("the Australian Act"). New Cap did not conduct insurance business in any country other than Australia, and the majority of New Cap's business was generated through reinsurance brokers conducting business in Australia and the balance was generated from overseas insurance brokers.

71. New Cap reinsured the Syndicate in relation to losses occurring on risks attaching during the 1997 and 1998 years of account under reinsurance contracts which were subject to English law, and contained London arbitration clauses and also (oddly) English jurisdiction clauses. The reinsurance contracts were placed with New Cap by the Syndicate's Australian broker, which was the sub-broker for the Syndicate's London broker.

72. Each reinsurance contract contained a commutation clause. The Syndicate and New Cap entered into a commutation agreement to commute the reinsurances with effect from 11 December 1998. Under the commutation agreement, New Cap agreed to make a lump sum payment to the Syndicate by 31 December 1998 in consideration for its release from liability under the reinsurance contracts. The payments were calculated on the basis of a 7.5% discount and a deduction from premium. New Cap made payment pursuant to the commutation agreements in two instalments of US\$2,000,000 and US\$3,980,600 in January 1999. The commutation payments were made from a bank account held by New Cap at the

Sydney branch of the Commonwealth Bank of Australia to a bank account in London.

73. The second respondent was appointed the administrator of New Cap by a resolution of its directors in April 1999. In September 1999 the creditors of New Cap resolved that New Cap be wound up and the second respondent (“the liquidator”) was appointed its liquidator. Under the Australian legislation, the winding up is deemed to have commenced on the day on which the administration began.

74. In April 2002 the liquidator caused proceedings to be commenced against the Syndicate in the Supreme Court of New South Wales alleging that because New Cap was insolvent when the commutation payments were made in January 1999, and because those payments were made within the period of six months ending on the date when the administrator was appointed, they constituted unfair preferences and were thus “voidable transactions” under Part 5.7B of the Australian Act.

75. The Syndicate (which does not accept that the payments were preferences) refused to accept service of the Australian proceedings. The liquidator obtained leave from the Australian court to serve the Australian proceedings on the Syndicate’s English solicitors in London. The Syndicate did not enter an appearance to the proceedings, but corresponded with the liquidator’s solicitors, including commenting on an Independent Expert’s Report to be used by the respondents as evidence of New Cap’s insolvency in all of the avoidance proceedings including the proceedings against the Syndicate.

76. The Australian court (White J in a judgment in September 2008, and Barrett J in a judgment in July 2009) recognised that there had been no submission by the Syndicate to the jurisdiction of the Australian court in that it did not enter an appearance, but White J held that the Australian court had jurisdiction over the Syndicate because a cause of action available under the Australian Act for the recovery of a preferential payment to an overseas party made when the company is insolvent was a cause of action which arose in New South Wales for the purposes of the New South Wales provisions for service out of the jurisdiction.

77. Barrett J gave a reasoned judgment in July 2009 holding the Syndicate liable. After the respondents had been given leave to re-open their case so that the orders made by the Australian court would more accurately reflect the differences between those appellants who were members of the Syndicate for the 1997 year of account and those appellants who were members for the 1998 year of account, the Australian court entered final judgment against the Syndicate in its absence on 11

September 2009. The Australian judgment declared that the commutation payments were voidable transactions within the meaning of part 5.7B of the Australian Act and ordered the Syndicate to repay the amount of the commutation payments to the liquidator together with interest.

78. On the liquidator's application the Australian court issued, in October 2009, a letter of request to the High Court in England and Wales requesting that the court "act in aid of and assist" the Australian court and exercise jurisdiction under section 426 of the Insolvency Act 1986 by: (1) ordering the Syndicate to pay the sums specified in the Australian judgment; alternatively (2) allowing the liquidator to commence fresh proceedings under the Australian Act in the English Court; (3) granting such further and other relief as the High Court may consider just; and (4) making such further or other orders as may, in the opinion of the High Court, be necessary or appropriate to give effect to the foregoing orders.

79. On 30 July 2010, the Court of Appeal handed down judgment in *Rubin*. As a result, the respondents' alternative application for permission to commence fresh proceedings against the Syndicate under the Australian Act in England pursuant to section 426 of the Insolvency Act 1986 was adjourned generally, and the respondents were granted permission to seek relief at common law as an alternative to relief under section 426.

80. In *New Cap Lewison J* and the Court of Appeal were bound by the decision of the Court of Appeal in *Rubin*. Lewison J held: (a) the judgment was not enforceable under the Foreign Judgments (Reciprocal Enforcement) Act 1933 because, although it applied to Australian judgments, it did not apply to orders made in insolvency proceedings; but (b) the judgment was enforceable under the assistance provision of section 426 of the Insolvency Act 1986 and also at common law: [2011] EWHC 677 (Ch).

81. The Court of Appeal (Mummery, Lloyd and Macfarlane LJJ) affirmed Lewison J's judgment on these grounds: (a) the 1933 Act applied, and registration would not be set aside for lack of jurisdiction in the foreign court, because of the *Rubin* decision; (b) section 426 could also be used and was not excluded by section 6 of the 1933 Act; (c) but section 6 would preclude an action at common law; (d) it was not necessary to decide whether the court's power of assistance at common law was exercisable where the statutory power was available: [2011] EWCA Civ 971, [2012] 2 WLR 1095.

82. This court gave permission for intervention by a written submission on behalf of Mr Irving Picard (“the trustee”), the trustee for the liquidation in the United States under the Securities Investor Protection Act of 1970 (“SIPA”) of Bernard L Madoff Investment Securities LLC (“Madoff”), which was Bernard Madoff’s broking company. The trustee is seeking to enforce at common law in Gibraltar judgments of the US Bankruptcy Court against Vizcaya Partners Ltd (“Vizcaya”), a BVI company, for \$180m, and against Asphalia Fund Ltd (“Asphalia”), a Cayman Islands company, for \$67m, representing alleged preferential payments. He is also seeking to enforce a US Bankruptcy Court default judgment in excess of \$1 billion in the Cayman Islands in *Picard v Harley International (Cayman) Ltd*. The Gibraltar and Cayman Islands proceedings have been adjourned to await the outcome of the present appeals.

83. In *Picard v Vizcaya Partners Ltd* proceedings have been brought in Gibraltar to enforce the default judgments against Vizcaya and Asphalia because \$73m is held there on behalf of Vizcaya which the trustee maintains is available to satisfy the judgments. Vizcaya and Asphalia have also, with the permission of the court, intervened by written submission.

84. There is no agreed statement of facts relating to this aspect of the case, and nothing which is said here about the facts should be taken as representing or reflecting any finding. According to Vizcaya and Asphalia the position is as follows. Between 2002 and 2007, a bank in Europe, acting as a custodian trustee for Vizcaya, sent \$327m to Madoff for investment in securities. Unknown to the bank, or to Vizcaya, or its shareholder Asphalia, Madoff had been engaged in a Ponzi scheme for some 30 years, and their money was never invested in securities. In 2008, at the time of the credit crunch and the banking crisis, the custodian trustee withdrew \$180m (leaving \$147m with Madoff) and \$67m of the \$180m was paid to Asphalia.

85. In late 2008, the Madoff fraud came to light, and the trustee was appointed. The trustee targeted investors who had withdrawn investments from Madoff in the two years before its collapse in December 2008 as a source for recovery of “customer property” for the benefit of other investors who had not withdrawn their investments. The trustee commenced adversary proceedings in the US Bankruptcy Court alleging preference and fraudulent conveyance against Vizcaya and Asphalia under SIPA and under the Bankruptcy Code, the effect of which, they say, is that (a) as the trustee argues, a person who, on the basis that he has received “customer money” has been required to repay a preference, does not necessarily become a “customer” and thereby entitled to share with other customers in the bankruptcy; and (b) the trustee may avoid a payment made by the bankrupt to a

creditor 90 days before the commencement of the bankruptcy, irrespective of the intention with which the payment is made or received.

86. The trustee obtained judgments in default, and Vizcaya and Asphalia say that they took no part in the New York proceedings because they had no connection with New York, and in particular (a) Asphalia was not a customer of Madoff but a shareholder of Vizcaya; (b) arguably Vizcaya was not a customer since it had appointed the bank to act as custodian trustee and it was the bank which entered into contracts with Madoff.

The issues

87. The principal issue on these appeals is whether the rules at common law or under the 1933 Act regulating those foreign courts which are to be regarded as being competent for the purposes of enforcement of judgments apply to judgments in avoidance proceedings in insolvency, and, if not, what rules do apply (section V below). The other issues are whether, in the *Rubin* appeal, enforcement may be effected through the assistance provisions of the Cross-Border Insolvency Regulations 2006 (section VI) or, in the *New Cap* appeal, section 426 of the Insolvency Act 1986 (section VII); whether the judgments are enforceable as a result of the submission by the judgment debtors to the jurisdiction of the foreign courts (section VIII); and, in the *New Cap* appeal, if the judgment is enforceable, whether enforcement is at common law or under the 1933 Act (section IX).

V The first issue: recognition and enforcement of foreign judgments in insolvency proceedings

Reasoning of the Court of Appeal in Rubin and the issue on the appeal

88. The Court of Appeal in the *Rubin* appeal decided that a foreign insolvency judgment could be enforced in England and Wales at common law against a defendant not subject to the jurisdiction of the foreign court under the traditional rule as formulated in the *Dicey* Rule.

89. As I have already said, on the *Rubin* appeal in the Court of Appeal the receivers sought only to enforce those parts of the judgment which in effect related to the avoidance causes of action. The Court of Appeal held that the judgment (as narrowed) was enforceable at common law. The reasoning was as follows: (a) the judgment was final and conclusive, and for definite sums of money, and on the face of the orders was a judgment in personam; (b) it was common ground that the judgment debtors were not resident (this was a slip for “present” since the action

was at common law and not under the 1933 Act) when the proceedings were instituted, and did not submit to the jurisdiction, and so at first blush had an impregnable defence; (c) *Cambridge Gas* decided that the bankruptcy order with which it was concerned was neither in personam nor in rem, and its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established: *Pattni v Ali* [2006] UKPC 51, [2007] 2 AC 85, para 23; (d) bankruptcy was a collective proceeding to enforce rights and not to establish them: *Cambridge Gas* [2006] UKPC 26, [2007] 1 AC 508, para 15; (e) the issue was whether avoidance proceedings which could only be brought by the representative of the bankrupt were to be characterised as part of the bankruptcy proceedings, ie part of the collective proceeding to enforce rights and not to establish them; (f) the adversary proceedings were part and parcel of the Chapter 11 proceedings; (g) the ordinary rules for enforcing foreign judgments in personam did not apply to bankruptcy proceedings; (h) avoidance mechanisms were integral to and central to the collective nature of bankruptcy and were not merely incidental procedural matters; (i) the process of collection of assets will include the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme: *HIH* [2008] UKHL 21, [2008] 1 WLR 852, para 19; (j) the judgment of the US Bankruptcy Court was a judgment in, and for the purposes of, the collective enforcement regime of the insolvency proceedings, and was governed by the sui generis private international law rules relating to insolvency; (k) that was a desirable development of the common law founded on the principles of modified universalism, and did not require the court to enforce anything that it could not do, mutatis mutandis, in a domestic context; (l) there was a principle of private international law that bankruptcy should be unitary and universal, and there should be a unitary insolvency proceeding in the court of the bankrupt's domicile which receives worldwide recognition and should apply universally to all the bankrupt's assets; (m) there was a further principle that recognition carried with it the active assistance of the court which included assistance by doing whatever the English court could do in the case of a domestic insolvency; (n) there was no unfairness to the appellants in upholding the judgment because they were fully aware of the proceedings, and after taking advice chose not to participate: [2011] Ch 133, paras 38, 41, 43, 45, 48, 50, 61-62, 64. It was unnecessary to decide whether the judgment was enforceable under the CBIR: para 63.

90. In short, Ward LJ accepted that the judgment was an in personam judgment, but he decided that the *Dicey* Rule did not apply to foreign judgments in avoidance proceedings because they were central to the collective enforcement regime in insolvency and were governed by special rules.

91. The essential questions on this aspect of the appeals are these. Is the judgment in each case to be regarded as a judgment in personam within the scope of the traditional rules embodied in the *Dicey* Rule, or is it to be characterised as

an insolvency order which is part of the bankruptcy proceedings, ie part of the collective proceeding to enforce rights and not to establish them? Is that a distinction which has a role to play? Is there a distinction between claims which are central to the purpose of the proceedings and claims which are incidental procedural matters? As a matter of policy, should the court, in the interests of universality of insolvency proceedings, devise a rule for the recognition and enforcement of judgments in foreign insolvency proceedings which is more expansive, and more favourable to liquidators, trustees in bankruptcy, receivers and other officeholders, than the traditional common law rule embodied in the *Dicey* Rule, or should it be left to legislation preceded by any necessary consultation?

92. Ward LJ's conclusion derives from a careful synthesis of dicta in Lord Hoffmann's brilliantly expressed opinion in *Cambridge Gas* and his equally brilliant speech in *HIH*, each of which has on these appeals been subjected to an exceptionally detailed analysis. For reasons which will be developed, I do not agree with the conclusions which Ward LJ draws.

93. But I begin with two matters on which I accept the respondents' analysis. The first is that avoidance proceedings have characteristics which distinguish them from ordinary claims such as claims in contract or tort. The second is that, if it were necessary to draw a distinction between insolvency orders and other orders, it would not be difficult to formulate criteria for the distinction, along similar lines to that drawn by the European Court in relation to the Brussels Convention, the Brussels I Regulation (Council Regulation (EC) 44/2001) and the EC Insolvency Regulation.

Nature of avoidance proceedings

94. In order to achieve a proper and fair distribution of assets between creditors, it will often be necessary to adjust prior transactions and to recover previous dispositions of property so as to constitute the estate which is available for distribution. The principle of equality among creditors which underlies the *pari passu* principle may require the adjustment of concluded transactions which but for the winding up of the company would have remained binding on the company, and the return to the company of payments made or property transferred under the transactions or the reversal of their effect. Systems of insolvency law use avoidance proceedings as mechanisms for adjusting prior transactions by the debtor and for recovering property disposed of by the debtor prior to the insolvency. Thus under the Insolvency Act 1986 an administrator, or liquidator, or trustee in bankruptcy may, where there has been a transaction at an undervalue, or amounting to an unlawful preference, apply for an order restoring the position to what it would have been had the transaction not taken place: sections 238 *et seq*

and 339 *et seq.* Other systems of law have similar mechanisms, but they will differ in matters such as the period during which such transactions are at risk of reversal and the role of good faith of the parties to the transaction.

95. The underlying policy is to protect the general body of creditors against a diminution of the assets by a transaction which confers an unfair or improper advantage on the other party, and it is therefore an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors should be amenable to adjustment or avoidance: *Fletcher, Law of Insolvency*, 4th ed (2009), para 26-002; *Goode, Principles of Corporate Insolvency Law*, 4th ed (2011), para 13-03.

96. Thus the UNCITRAL Legislative Guide on Insolvency Law (2005) says:

“150. Many insolvency laws include provisions that apply retroactively from a particular date (such as the date of application for, or commencement of, insolvency proceedings) for a specified period of time (often referred to as the ‘suspect’ period) and are designed to overturn those past transactions to which the insolvent debtor was a party or which involved the debtor's assets where they have certain effects. ...

151. It is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the same treatment. Provisions dealing with avoidance powers are designed to support these collective goals, ensuring that creditors receive a fair allocation of an insolvent debtor's assets consistent with established priorities and preserving the integrity of the insolvency estate.”

97. In *In re Condor Insurance Ltd*, 601 F 3d 319, 326 (5th Cir 2010), the Court of Appeals for the Fifth Circuit said that:

“Avoidance laws have the purpose and effect of re-ordering the distribution of a debtor's assets ... in favor of the collective priorities established by the distribution statute ... [and] must be treated as an integral part of the entire bankruptcy system.”

98. In different phases of the Australian proceedings in *New Cap* Barrett J made similar points. He said that in an action for unfair preference under the Australian legislation the liquidator might obtain an order for the payment of money, but the action did not contemplate recovery in the sense applicable to damages and debts; and the proceedings sought to remedy or counter the effects of that depletion caused by the payment by New Cap: *New Cap Reinsurance Corp v Renaissance Reinsurance Ltd* [2002] NSWSC 856, paras 23, 27. The order does not vindicate property rights which the company itself would have had prior to liquidation, but statutory rights which the liquidator has under the statutory scheme in consequence of winding up. The purpose of the order for the payment of money to a company in liquidation is not to compensate the company, but to adjust the rights of creditors among themselves in such a way as to eliminate the effects of favourable treatment afforded to one or more creditors, to the exclusion of others, in the period immediately before an insolvent administration commences: *New Cap Reinsurance Corp v Grant* [2009] NSWSC 662, 257 ALR 740, paras 20-21.

Difference between insolvency claims and others

99. I also accept that, if there were to be a separate rule for the recognition and enforcement of insolvency orders, it would not normally be difficult to distinguish between judgments in insolvency proceedings which are peculiarly the subject of insolvency law such as avoidance proceedings, and other judgments of the kind which are covered by the *Dicey* Rule.

100. In the context of the Brussels Convention, the Brussels I Regulation and the EC Insolvency Regulation, the European Court has developed a distinction between claims which derive directly from the bankruptcy or winding up, and which are closely connected with them, on the one hand, and those which do not, on the other hand, and the distinction has been applied by the English court. In my judgment, the distinction is a workable one which could be adapted to other contexts should it be useful or necessary to do so.

101. Claims which were regarded as bankruptcy claims have been held to include a claim under French law by a liquidator against a director to make good a deficiency in the assets of a company (*Gourdain v Nadler* (Case 133/78) [1979] ECR 733); or a claim under German law to set aside a transaction detrimental to creditors (*Seagon v Deko Marty NV* (Case C-339/07) [2009] 1 WLR 2168). Claims outside the category of bankruptcy claims have been held to include an action brought by a seller based on a reservation of title against a purchaser who was insolvent (*German Graphics Graphische Maschinen GmbH v van der Schee* (Case C-292/08) [2009] ECR I-8421) or a claim by a liquidator as to beneficial ownership of an asset (*Byers v Yacht Bull Corp* [2010] EWHC 133 (Ch), [2010] BCC 368). In *Oakley v Ultra Vehicle Design Ltd* [2005] EWHC 872 (Ch), [2006]

BCC 57, Lloyd LJ (sitting as an additional judge of the Chancery Division) said, at para 42):

“it has been held that a claim by a liquidator to recover pre-liquidation debts, although made in the course of the winding up and so, in a sense, relating to it, does not derive directly from it and is therefore not excluded from the Brussels Convention (and therefore now not from the [Brussels I] Regulation) by article 1.2(b): see *In re Hayward decd* [1997] Ch 45, and *UBS AG v Omni Holding AG* [2000] 1 WLR 916. By contrast, proceedings by a liquidator against a director or a third party to set aside a transaction as having been effected at an undervalue or on the basis of wrongful or fraudulent trading would be claims deriving directly from the winding up and therefore excluded from the Brussels Convention and now from the [Brussels I] Regulation.”

In personam or sui generis?

102. I have already quoted the passage in *Cambridge Gas* in which Lord Hoffmann distinguished between judgments in rem and in personam, on the one hand, and judgments in bankruptcy proceedings, on the other, but it is necessary to repeat it at this point. He said:

“13. ... Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.

14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. ...”

103. There is no doubt that the order of the US Bankruptcy Court in *Cambridge Gas* did not fall into the category of an in personam order. Even though the question whether a foreign judgment is in personam or in rem is sometimes a difficult one (*Dicey*, 15th ed, para 14-109), that was not a personal order against its shareholders, including Cambridge Gas. The order vested the shares in Navigator

in the creditors' committee. It did not declare existing property rights. Indeed the whole purpose of what was the functional equivalent of a scheme of arrangement was to alter property rights. But it is not easy to see why it was not an in rem order in relation to property in the Isle of Man in the sense of deciding the status of a thing and purporting to bind the world: see *Jowitt's Dictionary of English Law*, 3rd ed (2010) (ed Greenberg), p 1249.

104. The judgments in the *Rubin* and *New Cap* appeals were based on avoidance legislation which, with some differences of substance, performs the same function as the equivalent provisions in the Insolvency Act 1986 and its predecessors. But Ward LJ in *Rubin* accepted that the judgment was in personam and the *Rubin* respondents have not sought to argue that it was not an in personam judgment. What they say is that, even if it is in personam, it is within a sui generis category of insolvency orders or judgments subject to special rules.

105. There can be no doubt that the avoidance orders in the present appeals are in personam. In *In re Paramount Airways Ltd* [1993] Ch. 223, 238, Nicholls LJ said that the remedies under section 238 of the Insolvency Act 1986, (transactions at an undervalue) were “primarily of an in personam character,” and that accords with the nature of the orders in these appeals. The form of judgment of the US Bankruptcy Court in the *Rubin* case was that “plaintiffs have judgment ... against the defendants ...” in the sums awarded, and the orders of the New South Wales Supreme Court in the *New Cap* case included orders that “the defendants ... pay to the first plaintiff” the sums due under section 588FF(1) of the Australian Corporations Act.

The question of principle and policy

106. Since the judgments are in personam the principles in the *Dicey* Rule are applicable unless the court holds that there is, or should be, a separate rule for judgments in personam in insolvency proceedings, at any rate where those judgments are not designed to establish the existence of rights, but are central to the purpose of the insolvency proceedings or part of the mechanism of collective execution.

107. Prior to *Cambridge Gas* and the present cases, there had been no suggestion that there might be a different rule for judgments in personam in insolvency proceedings and other proceedings. There are no cases in England which are helpful. The normal rules for enforcement of foreign judgments were applied to a claim by a liquidator for moneys due to the company (*Gavin Gibson & Co Ltd v Gibson* [1913] 3 KB 379) and to a claim on a debt ascertained in bankruptcy under German law (*Berliner Industriebank Aktiengesellschaft v Jost* [1971] 2 QB 463). A

judgment of the US Bankruptcy Court in Chapter 11 proceedings for repayment of a preferential transfer was enforced in Ontario on the basis of the judgment debtor's submission to the New York court, without any suggestion that the normal rules did not apply: *Gourmet Resources International Inc v Paramount Capital Corp* (1991) 3 OR (3d) 286, [1993] ILPr 583, app dismissed (1993) 14 OR (3d) 319 (Ont CA).

108. The principles in the *Dicey* Rule have never received the express approval of the House of Lords or the UK Supreme Court and the leading decisions remain *Adams v Cape Industries plc* [1990] Ch 433 and the older Court of Appeal authorities which it re-states or re-interprets. But there can be no doubt that the references by the House of Lords in the context of foreign judgments to the foreign court of "competent jurisdiction" are implicit references to the common law rule: eg *In re Henderson, Nouvion v Freeman* (1890) 15 App Cas 1, 8; *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484.

109. The *Rubin* respondents question whether the rules remain sound in the modern world. It is true that the common law rule was rejected in Canada, at first in the context of the inter-provincial recognition of judgments. The Supreme Court of Canada held that the English rules developed in the 19th century for the recognition and enforcement of judgments of foreign countries could not be transposed to the enforcement of judgments from sister provinces in a single country with a common market and a single citizenship. Instead a judgment given against a person outside the jurisdiction should be recognised and enforced if the subject matter of the action had a real and substantial connection with the province in which the judgment was given: *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, para 45. This approach was applied, by a majority, to foreign country judgments in *Beals v Saldanha* [2003] 3 SCR 416 (applied to the recognition of an English order convening meetings in a scheme of arrangement in *Re Cavell Insurance Co* (2006) 269 DLR (4th) 679 (Ont CA)).

110. There is no support in England for such an approach except in the field of family law. In *Indyka v Indyka* [1969] 1 AC 33 it was held that a foreign decree of divorce would be recognised at common law if there was a "real and substantial connection" between the petitioner (or the respondent) and the country where the divorce was obtained. This rule (now superseded by the Family Law Act 1986) was in part devised to avoid "limping marriages", ie cases where the parties were regarded as divorced in one country but regarded as married in another country. It has never been adopted outside the family law sphere in the context of foreign judgments.

111. The Supreme Court of Ireland in *In re Flightlease (Ireland) Ltd* [2012] IESC 12 declined to follow *Cambridge Gas* (and also the decision of the Court of

Appeal in *Rubin*) and also held that the *Dicey* Rule should not be rejected in favour of a real and substantial connection test. In *Flightlease* the airline Swissair was in a form of debt restructuring proceeding in Switzerland, where it was incorporated. Flightlease is an Irish company in the same group as Swissair. An application was before the Swiss courts under the Swiss federal statute on debt enforcement and bankruptcy seeking the return of money paid by Swissair to Flightlease. The proceedings had reached the stage of judgment, but the liquidators of Flightlease were concerned to know whether a Swiss judgment would be enforceable in Ireland so that they could decide whether to appear in the Swiss proceedings.

112. The Irish Supreme Court held that the judgment would not be enforceable if Flightlease did not appear in the Swiss proceedings for these reasons: (1) the effect of the Swiss order would be to establish a liability on Flightlease to repay moneys and would therefore result in a judgment in personam; (2) it would be preferable for any change in the rules relating to the enforcement of foreign judgments to take place in the context of international consensus by way of treaty or convention given effect by legislation. In particular, the Irish Supreme Court said that it would not adopt the approach in *Cambridge Gas* because it had resulted from legislative changes in the United Kingdom (this appears to have been based on a misapprehension), and should not be adopted in Ireland in the absence of consensus among common law jurisdictions.

113. But there is no suggestion on this appeal that the principles embodied in the *Dicey* Rule should be abandoned. Instead the *Rubin* respondents suggest that the principles should not apply to foreign insolvency orders.

114. The respondents accept that the *Dicey* Rule applies to claims which may be of considerable significance by an officeholder in a foreign insolvency, such as a claim for breach of contract, or a tort claim, or a claim to recover debts. It is clear that such claims may affect the size of the insolvent estate just as much, and often more, than avoidance claims. Like claims to recover money due to the insolvent estate such as restitutionary claims not involving avoidance, avoidance claims may establish a liability to pay or repay money to the bankrupt estate (as in the present cases). There is no difference of principle.

115. The question, therefore, is one of policy. Should there be a more liberal rule for avoidance judgments in the interests of the universality of bankruptcy and similar procedures? In my judgment the answer is in the negative for the following reasons.

116. First, although I accept that it is possible to distinguish between avoidance claims and normal claims, for example in contract or tort, it is difficult to see in the

present context a difference of principle between a foreign judgment against a debtor on a substantial debt due to a company in liquidation and a foreign judgment against a creditor for repayment of a preferential payment. The respondents suggest that a person who sells goods to a foreign company accepts the risk of the insolvency legislation of the place of incorporation. Quite apart from the fact that the suggestion is wholly unrealistic, why should the seller/creditor be in a worse position than a buyer/debtor?

117. The second reason is that if there is to be a different rule for foreign judgments in such proceedings as avoidance proceedings, the court will have to ascertain (or, more accurately, develop) two jurisdictional rules. There are two aspects of jurisdiction which would have to be satisfied if a foreign insolvency judgment or order is to be outside the scope of the *Dicey* Rule: the first is the requisite nexus between the insolvency and the foreign court, and the second is the requisite nexus between the judgment debtor and the foreign court.

118. In *Cambridge Gas Navigator* was an Isle of Man company, and the jurisdiction of the United States Bankruptcy Court depends on whether the “debtor” resides or has a domicile or place of business, or property, in the United States. The shares in Navigator owned by Cambridge Gas (a Cayman Islands company) were, on ordinary principles of the conflict of laws, situated in the Isle of Man, and the shareholder relationship between Navigator and Cambridge Gas was governed by Manx law. The Privy Council, as noted above, did not articulate any rule for the jurisdiction of the US Bankruptcy Court over Navigator (although it had plainly submitted to its jurisdiction) or over Cambridge Gas (which, the Manx courts had held and the Privy Council accepted, had not submitted) or over Cambridge Gas’ Manx assets.

119. Nor did the Court of Appeal in *Rubin* articulate the reasons why the English court recognised the jurisdiction of the US Bankruptcy Court over TCT, or over the appellants. The receivers appear to have proceeded originally on the basis that the United States Bankruptcy Court had jurisdiction under United States bankruptcy law because of TCT’s residence and principal place of business in New York (petition, 5 December 2005), but the US Bankruptcy Court, in deciding to appoint the receivers as foreign representatives also noted that TCT’s business operations were conducted primarily in the United States, the majority of its creditors, substantially all of its assets, and its centre of main interests, were all in the United States. The basis of jurisdiction of the US Bankruptcy Court under United States law over the individual defendants in *Rubin* was that they were subject both to the general jurisdiction of the court (ie connection of the defendant with the jurisdiction) and also to the specific jurisdiction of the court (ie connection of the cause of action with the jurisdiction) because they specifically sought out the United States as a place to do business and specifically sought out United States merchants and consumers with whom to do business. Accordingly,

the exercise of jurisdiction satisfied the due process requirements of the Fifth Amendment.

120. The basis of jurisdiction in *New Cap* over New Cap itself was of course that it was incorporated in Australia. The basis of jurisdiction over the Syndicate under New South Wales law was that the cause of action against the Syndicate arose in New South Wales.

121. The respondents do not put forward any principled suggestion for rules which will deal with the two aspects of jurisdiction. They accept, as regards the jurisdictional link between the foreign country and the insolvent estate, that English law has traditionally recognised insolvency proceedings taking place in an individual bankrupt's place of domicile, or, in the case of corporations, the place of incorporation, but (because the connection which the trustees of the TCT, or the TCT itself, had with the United States was that the trust's main business was there) they rely on what Lord Hoffmann said in *HIH* [2008] UKHL 21, [2008] 1 WLR 852, para 31:

“I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings (Council Regulation (EC) No 1346/2000 of 29 May 2000) uses the concept of the ‘centre of a debtor's main interests’ as a test, with a presumption that it is the place where the registered office is situated: see article 3.1. That may be more appropriate.”

122. They propose that each of these issues be resolved, not by a black letter rule like the common law rule for enforcement of judgments, but instead by an appeal to what was said in oral argument to be the discretion of the English court to assist the foreign court.

123. On the second aspect, the jurisdictional link between the foreign country and the judgment debtor, they accept that it is necessary for there to be an appropriate connection between the foreign insolvency proceeding and the insolvency order in respect of which recognition and enforcement is sought. They propose that, in the exercise of the discretion, the court should adopt an approach similar to that taken by the English court in deciding whether to apply provisions of the Insolvency Act 1986, such as section 238 (transactions at an undervalue), to persons abroad, relying on *In re Paramount Airways Ltd* [1993] Ch 223.

124. That case decided that there is no implied territorial limitation to the exercise of jurisdiction over “any person.” The Court of Appeal rejected the argument that the section applied only to British subjects and to persons present in England at the time of the impugned transaction. In particular the physical absence or presence of the party at the time of the transaction bore no necessary relationship to the appropriateness of the remedy. Nor was the test of “sufficient connection” with England satisfactory because it would hardly be distinguishable from the ambit of the sections being unlimited territorially: p 237. Instead, the approach was to be found in the discretion of the court, first to grant permission to serve the proceedings out of the jurisdiction, and secondly, to make an order under the section. On both aspects the court would take into account whether the defendant was sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element.

125. The *Rubin* respondents say that *In re Paramount Airways Ltd* is instructive because, if the facts of the present case were reversed such that TCT had carried on the scheme in England and had been placed into insolvency proceedings here and the appellants were resident in New York, then it can be expected that the English court would have considered that England was the correct forum in which to bring section 238 proceedings to recover payments made to the appellants and would have given permission to serve out of the jurisdiction accordingly. They go on to say that it is implicit in this that the English court would have expected the New York court then to recognise and enforce any judgment of the English court even if the appellants had remained in New York and had not contested the proceedings; and that by the same token that the court seeks and expects the recognition and enforcement abroad of its own insolvency orders, the court should recognise and enforce in England insolvency orders made in insolvency proceedings in other jurisdictions.

126. There is no basis for this line of reasoning. There is no necessary connection between the exercise of jurisdiction by the English court and its recognition of the jurisdiction of foreign courts, or its expectation of the recognition of its judgments abroad. It has frequently been said that the jurisdiction exercised under what used to be RSC Ord 11, r. 1 (and is now CPR Practice Direction 6B, para 3.1) is an exorbitant one, in that it was a wider jurisdiction than was recognised in English law as being possessed by courts of foreign countries in the absence of a treaty providing for recognition: see *The Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210, 254 per Lord Diplock; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, 65 per Lord Diplock; *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 481 per Lord Goff of Chieveley.

127. Outside the sphere of matrimonial proceedings (see *Travers v Holley* [1953] P 246, disapproved on this aspect in *Indyka v Indyka* [1969] 1 AC 33) reciprocity

has not played a part in the recognition and enforcement of foreign judgments at common law. The English court does not concede jurisdiction in personam to a foreign court merely because the English court would, in corresponding circumstances, have power to order service out of the jurisdiction: *In re Trepca Mines Ltd* [1960] 1 WLR 1273.

128. In my judgment, the dicta in *Cambridge Gas* and *HIH* do not justify the result which the Court of Appeal reached. This would not be an incremental development of existing principles, but a radical departure from substantially settled law. There is a reason for the limited scope of the *Dicey* Rule and that is that there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new rules for enforcement of judgments depends on a degree of reciprocity. The EC Insolvency Regulation and the Model Law were the product of lengthy negotiation and consultation.

129. A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, “if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it”: *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 489.

130. Furthermore, the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit. I accept the appellants’ point that if recognition and enforcement were simply left to the discretion of the court, based on a factor like “sufficient connection,” a person in England who might have connections with a foreign territory which were only arguably “sufficient” would have to actively defend foreign proceedings which could result in an in personam judgment against him, only because the proceedings are incidental to bankruptcy proceedings in the courts of that territory. Although I say nothing about the facts of the *Madoff* case, it might suggest that foreigners who have bona fide dealings with the United States might have to face the dilemma of the expense of defending enormous claims in the United States or not defending them and being at risk of having a default judgment enforced abroad.

131. Nor is there likely to be any serious injustice if this court declines to sanction a departure from the traditional rule. It would not be appropriate to express a view on whether the officeholders in the present cases would have, or would have had, a direct remedy in England, because there might be, or might have been, issues as to the governing law, or issues as to time-limits or as to good faith. Subject to those reservations, several of the ways in which the claims were put (especially those parts of the judgment which were not the subject of these proceedings) in the United States proceedings in *Rubin* could have founded proceedings by trustees in England for the benefit of the creditors (as beneficiaries of the express trust). In addition there are several other avenues available to officeholders. Avoidance claims by a liquidator of an Australian company may be the subject of a request by the Australian court pursuant to section 426(4) of the Insolvency Act 1986, applying Australian law under section 426(5). In appropriate cases, article 23 of the Model Law will allow avoidance claims to be made by foreign representatives under the Insolvency Act 1986. In the cases where the insolvent estate has its centre of main interests in the European Union, judgments will be enforceable under Article 25 of the EC Insolvency Regulation.

132. It follows that, in my judgment, *Cambridge Gas* was wrongly decided. The Privy Council accepted (in view of the conclusion that there had been no submission to the jurisdiction of the court in New York) that Cambridge Gas was not subject to the personal jurisdiction of the US Bankruptcy Court. The property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man.

VI Issue 2: Rubin: Enforcement under the Cross-Border Insolvency Regulations

133. In the *Rubin* appeal it was argued by the respondents that the judgment should also be enforced through the CBIR, implementing the UNCITRAL Model Law.

134. The order made by the deputy judge recognised the Chapter 11 proceeding “including the Adversary Proceedings,” because “bringing adversary proceedings against debtors of the bankrupt is clearly part of collecting the bankrupt’s assets with a view to distributing them to creditors” and “the adversary proceedings are part and parcel of the Chapter 11 insolvency proceedings”: [2010] 1 All ER (Comm) 81, paras 46, 47. The Court of Appeal was of the same view: [2011] Ch 133, para 61(2)-(3). The appellants no longer maintain that the adversary proceedings should not be recognised under the Model Law.

135. The issue which still arises in relation to the Model Law as implemented by the CBIR is whether the court has power to grant relief recognising and enforcing the relevant parts of the judgment.

136. Article 21 provides that:

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

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

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

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

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

(e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court;

(f) extending relief granted under paragraph 1 of article 19; and

(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986.”

137. The reference to relief under paragraph 43 of Schedule B1 to the Insolvency Act 1986 is a reference to a moratorium on claims in an administration.

138. The Guide to Enactment states, at paras 154, 156:

“[154] The types of relief listed in article 21, paragraph 1, are typical or most frequent 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.

...

[156] It is in the nature of discretionary relief that the court may tailor it to the case at hand. This idea is reinforced by article 22, paragraph 2, according to which the court may subject the relief granted to conditions that it considers appropriate.”

139. Article 25 provides (under the heading “Co-operation and direct communication between a court of Great Britain and foreign courts or foreign representatives”) that:

“1. ... the court may co-operate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a British insolvency officeholder.

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

140. Article 27 provides that the co-operation referred to in article 25 may be implemented “by any appropriate means”, including

“(a) appointment of a person to act at the direction of the court;

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

- (c) coordination of the administration and supervision of the debtor's assets and affairs;
- (d) approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) coordination of concurrent proceedings regarding the same debtor.”

141. The respondents say that (a) the power under article 21 is to grant any type of relief that is available under the law of the relevant state, and that the fact that recognition and enforcement of foreign judgments is not specifically mentioned in article 21 as one of the forms of relief available, does not mean that such relief cannot be granted; (b) the recognition and enforcement of the judgments of a foreign court is the paradigm means of co-operation with that court; and (c) the examples of co-operation in article 27 are merely examples and are not exhaustive.

142. But the CBIR (and the Model Law) say nothing about the enforcement of foreign judgments against third parties. As Lord Mance pointed out in argument, recognition and enforcement are fundamental in international cases. Recognition and enforcement of judgments in civil and commercial matters (but not in insolvency matters) have been the subject of intense international negotiations at the Hague Conference on Private International Law, which ultimately failed because of inability to agree on recognised international bases of jurisdiction.

143. It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties.

144. The respondents rely on United States decisions but the only case involving enforcement of a foreign judgment in fact supports the appellants' argument. The Model Law has been implemented into United States law through Chapter 15 of Title 11 of the United States Code, which has in sections 1521, 1525 and 1527 provisions which are, with modifications not relevant for present purposes, equivalent to articles 21, 25 and 27 of the CBIR. In *Re Metcalfe & Mansfield Alternative Investments* 421 BR 685 (Bankr SDNY 2010) the US Bankruptcy Court ordered that orders made by a Canadian court in relation to a plan of compromise and arrangement under the (Canadian) Companies' Creditors

Arrangement Act 1985 be enforced. That decision does not assist the respondents because the US Bankruptcy Court applied the normal rules in non-bankruptcy cases for enforcement of foreign judgments in the United States: pp 698-700. In my judgment the Model Law is not designed to provide for the reciprocal enforcement of judgments.

VII Issue 3: New Cap: Enforcement through assistance under section 426 of the Insolvency Act 1986

145. In view of my conclusion in the next section (section VIII) that the Syndicate submitted to the jurisdiction of the Australian court, the issues on section 426(4) and (5) of the Insolvency Act 1986, and their relationship with section 6 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 do not arise, but since the matter was fully argued I will express a view on the applicability of section 426(4) to a case such as this.

146. Section 426(4)-(5) of the Insolvency Act 1986 provides:

“(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.

(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom, or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matter specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.”

147. The reference to the application of rules of private international law in section 426(5) is difficult and obscure: see *Dicey*, 15th ed, para 30-119; my discussion in *In re Television Trade Rentals* [2002] EWHC 211 (Ch), [2002] BCC 807, para 17, and the cases there cited; and *Al-Sabah v Grupo Torras SA* [2005] UKPC 1, [2005] 2 AC 333, para 47. But nothing turns on it on these appeals.

148. The question is whether section 426(4) of the 1986 Act provides a procedure by which a judgment of a court having jurisdiction in relation to insolvency law in a “relevant country or territory” may be enforced in the United Kingdom. As I have said, Australia is a relevant country.

149. A further question arises if section 426(4) applies to the enforcement of foreign judgments and that is whether section 426 is ousted by section 6 of the Foreign Judgments (Reciprocal Enforcement) Act 1933, which provides:

“No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of the Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom.”

150. Both Lewison J and the Court of Appeal [2012] 2 WLR 1095 held that section 426(4) was available as a tool for the enforcement of the judgment.

151. Section 426(4) has been given a broad interpretation: see *Hughes v Hannover Rückversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497 (CA); *England v Smith* [2001] Ch 419 (CA); *HIH* [2008] UKHL 21, [2008] 1 WLR 852. It has been held that the fact that a letter of request has been made is a weighty factor, and public policy and comity favour the giving of assistance: *Hughes v Hannover*, at pp 517-518; *England v Smith*, at p 433. Thus in *England v Smith* the Australian court overseeing the liquidation of the Bond Corporation made an order for the examination of a London partner in Arthur Andersen. It issued a letter of request asking the English court to assist it by making its own order for the examination. The Court of Appeal decided that the order should be made.

152. But, despite the respondents’ argument to the contrary, *England v Smith* was not a case of the enforcement of the Australian order, but rather the making of the court’s own order in aid of the Australian liquidation. In my judgment, subsections 426(4) and (5) of the 1986 Act are not concerned with enforcement of judgments. Section 426(1)-(2), by contrast, deals with enforcement of orders in one part of the United Kingdom in another part, and refer expressly to the enforcement of such orders (“shall be enforced” in section 426(1)). Section 426(4) deals with assistance not only for foreign designated countries such as Australia but also to intra-United Kingdom assistance. If section 426(4) applied to intra-United Kingdom enforcement of orders, then section 426(1) would be largely redundant, going beyond what the Court of Appeal [2012] 2 WLR 1095, para 57 described as “a degree of overlap.”

153. Sections 426(1) and (4) have their origin in sections 121 and 123 of the Bankruptcy Act 1914. Section 121 of the 1914 Act provided that orders of bankruptcy courts in one part of the United Kingdom were to be enforced in other parts. Section 122 provided that the courts exercising bankruptcy and insolvency jurisdiction in the United Kingdom and “every British court elsewhere” were to act in aid of, and be auxiliary to, each other; and, upon a request by the non-English court, could exercise the jurisdiction of either court.

154. The Insolvency Law and Practice Report of the Review Committee (1982) (Cmnd 8558) (the “Cork Report”) said (paras 1909-1913) that section 122 was the “vital section in this context”, and recommended that the section should be extended to winding up. But, despite the respondents’ arguments, I do not discern any recommendation which would suggest that section 426(4) applies to the enforcement of foreign judgments.

155. Consequently the applicability of section 6 of the 1933 Act does not arise for decision, except in a context which makes little practical difference, and to which I will revert.

VIII Submission

156. If the *Dicey* Rule applies the judgments in issue will be enforceable in England if the judgment debtors submitted to the jurisdiction of the foreign court.

New Cap

157. The Australian court granted leave to serve these proceedings out of the jurisdiction on the Syndicate: section IV, above. The Syndicate did not enter an appearance, but its solicitors commented in writing on evidence presented to the Australian court about New Cap’s insolvency and their comments were placed before the Australian judge.

158. More relevant is the fact that from August 1999 the Syndicate submitted proofs of debt (in relation to unsettled claims and outstanding premiums for the 1997, 1998, and 1999 years of account, and not to the reinsurance contracts which are the subject of these proceedings) and attended and participated in creditors’ meetings. In particular at an adjourned meeting of creditors on 16 September 2009 the Syndicate had given a proxy for that meeting to the chairman, and submitted a proof of debt and proxy form for that meeting. The Syndicate voted at a meeting of creditors in favour of a scheme of arrangement. The liquidator has admitted claims by the Syndicate for the sterling equivalent of more than £650,000, although the

liquidator is retaining the dividend in partial settlement of the costs incurred in these proceedings.

159. The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have “taken some step which is only necessary or only useful if” an objection to jurisdiction “has been actually waived, or if the objection has never been entertained at all”: *Williams & Glyn’s Bank plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438, 444 (HL) approving *Rein v Stein* (1892) 66 LT 469, 471 (Cave J).

160. The same general rule has been adopted to determine whether there has been a submission to the jurisdiction of a foreign court for the purposes of the rule that a foreign judgment will be enforced on the basis that the judgment debtor has submitted to the jurisdiction of the foreign court: *Adams v Cape Industries* [1990] Ch 433, 459 (Scott J); *Akai Pty Ltd v People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep 90, 96-97 (Thomas J); see also *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, 856 (CA); *Akande v Balfour Beatty Construction Ltd* [1998] ILPr 110; *Starlight International Inc v Bruce* [2002] EWHC 374 (Ch), [2002] ILPr 617, para 14 (cases of foreign judgments); *Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader)* [1996] 2 Lloyd’s Rep 585, 601 (a case involving the question whether the party seeking an anti-suit injunction in support of an English arbitration clause had waived the agreement by submitting to the jurisdiction of the foreign court).

161. The characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on English law. The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts.

162. It is in that context that Scott J said at first instance in *Adams v Cape Industries plc* [1990] 1 Ch 433, 461 (a case in which the submission issue was not before the Court of Appeal): “If the steps would not have been regarded by the domestic law of the foreign court as a submission to the jurisdiction, they ought not ... to be so regarded here, notwithstanding that if they had been steps taken in an English court they might have constituted a submission. The implication of

procedural steps taken in foreign proceedings must ... be assessed in the context of the foreign proceedings.”

163. I agree with the way it was put by Thomas J in *Akai Pty Ltd v People's Insurance Company Ltd* [1998] 1 Lloyd's Rep 90, 97:

“The court must consider the matter objectively; it must have regard to the general framework of its own procedural rules, but also to the domestic law of the court where the steps were taken. This is because the significance of those steps can only be understood by reference to that law. If a step taken by a person in a foreign jurisdiction, such as making a counterclaim, might well be regarded by English law as amounting to a submission to the jurisdiction, but would not be regarded by that foreign court as a submission to its jurisdiction, an English court will take into account the position under foreign law.”

164. The Syndicate did not take any steps in the avoidance proceedings as such which would be regarded either by the Australian court or by the English court as a submission. Were the steps taken by the Syndicate in the liquidation a submission for the purposes of the rules relating to foreign judgments?

165. In English law there is no doubt that orders may be made against a foreign creditor who proves in an English liquidation or bankruptcy on the footing that by proving the foreign creditor submits to the jurisdiction of the English court. In *Ex p Robertson, In re Morton* (1875) LR 20 Eq 733 trustees were appointed over the property of bankrupt potato merchants in a liquidation by arrangement. A Scots merchant received payment of £120 after the liquidation petition was presented, and proved for a balance of £247 and received a dividend of what is now 20p in the pound. The trustees served a notice of motion, seeking repayment of the £120 paid out of the insolvent estate, out of the jurisdiction. The respondent objected to the jurisdiction of the English court on the ground that he was a domiciled Scotsman. On appeal from the county court, Sir James Bacon CJ held that the court had jurisdiction. He said, at pp 737-738:

“... what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it - that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the court, and the court has jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else

the court may think necessary in order to effect complete distribution of the bankrupt's estate. ... [C]an there be any doubt that the Appellant in this case has agreed that, as far as he is concerned, the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit .. [The Appellant] is as much bound to perform the conditions of the compact, and to submit to the jurisdiction of the court, as if he had never been out of the limits of England.”

166. The Syndicate objected to the jurisdiction of the Australian court. Barrett J in his judgment of 14 July 2009 accepted that it had made it clear that it was not submitting to its jurisdiction, and he also accepted that as a result the judgment of the Australian court would not be enforceable in England. His judgment is concerned exclusively with the preference claims, and he did not deal with the question of submission by reference to the Syndicate’s participation in the liquidation by way of proof and receipt of dividends. He decided that the court had jurisdiction because the New South Wales rules justified service out of the jurisdiction on the basis that the cause of action arose in New South Wales.

167. I would therefore accept the liquidators’ submission that, having chosen to submit to New Cap's Australian insolvency proceeding, the Syndicate should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding. It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding.

Rubin

168. The position is different in the *Rubin* appeal. It would certainly have been arguable that Eurofinance SA had submitted to the jurisdiction of the United States District Court, for these reasons: first, it was Eurofinance SA which applied for the appointment by the High Court of Mr Rubin and Mr Lan as receivers of TCT specifically for the purpose of causing TCT then to obtain protection under Chapter 11; second, it was Eurofinance SA which represented to the English court that officeholders appointed by the United States court would be able to pursue claims against third parties; third, the judgment of the US Bankruptcy Court states that the court had personal jurisdiction over Eurofinance SA not only because it did business in the United States but also (as I have mentioned above) because it had filed a notice of appearance in the Chapter 11 proceedings (Order 22 of July 2008, paras 42-43).

169. But the *Rubin* appellants did not appear in the adversary proceedings, and it was not argued in these proceedings that Eurofinance SA (or Mr Adrian Roman, who caused Eurofinance SA to make the application) had submitted to the jurisdiction of the US Bankruptcy Court in any other way and it is not necessary therefore to explore the matter further.

IX New Cap: enforcement at common law or under the 1933 Act

170. In view of my conclusion that the Australian judgment in *New Cap* is enforceable by reason of the Syndicate's submission, a purely technical point arises on the method of enforcement. The point is whether the enforcement is to be under the 1933 Act or at common law. If insolvency proceedings are excluded from the 1933 Act, then enforcement would be at common law. If they are not excluded, then (as I have said) section 6 has the effect of excluding an action at common law on the judgment and making registration under the 1933 Act the only method of enforcement of judgments within Part I of the Act.

171. Section 11(2) of the 1933 Act provides that the expression "action in personam" shall not be deemed to include (inter alia) proceedings in connection with bankruptcy and winding up of companies. But the effect of section 4(2)(c) is that in the case of a judgment given in an action other than an action in personam or an action in rem, the foreign court shall be deemed to have jurisdiction if its jurisdiction is recognised by the English court, ie at common law. Accordingly, the question whether insolvency proceedings are wholly excluded from the operation of the 1933 Act still arises. There is no other provision in the 1933 Act which throws any light on the point.

172. The main object of the 1933 Act was to facilitate the enforcement of commercial judgments abroad by making reciprocity easier. The only reference to insolvency proceedings in the Report of the Foreign Judgments (Reciprocal Enforcement) Committee (1932) (Cmnd 4213), (the Greer Report), which recommended the legislation, is the statement (para 4): "It is not necessary for our present purposes to consider the effect in England of foreign judgments in bankruptcy proceedings...". The Report annexed draft Conventions which had been drawn up in consultation with experts from Belgium, France and Germany. The draft Conventions with Belgium (article 4(3), (4)) and Germany (article 4(4)) provided that the jurisdictional rules in the Convention did not apply to judgments in bankruptcy proceedings or proceedings relating to the winding up of companies or other bodies corporate, but that the jurisdiction of the original court would be recognised where such recognition was in accordance with the rules of private international law observed by the court applied to. That provision paralleled what became sections 4(2)(c) and 11(2) of the 1933 Act. The draft Convention with France did not apply to judgments in bankruptcy proceedings etc (article 2(3)), but

provided that nothing was deemed to preclude the recognition and enforcement of judgments to which the Convention did not apply: article 2(4).

173. The Conventions concluded with countries to which the 1933 Act applied adopted similar techniques. It is unnecessary to set them out in detail. But there is no reason to suppose that bankruptcy proceedings were not regarded as being “civil and commercial matters.” Thus the 1961 Convention with the Federal Republic of Germany of 1961 (the Reciprocal Enforcement of Foreign Judgments (Germany) Order) (SI 1961/1199) provided in article I(6) that the expression “judgments in civil and commercial matters” did not include judgments for fines or penalties, and had a separate provision in article II(2) that the Convention did not apply to judgments in bankruptcy proceedings or proceedings relating to the winding up of companies or other bodies corporate (although, in accordance with the usual technique, it did not rule out recognition and enforcement: Art II(3)). Other Conventions simply excluded bankruptcy proceedings from the specific jurisdictional provisions of the Convention, like the draft Conventions annexed to the Greer Report: article 4(5) of the Reciprocal Enforcement of Foreign Judgments (Austria) Order 1962 (SI 1962/1339), article 4(3) of the Reciprocal Enforcement of Foreign Judgments (Norway) Order 1962 (SI 1962/636), and article IV(3) of the Reciprocal Enforcement of Foreign Judgments (Italy) Order 1963 (SI 1973/1894).

174. The Reciprocal Enforcement of Judgments (Australia) Order 1994 (SI 1994/1901) extended the 1933 Act to Australia, implementing the UK-Australia Agreement for the reciprocal enforcement of judgments in civil and commercial matters. The Agreement is expressed in article I(c)(i) to apply to judgments in civil and commercial matters. The Order applies Part I of the Act to judgments in respect of a “civil or commercial matter” (article 4(a)).

175. There is no reason to conclude that the phrase “civil and commercial matters” does not include insolvency proceedings, and the history of the 1933 Act and the Conventions shows that it does. The fact that insolvency was expressly excluded from the operation of the Brussels Convention, the original and revised Lugano Conventions and the Brussels I Regulation in fact suggests that otherwise they would have been within their scope. The respondents relied on a passage in the ruling of the European Court of Justice in *Gourdain v Nadler* (Case 133/78) [1979] ECR 733, paras 3-4, as suggesting that the exclusion of bankruptcy in article 1 of the Brussels Convention was an example of a matter excluded from the concept of civil and commercial matters. But it is clear from the context (and from the opinion of Advocate General Reischl) that the court was simply saying that because the expression “civil and commercial matters” in Article 1 had to be given an autonomous meaning, so also was the case with the expression “bankruptcy”. That the exclusion of bankruptcy proceedings does not affect their character as civil or commercial matters is confirmed by the recent ruling in *F-Tex SIA v Lietuvos-Anglijos UAB-JadecLOUD-Vilma* (Case C-213/10) 19 April 2012, where

the court said that the Brussels I Regulation was “intended to apply to all civil and commercial matters apart from certain well-defined matters” and as a result actions directly deriving from insolvency proceedings and closely connected with them were excluded: para 29.

176. It follows that the 1933 Act applies to the Australian judgment and that enforcement should be by way of registration under the 1933 Act.

X Disposition

177. I would therefore allow the appeal in *Rubin*, but dismiss the appeal in *New Cap* on the ground that the Syndicate submitted to the jurisdiction of the Australian court.

LORD MANCE

178. I agree with Lord Collins’ reasoning and conclusions in his judgment on these appeals, essentially for the reasons he gives, though without subscribing to his incidental observation (para 132) that the Privy Council decision in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508 was necessarily wrongly decided. This was not argued before the Supreme Court, and I would wish to reserve my opinion upon it. *Cambridge Gas* is, on any view, distinguishable.

179. The common law question central to these appeals is whether the Supreme Court should endorse or introduce a special rule of recognition and enforcement, one falling outside the scope of the *Dicey* Rule which Lord Collins has identified (Rule 36 in the 14th and Rule 43 in the 15th edition) and applicable to judgments in foreign insolvency proceedings setting aside voidable pre-insolvency transactions. For the principal reasons which Lord Collins gives in paras 95 to 131, I agree that we should not do so.

180. Since much weight was placed by the respondents and the Court of Appeal upon the Board’s reasoning and decision in *Cambridge Gas*, I add some observations to indicate why, as the present appellants submitted, it concerned circumstances and proceeded upon factual assumptions and a legal analysis which have no parallel in the present case.

181. *Cambridge Gas* has attracted both Irish judicial dissent and English academic criticism, to which Lord Collins refers in paras 53 and 111-112. Giving the judgment of the Board in *Pattni v Ali* [2006] UKPC 51, [2007] 2 AC 85, I said that the purpose of the bankruptcy order with which the Board was concerned in *Cambridge Gas* “was simply to establish a mechanism of collective execution against the property of the debtor [Navigator] by creditors whose rights were admitted or established” (para 23).

182. This analysis, admittedly, involved treating the vesting in creditors of shares in Navigator as no different in substance from the vesting in creditors of Navigator’s shares in its ship-owning subsidiaries. But it is clear from paras 8 and 9 and again 24 to 26 of the Board’s advice in *Cambridge Gas* that the Board saw no difference. It did not regard Cambridge Gas as having any interest of value to advance or protect in the shares still held nominally in its name. Their vesting in Navigator’s creditors was no more than a mechanism for disposing of Navigator’s assets, which did not affect or concern Cambridge Gas. The Board was therefore, in its view (and rightly or wrongly), concerned with distribution of the insolvent company’s assets in a narrow and traditional sense.

183. Amplifying this, the Board approached the situation in *Cambridge Gas* as follows. The New York court had jurisdiction over Navigator’s assets, since Navigator had submitted to the New York proceedings. Cambridge Gas’s shares in Navigator (located in the Isle of Man, Navigator’s place of incorporation) were “completely and utterly worthless”: [2007] 1 AC 508, para 9. The transfer to Navigator’s creditors of Cambridge Gas’s shares in Navigator had the like effect to a transfer of Navigator’s assets, since Navigator was “an insolvent company, in which the shareholders ha[d] no interest of any value” (para 26). Cambridge Gas’s shares in Navigator were vulnerable in the Isle of Man, under section 152 of the Companies Act 1931, to a similar scheme of arrangement to that which the New York Court intended by its Chapter 11 order. More generally, as I noted in *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, [2009] AC 1391, paras 236 to 238, in insolvency shareholders’ interests yield to those of creditors.

184. It was in this limited context that the Board concluded that the New York and Manx courts’ orders could be regarded as doing no more than facilitating or enabling collective execution against Navigator’s property.

185. The Court of Appeal believed on the contrary that the answer to the present cases lay in the Board’s general statements in *Cambridge Gas* at paras 19 to 21 regarding the nature of insolvency proceedings. It is true that proceedings to avoid pre-insolvency transactions can be related to the process of collection of assets. That is, their general purpose and effect is to ensure a fair allocation of assets between all who are and were within some specified pre-insolvency period

creditors. A dictum of Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852, para 19, quoted by Lord Collins in paras 15 and 52, is to that effect, though again uttered in a different context to the present.

186. However, the Board did not see these considerations as answering or eliminating all questions regarding the existence of jurisdiction or at least its exercise in *Cambridge Gas*. On the contrary, it went on to examine in close detail in paras 22 to 26 the limits of the assistance that a court could properly give. In rejecting the argument that the interference with the shareholding held in Cambridge Gas's name was beyond the Manx court's jurisdiction (para 26), the only reason it gave related to the nature of shares in an insolvent company. This meant, according to its advice, that Cambridge Gas had no interest of any value to protect and that registration of the shares in Navigator's creditors' name was no more than a mechanism for giving creditors access to Navigator's assets.

187. On this basis, the decision in *Cambridge Gas* is, as Professor Adrian Briggs noted in a penetrating case-note in *The British Year Book of International Law* (2006) p575-581, less remarkable (although, as Professor Briggs also notes, it perhaps still poses problems of reconciliation with the House's decision in *Société Eram Shipping Co Ltd v Hong Kong & Shanghai Banking Corp Ltd* [2003] UKHL 30, [2004] AC 260). But, because the actual decision in *Cambridge Gas* was so narrowly focused on the nature of a shareholder's rights in an insolvent company and was not directly challenged, I prefer to leave open its correctness.

188. Whatever view may be taken as to the validity of the Board's reasoning in *Cambridge Gas*, it is clear that it does not cover or control the present appeal. The present cases are not concerned with shares, with situations in which shares are, or are treated by the court as, no more than a key to the insolvent company's assets or even with situations in which it is clear that those objecting to recognition and enforcement of the foreign courts' orders have no interests to protect. There are, on the contrary, substantial issues as to whether there were fraudulent preferences giving rise to in personam liability in large amounts. The persons allegedly benefitting by fraudulent preferences did not appear in the relevant foreign insolvency proceedings in which judgment was given against them. They were (leaving aside any question of submission) outside the international jurisdiction of the relevant foreign courts.

189. Lord Clarke takes a different view from Lord Collins, but does not define either the circumstances in which a foreign court should, under English private international law rules, be recognised as having "jurisdiction to entertain" bankruptcy proceedings or, if one were (wrongly in my view) to treat the whole area as one of discretion, the factors which might make it either unjust or contrary

to public policy to recognise an avoidance order made in such foreign proceedings (see paras 193, 200 and 201 of Lord Clarke's judgment). The scope of the jurisdiction to entertain bankruptcy proceedings which English private international law will recognise a foreign court as having is described in Dicey (in para 31-064 in the 14th and 15th editions) as a "vexed and controversial" question. But it would include situations in which the bankrupt or insolvent company had simply submitted to the foreign bankruptcy jurisdiction. On Lord Clarke's analysis, in such a case (of which *Rubin v Eurofinance* is an example), it would be irrelevant that the debtor under the avoidance order had not submitted, and was not on any other basis subject, to the foreign jurisdiction. It would be enough that the judgment debtor had had the chance of appearing and defending before the foreign court. For the reasons given by Lord Collins, I do not accept that this is the common law.

190. In the light of the above, the Court of Appeal was, in my view, in error in seeing the solution to the present appeals as lying in the advice given by the Board in *Cambridge Gas*. Even on an assumption that the actual decision in *Cambridge Gas* can be supported, it cannot and should not be treated as supporting the respondents' case that fraudulent preference claims and avoidance orders in insolvency proceedings generally escape the common law rules requiring personal or in rem jurisdiction.

LORD CLARKE

191. I would like to pay tribute to the learning in Lord Collins' comprehensive judgment. However, left to myself, I would dismiss the appeal in the *Rubin* case. Since I am in a minority of one, little is to be gained by my writing a long dissent. I will therefore try to explain my reasons shortly. In doing so, I adopt the terminology and abbreviations used by Lord Collins.

192. I agree with Lord Collins and Lord Mance that the decision of the Privy Council in *Cambridge Gas Transportation Corp'n v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 is distinguishable. The facts there were quite different from those here. However, in so far as it is suggested that *Cambridge Gas* was wrongly decided, I do not agree. Moreover, I do not think that it would be appropriate so to hold because it was not submitted to be wrong in the course of the argument. To my mind the approach which should be adopted is presaged in the speech of Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 and in his judgment in *Cambridge Gas*.

193. As I see it, the issue is simply whether an avoidance order made by a foreign bankruptcy court made in the course of the bankruptcy proceedings, whether personal or corporate, which the court has jurisdiction to entertain, is unenforceable if it can fairly be said to be an order made either in personam or in rem. I would answer that question in the negative. Put another way, the question is whether the English court has jurisdiction under English rules of private international law to enforce an avoidance order made in foreign bankruptcy proceedings in circumstances where, under those rules, the foreign court has jurisdiction to entertain the bankruptcy proceedings themselves. I would answer that question in the affirmative. It is not, as I understand it, suggested here that the US court did not have jurisdiction to entertain the bankruptcy proceedings themselves.

194. The relevant paragraphs of Lord Hoffmann's judgment in *Cambridge Gas* are in these terms (as quoted by Lord Collins at para 43 above):

"13. ... Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.

14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. ...

15 ... [B]ankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them. Of course, as Brightman LJ pointed out in *In re Lines Bros Ltd* [1983] Ch 1, 20, it may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy proceedings or directed to be determined by ordinary action. But these again are incidental procedural matters and not central to the purpose of the proceedings."

195. The critical paragraph is para 15, which seems to me to make it clear that it is possible to have an order which is both in personam or in rem and an order of the kind referred to by Lord Hoffmann in para 14. Thus it may be incidentally necessary to establish substantive rights in the course of the bankruptcy proceedings as part of a collective proceeding to enforce rights. In such a case the order will be doing two things. It will be both establishing the right and enforcing it. This can be seen from the examples given in para 15. Proofs of debt may be rejected, which is a process which may involve determining, for example, the substantive rights of the creditor against the debtor. Or it may be necessary to determine whether or not a particular item of property belongs to the debtor and is available for distribution. As para 15 contemplates, such procedures may be tried either summarily within the bankruptcy proceedings or by ordinary action. In either such case Lord Hoffmann describes them as incidental procedures which are not central to the purpose of the bankruptcy proceedings. As I see it, in such a case, an avoidance order may be both an order in personam or in rem and an order in the bankruptcy proceedings.

196. I agree with Lord Collins at para 103 that it is not easy to see why the order of the US Bankruptcy Court in *Cambridge Gas* was not an order in rem. However, that does not to my mind show that *Cambridge Gas* was wrongly decided but demonstrates that it is possible to have an in rem order which is made as incidental to bankruptcy proceedings but which is enforceable at common law, provided that the bankruptcy court has jurisdiction in the bankruptcy.

197. The approach is explained by Lord Hoffmann in *HIH* at para 30 and in *Cambridge Gas* at para 16, both of which are quoted by Lord Collins at para 19 above. In *HIH* he said:

“The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution.”

In *Cambridge Gas* he said:

“The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a

single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated. ...”

198. At paras 94 to 98 above Lord Collins discusses the nature of avoidance proceedings. I entirely agree with his analysis. Avoidance provisions requiring the adjustment of prior transactions and the recovery of previous dispositions of property so as to constitute the estate available for distribution are necessary in order to maintain the principle of equality among creditors. At para 15 Lord Collins notes that Lord Hoffmann said at para 19 of *HIH* that

“the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme.”

In short, avoidance proceedings, and therefore avoidance orders, are central to the bankruptcy proceedings. As Lord Collins puts it at para 98, avoidance proceedings are peculiarly the subject of insolvency law.

199. I accept that to permit the enforcement of an avoidance order in circumstances of this kind would be a development of the common law. However, it seems to me that it would be a principled development. It would in essence be an application of the principle identified by Lord Hoffmann in the passage quoted above from para 30 of *HIH* that the principle of modified universalism requires that English courts should, so far as is consistent with justice and United Kingdom public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution.

200. The position of the judgment debtor in such a case would be protected by the principle that the English court would only enforce a judgment in a case like this where to do so was consistent with justice and United Kingdom public policy. All would depend upon the facts of the particular case. In the case of *Rubin*, there would be no injustice in enforcing the judgment against the appellants.

201. Lord Mance notes at para 189 that I do not define either the circumstances in which a foreign court should be recognised as having jurisdiction to entertain bankruptcy proceedings or the factors which would make it unjust or contrary to public policy to recognise an avoidance order made in such foreign proceedings. As I see it, these are matters which would be worked out on a case by case basis in

(as Lord Hoffmann put it in *HIH* at para 30) co-operating with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. It would not be irrelevant that the debtor under the avoidance order had not submitted. All would depend upon the particular circumstances of the case, including the reasons why the debtor had not submitted.

202. In essence, on the critical question, I prefer the reasoning of the Court of Appeal, which is contained in the judgment of Ward LJ, with whom Wilson LJ and Henderson J agreed. Lord Collins has concisely summarised their reasoning in paras 88 to 90, substantially as follows: (a) the judgment was final and conclusive, and for definite sums of money, and on the face of the orders was a judgment in personam; (b) it was common ground that the judgment debtors were not present when the proceedings were instituted, and did not submit to the jurisdiction, and so at first blush had an impregnable defence; (c) *Cambridge Gas* decided that the bankruptcy order with which it was concerned was neither in personam nor in rem, and its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established: *Pattni v Ali* [2007] 2 AC 85, para 23; (d) bankruptcy was a collective proceeding to enforce rights and not to establish them: *Cambridge Gas* [2007] 1 AC 508, para 15; (e) the issue was whether avoidance proceedings which could only be brought by the representative of the bankrupt were to be characterised as part of the bankruptcy proceedings, ie part of the collective proceeding to enforce rights and not to establish them; (f) the adversary proceedings were part and parcel of the Chapter 11 proceedings; (g) the ordinary rules for enforcing foreign judgments in personam did not apply to bankruptcy proceedings; (h) avoidance mechanisms were integral to and central to the collective nature of bankruptcy and were not merely incidental procedural matters; (i) the process of collection of assets will include the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme: *HIH* [2008] 1 WLR 852, para 19; (j) the judgment of the US Bankruptcy Court was a judgment in, and for the purposes of, the collective enforcement regime of the insolvency proceedings, and was governed by the sui generis private international law rules relating to insolvency; (k) that was a desirable development of the common law founded on the principles of modified universalism, and did not require the court to enforce anything that it could not do, mutatis mutandis, in a domestic context; (l) there was a principle of private international law that bankruptcy should be unitary and universal, and there should be a unitary insolvency proceeding in the court of the bankrupt's domicile which receives worldwide recognition and should apply universally to all the bankrupt's assets; (m) there was a further principle that recognition carried with it the active assistance of the court which included assistance by doing whatever the English court could do in the case of a domestic insolvency; (n) there was no unfairness to the appellants in upholding the judgment because they were fully aware of the proceedings, and after taking advice chose not to participate: see [2011] Ch 133, paras 38, 41, 43, 45, 48, 50, 61-62 and 64.

203. That seems to me to be a correct summary of the views of the Court of Appeal. I agree with those views subject to this comment on point (c). I am not sure that in *Cambridge Gas* the Privy Council decided that the bankruptcy order with which it was concerned was neither in personam nor in rem. It held that the purpose of the order was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established. As discussed above, it may well have appreciated that it was also an order in rem. However that may be, I agree with Lord Collins at para 90 that, in short, the Court of Appeal accepted that the judgment sought to be enforced in the instant cases was an in personam judgment, but decided that the *Dicey* Rule did not apply to foreign judgments in avoidance proceedings because they were central to the collective enforcement regime in insolvency and were governed by special rules. I agree with the reasoning of the Court of Appeal. Put another way, the *Dicey* Rule should in my opinion be modified to include a fifth case in which a foreign court has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it is given. That fifth case would be if the judgment was given in avoidance proceedings as part of foreign bankruptcy proceedings which the foreign court had jurisdiction to entertain.

204. I recognise that there are other ways of achieving such a result, as for example by an equivalent provision to the EC Insolvency Regulation: per Lord Collins at paras 99-101. I also recognise that it would be possible to adopt a more radical approach not limited to avoidance proceedings. However, so limited, I respectfully disagree with the view expressed by Lord Collins at para 128 that this development would not be an incremental development of existing principles but a radical departure from substantially settled law. For the reasons given in para 198, it would in essence be an application of the principle of modified universalism. It seems to me that in these days of global commerce, the step taken by the Court of Appeal was but a small step forward. Judgment debtors are protected by the principle that no order would be made if it were contrary to justice or United Kingdom public policy. Moreover, on the facts here, I can see no basis upon which the order made by the Court of Appeal would be either unjust or contrary to public policy. Finally, I do not think that that conclusion is undermined by any absence of reciprocity.

205. For these reasons, I would dismiss the appeal in the *Rubin* case on the common law point. On all other issues I agree with the judgment of Lord Collins.

UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation



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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation



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Part one

**UNCITRAL MODEL LAW
ON CROSS-BORDER INSOLVENCY**

UNCITRAL Model Law on Cross-Border Insolvency

PREAMBLE

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

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

1. This Law applies where:

- (a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) Assistance is sought in a foreign State in connection with a proceeding under [*identify laws of the enacting State relating to insolvency*]; or
- (c) A foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] in respect of the same debtor are taking place concurrently; or

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

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

Article 2. Definitions

For the purposes of this Law:

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

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

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

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

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

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

Article 3. International obligations of this State

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

Article 4. [Competent court or authority]^a

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

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

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

Article 6. Public policy exception

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

Article 7. Additional assistance under other laws

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

Article 8. Interpretation

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

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

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

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

Article 9. Right of direct access

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

Article 10. Limited jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

^bThe enacting State may wish to consider the following alternative wording to replace paragraph 2 of article 13:

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

CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 15. Application for recognition of a foreign proceeding

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

2. An application for recognition shall be accompanied by:

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

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

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

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

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

Article 16. Presumptions concerning recognition

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

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

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

Article 17. Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:
 - (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
 - (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
 - (c) The application meets the requirements of paragraph 2 of article 15; and
 - (d) The application has been submitted to the court referred to in article 4.
2. The foreign proceeding shall be recognized:
 - (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.
3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Article 18. Subsequent information

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

- (a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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

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

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

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

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

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

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

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

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

Article 20. Effects of recognition of a foreign main proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 22. Protection of creditors and other interested persons

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

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

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

Article 23. Actions to avoid acts detrimental to creditors

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

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

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

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

CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

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

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

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

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

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

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

Article 27. Forms of cooperation

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

- (a) Appointment of a person or body to act at the direction of the court;
- (b) Communication of information by any means considered appropriate by the court;
- (c) Coordination of the administration and supervision of the debtor's assets and affairs;

- (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) Coordination of concurrent proceedings regarding the same debtor;
- (f) [*The enacting State may wish to list additional forms or examples of cooperation*].

CHAPTER V. CONCURRENT PROCEEDINGS

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

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

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

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

- (a) When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,
 - (i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and
 - (ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;
- (b) When the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,
 - (i) Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and

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

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

Article 30. Coordination of more than one foreign proceeding

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

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

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

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

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

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

Article 32. Rule of payment in concurrent proceedings

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

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

Part two

**GUIDE TO ENACTMENT AND INTERPRETATION
OF THE UNCITRAL MODEL LAW
ON CROSS-BORDER INSOLVENCY**

Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency

I. Purpose and origin of the Model Law

A. Purpose of the Model Law

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

2. The Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Thus, the States enacting the Model Law would be introducing useful additions and improvements in national insolvency regimes designed to resolve problems arising in cross-border insolvency cases. By adopting legislation based upon the Model Law, States recognize that certain laws relating to insolvency may have to be or might have been amended in order to meet internationally recognized standards.

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

(a) Providing the person administering a foreign insolvency proceeding (“foreign representative”) with access to the courts of the enacting State,¹ thereby permitting the foreign representative to seek a temporary “breathing space”, and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

(b) Determining when a foreign insolvency proceeding should be accorded “recognition” and what the consequences of recognition may be;

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

(d) Permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

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

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

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

4. For jurisdictions that currently have to deal with numerous cases of cross-border insolvency, as well as jurisdictions that wish to be well prepared for the increasing likelihood of cases of cross-border insolvency, the Model Law is an essential reference for developing an effective cross-border cooperation framework.

B. Origin of the Model Law

5. The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws by and large have not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection

¹The “enacting State” refers to a State that has enacted legislation based on the Model Law. Unless otherwise provided, that term is used in the *Guide to Enactment and Interpretation* to refer to the State receiving an application under the Model Law.

of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases can impede capital flow and be a disincentive to cross-border investment.

6. Fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is an increasing problem, in terms of both its frequency and its magnitude. The modern, interconnected world makes such fraud easier to conceive and carry out. The cross-border cooperation mechanisms established by the Model Law are designed to confront such international fraud.

7. Only a limited number of countries have a legislative framework for dealing with cross-border insolvency that is well suited to the needs of international trade and investment. Various techniques and notions are employed in the absence of a specific legislative or treaty framework for dealing with cross-border insolvency. These include the following: application of the doctrine of comity by courts in common-law jurisdictions; issuance for equivalent purposes of enabling orders (exequatur) in civil-law jurisdictions; enforcement of foreign insolvency orders relying on legislation for enforcement of foreign judgements; and techniques such as letters rogatory for transmitting requests for judicial assistance.

8. 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. For example, in a given legal system general legislation on reciprocal recognition of judgements, including exequatur, might be confined to enforcement of specific money judgements or injunctive orders in two-party disputes, thus excluding decisions opening collective insolvency proceedings. Furthermore, recognition of foreign insolvency proceedings might not be considered as a matter of recognizing a foreign “judgement”, for example, if the foreign bankruptcy order is considered to be merely a declaration of status of the debtor or if the order is considered not to be final.

9. To the extent that there is a lack of communication and coordination among courts and administrators from concerned jurisdictions, it is more likely that assets would be dissipated, fraudulently concealed, or possibly liquidated without reference to other more advantageous solutions. As a result, not only is the ability of creditors to receive payment diminished, but so is the possibility of rescuing financially viable businesses and saving jobs. By contrast, mechanisms in national legislation for coordinated

administration of cases of cross-border insolvency make it possible to adopt solutions that are sensible and in the best interest of the creditors and the debtor; the presence of such mechanisms in the law of a State is therefore perceived as advantageous for foreign investment and trade in that State.

10. The Model Law takes into account the results of other international efforts, including the negotiations leading to the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the “EC Regulation”), the European Convention on Certain International Aspects of Bankruptcy (1990),² the Montevideo treaties on international commercial law (1889 and 1940), the Convention regarding Bankruptcy between Nordic States (1933) and the Convention on Private International Law (Bustamante Code) (1928).³ Proposals from non-governmental organizations that have been taken into account include the Model International Insolvency Cooperation Act and the Cross-Border Insolvency Concordat, both developed by the former Committee J (Insolvency) of the Section on Business Law of the International Bar Association.⁴

11. The EC Regulation establishes a cross-border insolvency regime within the European Union for cases where the debtor has the centre of its main interests in a State member of the Union. The Regulation does not deal with cross-border insolvency matters extending beyond a State member of the European Union into a non-member State. Thus, the Model Law offers to States members of the European Union a complementary regime of considerable practical value that could address the many cases of cross-border cooperation not covered by the EC Regulation.

C. Preparatory work and adoption

12. The project was initiated by the United Nations Commission on International Trade Law (UNCITRAL), in close cooperation with INSOL International. The project benefited from the expert advice of INSOL during all stages of the preparatory work. In addition, during the formulation of the Law, consultative assistance was provided by the former Committee J (Insolvency) of the Section on Business Law of the International Bar Association.

13. Prior to the decision by UNCITRAL to undertake work on cross-border insolvency, the Commission and INSOL held two international colloquiums for insolvency practitioners, judges, government officials and representatives

²European Treaty Series, No. 136.

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

⁴Available from <http://www.iiiglobal.org/component/jdownloads/finish/396/1522.html> (last visited 1 August 2013).

of other interested sectors.⁵ The suggestion arising from those colloquiums was that work by UNCITRAL should have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency representatives and recognition of foreign insolvency proceedings.

14. When UNCITRAL decided in 1995 to develop a legal instrument relating to cross-border insolvency, it entrusted the work to the Working Group on Insolvency Law, one of the subsidiary bodies of UNCITRAL.⁶ The Working Group devoted four two-week sessions to the work on the project.⁷

15. In March 1997, another international meeting of practitioners was held to discuss the draft text as prepared by the Working Group. The participants (mostly judges, judicial administrators and government officials) generally considered that the model legislation, when enacted, would constitute a major improvement in dealing with cross-border insolvency cases.⁸

16. The final negotiations on the draft text took place during the thirtieth session of UNCITRAL, held in Vienna from 12 to 30 May 1997. UNCITRAL adopted the Model Law by consensus on 30 May 1997.⁹ In addition to the 36 States members of UNCITRAL, representatives of 40 observer States and 13 international organizations participated in the deliberations of the Commission and the Working Group. Subsequently, the General Assembly adopted resolution 52/158 of 15 December 1997 (see annex), in which it expressed its appreciation to UNCITRAL for completing and adopting the Model Law.

⁵The first was the UNCITRAL-INSOL Colloquium on Cross-Border Insolvency (Vienna, 17 to 19 April 1994) (for the report on the Colloquium, see document A/CN.9/398 and http://www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html; for the proceedings of the Colloquium, see International Insolvency Review, Special Conference Issue, vol. 4, 1995; and for the considerations of UNCITRAL relating to the Colloquium, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*, paras. 215-222). The second colloquium, organized to elicit the views of judges, was the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22 to 23 March 1995) (for the report on the Judicial Colloquium, see document A/CN.9/413 and http://www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html; and for the considerations of UNCITRAL relating to the Judicial Colloquium, see *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)*, paras. 382-393).

⁶*Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)*, paras. 392 and 393.

⁷For the reports of the Working Group see: eighteenth session, (Vienna, 30 October to 10 November 1995), document A/CN.9/419 and Corr.1; nineteenth session (New York, 1 to 12 April 1996), document A/CN.9/422; twentieth session (Vienna, 7 to 18 October 1996), document A/CN.9/433; and twenty-first session (New York, 20 to 31 January 1997), document A/CN.9/435; all documents are available from <http://www.uncitral.org/uncitral/en/commission/sessions.html>.

⁸The Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency was held at New Orleans from 22 to 23 March 1997. A brief account of the Colloquium appears in the report of UNCITRAL on the work of its thirtieth session (Vienna, 12 to 30 May 1997) (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17)*, paras. 17-22) and the report on the Colloquium is available from http://www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html.

⁹For the discussion, see the report of UNCITRAL on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17)*, paras. 12-225).

II. Purpose of the Guide to Enactment and Interpretation

17. UNCITRAL considered that the Model Law would be a more effective tool if it were accompanied by background and explanatory information. While such information would primarily be directed to executive branches of Governments and legislators preparing the necessary legislative revisions, it would also provide useful insight to those charged with interpretation and application of the Model Law, such as judges,¹⁰ and other users of the text such as practitioners and academics. Such information might also assist States in considering which, if any, of the provisions should be adapted to address particular national circumstances.

18. The present Guide was prepared by the Secretariat pursuant to the request of UNCITRAL made at the close of its thirtieth session, in 1997. It is based on the deliberations and decisions of the Commission at that thirtieth session,¹¹ when the Model Law was adopted, as well as on considerations of the Working Group on Insolvency Law, which conducted the preparatory work. The Guide has been revised in accordance with the request of UNCITRAL at its forty-third session (2010)¹² in order to include additional guidance with respect to the interpretation and application of selected aspects of the Model Law relating to “centre of main interests”. The revisions are based on the deliberations of Working Group V (Insolvency Law) at its thirty-ninth (2010), fortieth (2011), forty-first (2012), forty-second (2012) and forty-third (2013) sessions, as well as of the Commission at its forty-sixth session (2013) and were adopted by the Commission as the “Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency” on 18 July 2013.

III. The model law as a vehicle for the harmonization of laws

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 the State enacting it to notify the United Nations or other States that may have also enacted it.

¹⁰ Where “judges” would include a judicial officer or other person appointed to exercise the powers of the court or other competent authority having jurisdiction under domestic insolvency laws [enacting the Model Law].

¹¹ *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17)*, para. 220.

¹² *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 259.

A. Flexibility of a model law

20. In incorporating the text of a model law into its system, a State may modify or leave out some of its provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as “reservations”) is much more restricted; in particular trade law conventions usually either totally prohibit reservations or allow only specified ones. The flexibility inherent in a model law is particularly desirable in those cases when it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as a national law. Some modifications may be expected in particular when the uniform text is closely related to the national court and procedural system (which is the case with the UNCITRAL Model Law on Cross-Border Insolvency). This, however, also means that the degree of, and certainty about, harmonization achieved through a model law is likely to be lower than in the case of a convention. Therefore, in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the Model Law into their legal systems.

B. Fitting the Model Law into existing national law

21. With its scope limited to some procedural aspects of cross-border insolvency cases, the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State. This is manifested in several ways:

(a) The amount of possibly new legal terminology added to existing law by the Model Law is limited. New legal terms are those specific to the cross-border context, such as “foreign proceeding” and “foreign representative”. The terms used in the Model Law are unlikely to be in conflict with terminology in existing law. Moreover, where the expression is likely to vary from country to country, the Model Law, instead of using a particular term, indicates the meaning of the term in italics within square brackets and calls upon the drafters of the national law to use the appropriate term;

(b) The Model Law presents to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding under the national law (article 20);

(c) Recognition of foreign proceedings does not prevent local creditors from initiating or continuing collective insolvency proceedings in the enacting State (article 28);

(d) Relief available to the foreign representative is subject to the protection of local creditors and other interested persons, including the debtor, against undue prejudice; relief is also subject to compliance with the procedural requirements of the enacting State and to applicable notification requirements (article 22 and article 19, paragraph 2);

(e) The Model Law preserves the possibility of excluding or limiting any action in favour of the foreign proceeding, including recognition of the proceeding, on the basis of overriding public policy considerations, although it is expected that the public policy exception will be rarely used (article 6);

(f) 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 cooperate and coordinate in insolvency matters (articles 25-27).

22. The flexibility to adapt the Model Law to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation (see paras. 106-107 below) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in insolvency matters. Thus it is advisable to limit deviations from the uniform text to a minimum. This will assist in making the national law as transparent as possible for foreign users (see also paras. 20 and 21 above). The advantage of uniformity and transparency is that it will make it easier for enacting States to demonstrate the basis of their national law on cross-border insolvency and obtain cooperation from other States in insolvency matters.

23. If the enacting State decides to incorporate the provisions of the Model Law into an existing national insolvency statute, the title of the enacted provisions would have to be adjusted accordingly and the word “Law”, which appears at various places in the title and in the text of the Model Law, would have to be replaced by the appropriate expression.

IV. Main features of the model law

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

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

- (b) Recognition of certain orders issued by foreign courts;
- (c) Relief to assist foreign proceedings; and
- (d) Cooperation among the courts of States where the debtor's assets are located and coordination of concurrent proceedings.

A. Access

25. The provisions on access address both inbound and outbound aspects of cross-border insolvency. In terms of outbound aspects, article 5 authorizes the person or body administering a reorganization or liquidation under the law of the enacting State (referred to as the insolvency representative)¹³ to act in a foreign State (article 5) on behalf of local proceedings. In terms of inbound requests, a foreign representative applying in the enacting State has the following rights: of direct access to courts in the enacting State (article 9); to apply to commence a local proceeding in the enacting State on the conditions applicable in that State (article 11); and to apply for recognition of the foreign proceedings in which they have been appointed (article 15). Upon recognition, a foreign representative is entitled to participate in insolvency-related proceedings conducted in the enacting State under the law of that State (article 12); to initiate in the enacting State an action to avoid or otherwise render ineffective acts detrimental to creditors (article 23); and to intervene in any local proceedings in which the debtor is a party (article 24).

26. The fact that a foreign representative has the right to apply to the courts of the enacting State does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the enacting State for any purpose other than that application (article 10).

27. Importantly, foreign creditors have the same right as local creditors to commence and participate in proceedings in the enacting State (article 13).

28. Questions of notice to interested persons, while closely related to the protection of their interests, are in general not regulated in the Model Law. Thus, such questions are governed by the procedural rules of the enacting State, some of which may be of a public-order character. For example, the law of the enacting State will determine whether any notice is to be given

¹³This terminology reflects the language used in article 5 of the Model Law and is used for consistency with the *UNCITRAL Legislative Guide on Insolvency Law*, which explains that an “insolvency representative” is “a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or liquidation of the insolvency estate”: Introduction, para. 12 (v).

to the debtor or another person of an application for recognition of a foreign proceeding and the time period for giving the notice.

B. Recognition

29. One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings that would avoid time-consuming legalization or other processes and provide certainty with respect to the decision to recognize. The Model Law is not intended to accord recognition to all foreign insolvency proceedings. Article 17 provides that, subject to article 6, when the specified requirements of article 2 concerning the nature of the foreign proceeding (i.e. that the foreign proceeding is, as a matter of course, a collective proceeding¹⁴ for the purposes of liquidation or reorganization under the control or supervision of the court) and the foreign representative are met and the evidence required by article 15 has been provided, the court should recognize the foreign proceeding without further requirement. The process of application and recognition is aided by the presumptions provided in article 16 that enable the court in the enacting State to presume the authenticity and validity of the certificates and documents, originating in the foreign State, that are required by article 15.

30. Article 6 allows recognition to be refused where it would be “manifestly contrary to the public policy” of the State in which recognition is sought. This may be a preliminary question to be considered on an application for recognition. No definition of what constitutes public policy is attempted as notions vary from State to State. However, the intention is that the exception be interpreted restrictively and that article 6 be used only in exceptional and limited circumstances (see paras. 101-104). Differences in insolvency schemes do not themselves justify a finding that enforcing one State’s laws would violate the public policy of another State.

31. A foreign proceeding should be recognized as either a main proceeding or a non-main proceeding (article 17, paragraph 2). A main proceeding is one taking place where the debtor had its centre of main interests (COMI) at the date of commencement of the foreign proceeding (see paras. 157-160 on timing). In principle, a main proceeding is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs. Centre of main interests is not defined in the Model Law, but is based on a

¹⁴ On what constitutes a collective proceeding, see paras. 69-72 below.

presumption that it is the registered office or habitual residence of the debtor (article 16, paragraph 3).

32. A non-main proceeding is one taking place where the debtor has an establishment. This is defined as “any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services” (article 2, subparagraph (f)). Proceedings commenced on a different basis, such as presence of assets without a centre of main interests or establishment, would not qualify for recognition under the Model Law scheme. Main and non-main proceedings are discussed in more detail below at paras. 81-85.

33. Acknowledging that it might subsequently be discovered that the grounds for granting recognition were lacking at the time of recognition, have changed or ceased to exist, the Model Law provides for modification or termination of the order for recognition (article 17, paragraph 4).

34. Recognition of foreign proceedings under the Model Law has several effects. Principal amongst them is the relief accorded to assist the foreign proceeding (articles 20 and 21), but additionally, as noted above, the foreign representative is entitled to participate in any local insolvency proceeding regarding the debtor (article 13), has standing to initiate an action for avoidance of antecedent transactions (article 23) and may intervene in any proceeding in which the debtor is a party (article 24).

C. Relief

35. A basic principle of the Model Law is that the relief considered necessary for the orderly and fair conduct of a cross-border insolvency should be available to assist foreign proceedings, whether on an interim basis or as a result of recognition. Accordingly, the Model Law specifies the relief that is available in both of those instances. As such, it neither necessarily imports the consequences of the foreign law into the insolvency system of the enacting State nor applies to the foreign proceeding the relief that would be available under the law of the enacting State. However, it is possible, as noted above, to align the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding commenced under the law of the enacting State (article 20).

36. Interim relief is available at the discretion of the court between the making of an application for recognition and the decision on that application (article 19); specified forms of relief are available on recognition of main proceedings (article 20); and relief at the discretion of the court is available

for both main and non-main proceedings following recognition (article 21). In the case of main proceedings, that discretionary relief would be in addition to the relief available on recognition. Additional assistance might be available under other laws of the enacting State (see article 7).

37. Key elements of the relief accorded upon recognition of a foreign “main” proceeding include a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the assets of the debtor, and a suspension of the debtor’s right to transfer or encumber its assets (article 20, paragraph 1). Such stay and suspension are “mandatory” (or “automatic”) in the sense that either they flow automatically from the recognition of a foreign main proceeding or, in the States where a court order is needed for the stay or suspension, the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide “breathing space” until appropriate measures are taken for reorganization or liquidation of the assets of the debtor. The suspension of transfers is necessary because in a modern, globalized economic system it is possible for a multinational debtor to move money and property across boundaries quickly. The mandatory moratorium triggered by the recognition of the foreign main proceeding provides a rapid “freeze” essential to prevent fraud and to protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.

38. Exceptions and limitations to the scope of the stay and suspension (e.g. exceptions for secured claims, payments by the debtor made in the ordinary course of business, set-off, execution of rights *in rem*) and the possibility of modifying or terminating the stay or suspension are determined by provisions governing comparable stays and suspensions in insolvency proceedings under the laws of the enacting State (article 20, paragraph 2).

39. With respect to interim and discretionary relief, the court can impose conditions and modify or terminate the relief to protect the interests of creditors and other interested persons affected by the relief ordered (article 22).

D. Cooperation and coordination

Cooperation

40. The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts. Cooperation between courts and foreign representatives and between foreign representatives is also authorized. Cooperation is not dependent upon recognition and may thus occur at an early stage and before

an application for recognition is made. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere (see also article 5). Moreover, cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph (a) that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets. Cooperation is discussed in detail in paragraphs 209-223.

41. Recognizing that the idea of cooperation might be unfamiliar to many judges and insolvency representatives, article 27 sets out some of the possible means of cooperation. These are further discussed and amplified in the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*,¹⁵ which also compiles practice and experience with respect to the use and negotiation of cross-border insolvency agreements.

Coordination of concurrent proceedings

42. Several provisions of the Model Law address coordination of concurrent proceedings and aim to foster decisions that would best achieve the objectives of both proceedings.

43. The recognition of foreign main proceedings does not prevent commencement of local proceedings in the enacting State (article 28), nor does the commencement of local proceedings in that State terminate recognition already accorded to foreign proceedings or prevent recognition of foreign proceedings.

44. Article 29 addresses adjustment of the relief available where there are concurrent proceedings. The basic principle is that relief granted to a recognized foreign proceeding should be consistent with the relief granted in local proceedings, irrespective of whether the foreign proceeding was recognized before or after the commencement of the local proceeding. For example, where local proceedings have already commenced at the time the application for recognition is made, relief granted to the foreign proceeding must be consistent with the local proceeding. If the foreign proceeding is recognized as a main proceeding, the automatic relief available on recognition under article 20 will not apply.

¹⁵The *Practice Guide* is available from: http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html

45. Articles 31 and 32 contain additional means of facilitating coordination. Article 31 establishes a presumption to the effect that recognition of a foreign proceeding is proof that the debtor is insolvent where insolvency is required for commencement of a local proceeding. Article 32 establishes the hotchpot rule to avoid situations in which a creditor might make claims and be paid in multiple insolvency proceedings in different jurisdictions, thereby potentially obtaining more favourable treatment than other creditors.

V. Article-by-article remarks

PREAMBLE

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

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

46. The Preamble gives a succinct statement of the basic policy objectives of the Model Law. It 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.

47. In States where it is not customary to set out preambular statements of policy in legislation, consideration might be given to including the statement of objectives either in the body of the statute or in a separate document, in order to preserve a useful tool for the interpretation of the law

Use of the term “insolvency”

48. Acknowledging that different jurisdictions might have different notions of what falls within the term “insolvency proceedings”, the Model Law does

not define the term “insolvency”.¹⁶ However, as used in the Model Law, the word “insolvency” refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent. The reason is that the Model Law (as pointed out above in paragraphs 23-24) covers proceedings concerning different types of debtors and, among those proceedings, deals with proceedings aimed at liquidating or reorganizing the debtor as a commercial entity. A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2 subparagraph (a) are not insolvency proceedings within the scope of the Model Law. Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a) of the Model Law only if the debtor is insolvent or in severe financial distress.

49. Debtors covered by the Model Law would generally fall within the scope of the *UNCITRAL Legislative Guide on Insolvency Law* and would therefore be eligible for commencement of insolvency proceedings in accordance with recommendations 15 and 16 of the *Legislative Guide*,¹⁷ being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets.

50. It should be noted that in some jurisdictions the expression “insolvency proceedings” has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person or only to collective proceedings against a natural person. No such distinction is intended to be drawn by the use of the term “insolvency” in the Model Law, since the Model Law is designed to be applicable to proceedings regardless of whether they involve a natural or a legal person as the debtor. If, in the enacting State, the word “insolvency” may be misunderstood as referring to one particular type of collective proceeding, another term should be used to refer to the proceedings covered by the Law.

¹⁶The *UNCITRAL Legislative Guide on Insolvency Law* explains insolvency as being “when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets” and insolvency proceedings as being “collective proceedings, subject to court supervision, either for reorganization or liquidation”, Introduction, paras. 12 (s) and (u).

¹⁷Recommendations 15 and 16 of the *Legislative Guide* provide:

15. The insolvency law should specify that insolvency proceedings can be commenced on the application of a debtor if the debtor can show either that:

- (a) It is or will be generally unable to pay its debts as they mature; or
- (b) Its liabilities exceed the value of its assets.

16. The insolvency law should specify that insolvency proceedings can be commenced on the application of a creditor if it can be shown that either:

- (a) The debtor is generally unable to pay its debts as they mature; or
- (b) The debtor’s liabilities exceed the value of its assets.

51. However, when referring to foreign insolvency proceedings, it is desirable to utilize the wording of article 2, subparagraph (a), so as not to exclude recognition of foreign proceedings that, according to article 2, subparagraph (a), should be covered.

“State”

52. The word “State”, as used in the preamble and throughout the Model Law, refers to the entity that enacts the Law (the “enacting State”). The term should not be understood as referring, for example, to a state in a country with a federal system. The national statute may use another expression that is customarily used for this purpose.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 136-139.

A/CN.9/422, paras. 19-23.

A/CN.9/WG.V/WP.46, pp. 4-5.

A/CN.9/433, paras. 22-28.

A/CN.9/WG.V/WP.48, p. 5.

A/CN.9/435, para. 100.

(b) Guide to Enactment

A/CN.9/436, paras. 37-38.

A/CN.9/442, paras. 54-56.

(c) Guide to Enactment and Interpretation

A/CN.9/738, paras. 14-16.

A/CN.9/WG.V/WP.103, paras. 54, 51-52 and 56.

A/CN.9/742, para. 23.

A/CN.9/WG.V/WP.112, paras. 54, 51-51A and 56.

A/CN.9/766, paras. 21-25.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

1. This Law applies where:

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

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

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

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

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

Paragraph 1

53. Article 1, paragraph 1, outlines the types of issue that may arise in cases of cross-border insolvency and for which the Model Law provides solutions: (a) inward-bound requests for recognition of a foreign proceeding; (b) 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; (c) coordination of proceedings taking place concurrently in two or more States; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State.

54. “Assistance” in paragraph 1, subparagraphs (a) and (b), is intended to cover various situations dealt with in the Model Law, in which a court or an insolvency representative in one State may make a request directed to a court or an insolvency representative in another State for assistance within the scope of the Model Law. The Law specifies some of the types of assistance available (e.g. article 19, subparagraphs 1 (a) and (b); article 21, subparagraphs 1 (a)-(f) and paragraph 2; and article 27, subparagraphs (a)-(e)), while other possible types of assistance are covered by a broader formulation (such as the one in article 21, subparagraph 1 (g)).

Paragraph 2 (Specially regulated insolvency proceedings)

55. In principle, the Model Law was formulated to apply to any proceeding that meets the requirements of article 2, subparagraph (a), independently of the nature of the debtor or its particular status under national law. The only possible exceptions contemplated in the text of the Model Law itself are indicated in paragraph 2 (see, however, para. 61 below, for considerations regarding “consumers”).

56. Banks or insurance companies are mentioned as examples of entities that the enacting State might decide to exclude from the scope of the Model Law.

The reason for the exclusion would typically be that the insolvency of such entities gives rise to the particular need to protect vital interests of a large number of individuals or that the insolvency of those entities usually requires particularly prompt and circumspect action (for instance to avoid massive withdrawals of deposits). For those reasons, the insolvency of such types of entity is administered in many States under a special regulatory regime.

57. Paragraph 2 indicates that the enacting State might decide to exclude the insolvency of entities other than banks and insurance companies; the State might do so where the policy considerations underlying the special insolvency regime for those other types of entity (e.g. public utility companies) call for special solutions in cross-border insolvency cases.

58. It is not advisable to exclude all cases of insolvency of the entities mentioned in paragraph 2. In particular, the enacting State might wish to treat, for recognition purposes, a foreign insolvency proceeding relating to a bank or an insurance company as an ordinary insolvency proceeding if the insolvency of the branch or of the assets of the foreign entity in the enacting State do not fall under the national regulatory scheme. The enacting State might also wish not to exclude the possibility of recognition of a foreign proceeding involving one of those entities if the law of the State of origin does not make that proceeding subject to special regulation.

59. In enacting paragraph 2, a State may wish to make sure that it would not 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. Moreover, even if the particular insolvency is governed by special regulation, it is advisable, before generally excluding those cases from the Model Law, to consider whether it would be useful to leave certain features of the Model Law (e.g. on cooperation and coordination and possibly on certain types of discretionary relief) applicable also to the specially regulated insolvency proceedings.

60. In any case, with a view to making the national insolvency law more transparent (for the benefit of foreign users of a law based on the Model Law), it is advisable that exclusions from the scope of the law be expressly mentioned by the enacting State in paragraph 2.

Non-traders or natural persons

61. In jurisdictions that have not made provision for the insolvency of consumers or whose insolvency law provides special treatment for the

insolvency of non-traders, the enacting State might wish to exclude from the scope of application of the Model Law insolvencies that relate to natural persons residing in the enacting State whose debts have been incurred predominantly for personal or household purposes, rather than for commercial or business purposes, or insolvencies that relate to non-traders. The enacting State might also wish to provide that such exclusion would not apply in cases where the total debts exceed a certain monetary ceiling.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 141-150.

A/CN.9/WG.V/WP.44, pp. 6-7.

A/CN.9/422, paras. 24-33.

A/CN.9/WG.V/WP.46, p. 5.

A/CN.9/433, paras. 29-32.

A/CN.9/WG.V/WP.48, pp. 6 and 15.

A/CN.9/435, paras. 102-106 and 179.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.103, paras. 57-59.

A/CN.9/742, para. 24.

A/CN.9/WG.V/WP.107, para. 65.

A/CN.9/763, paras. 22.

A/CN.9/WG.V/WP.112, paras. 58-59 and 65.

A/CN.9/766, para. 26.

(b) Guide to Enactment

A/CN.9/436, paras. 39-42.

A/CN.9/442, paras. 57-66.

Article 2. Definitions

For the purposes of this Law:

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

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

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

(d) “Foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer

Article 2. Definitions (continued)

the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

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

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

Subparagraphs (a)-(d)

62. Since the Model Law will be embedded in the national law, article 2 only needs to define the terms specific to cross-border scenarios. Thus, the Model Law contains definitions of the terms "foreign proceeding" (subparagraph (a)) and "foreign representative" (subparagraph (d)), but not of the person or body that may be entrusted with the administration of the assets of the debtor in an insolvency proceeding in the enacting State. To the extent that it would be useful to define in the national statute the term used for such a person or body (rather than just using the term commonly employed to refer to such persons), this may be added to the definitions in the law enacting the Model Law.

63. By specifying the required characteristics of a "foreign proceeding" and a "foreign representative", the definitions limit the scope of application of the Model Law. For a proceeding to be susceptible to recognition or cooperation under the Model Law and for a foreign representative to be accorded access to local courts under the Model Law, the foreign proceeding and the foreign representative must have the attributes specified in subparagraphs (a) and (d).

64. Proceedings and foreign representatives that do not have those attributes would not be eligible for recognition under the Model Law.

Subparagraph (a) – Foreign proceeding

65. The definitions of proceedings or persons emanating from foreign jurisdictions avoid the use of expressions that may have different technical meaning in different legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the laws of the enacting State. As noted

in paragraph 50 above, the expression “insolvency proceedings” may have a technical meaning in some legal systems, but is intended in subparagraph (a) to refer broadly to proceedings involving debtors that are in severe financial distress or insolvent.

66. The attributes required for a foreign proceeding to fall within the scope of the Model Law include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding (article 2, subparagraph (a)). Whether a foreign proceeding possesses or possessed those elements would be determined at the time the application for recognition is considered.

67. As noted in subparagraph (e) of the preamble, the focus of the Model Law is upon severely financially distressed and insolvent debtors and the laws that prevent or address the financial distress of those debtors. As noted above (para. 49), these are debtors that would generally fall within the commencement criteria discussed in the *Legislative Guide*, being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets (recommendations 15 and 16).

68. The following paragraphs discuss the various characteristics required of a “foreign proceeding” under article 2. Although discussed separately, these characteristics are cumulative and article 2, subparagraph (a) should be considered as a whole.

(i) *Collective proceeding*

69. For a proceeding to qualify for relief under the Model Law, it must be a collective proceeding because the Model Law is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State. Nor is it intended that the Model Law serve as a tool for gathering up assets in a winding up¹⁸ or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or

¹⁸“Winding up” is a procedure in which the existence of a corporation and its business are brought to an end.

brokerage firms, provided the proceeding is collective as that term is used in the Model Law. If a proceeding is collective it must also satisfy the other elements of the definition, including that it be for the purposes of liquidation or reorganization (see paras. 77-78 below).

70. In evaluating whether a given proceeding is collective for the purpose of the Model Law, 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. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it. An example would be insolvency proceedings that exclude encumbered assets from the insolvency estate, leaving those assets unaffected by the commencement of the proceedings and allowing secured creditors to pursue their rights outside of the insolvency law (see *Legislative Guide on Insolvency Law*, part two, chap. II, paras. 7-9). Examples of the manner in which a collective proceeding for the purposes of article 2 might deal with creditors include providing creditors that are adversely affected by the proceeding with a right (though not necessarily the obligation): to submit claims for determination and to receive an equitable distribution or satisfaction of those claims, to participate in the proceedings, and to receive notice of the proceedings in order to facilitate their participation. The *Legislative Guide* deals extensively with the rights of creditors, including the right to participate in proceedings (part two, chapter III, paras. 75-112).

71. Within the parameters of the definition of a foreign proceeding, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding-up or reorganization. The definition would also include those proceedings in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments, "debtor in possession").

72. The Model Law recognizes that, for certain purposes, insolvency proceedings may be commenced under specific circumstances defined by law that do not necessarily mean the debtor is in fact insolvent. Paragraph 235 below notes that those circumstances might include cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissipation of its assets or abandonment of its establishment. Paragraph 236 below notes that for use in jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of foreign main proceedings, a rebuttable presumption of insolvency of the debtor for the purposes of commencing a local insolvency proceeding.

(ii) Pursuant to a law relating to insolvency

73. This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained¹⁹ and irrespective of whether the law that contained the rules related exclusively to insolvency. A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress.

(iii) Control or supervision by a foreign court

74. The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.

75. Expedited proceedings of the type referred to in the *Legislative Guide* (see part two, chap IV, paras. 76-94 and recommendations 160-168) should not be excluded. These are proceedings in which the court exercises control or supervision at a late stage of the insolvency process. Proceedings in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so should also not be excluded. An example of the latter might be cases where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceedings nevertheless remain open or pending and the court retains jurisdiction until implementation is completed.

¹⁹ A/CN.9/422, para. 49.

76. Subparagraph (a) of article 2 makes it clear that both assets and affairs of the debtor should be subject to control or supervision; it is not sufficient if only one or the other are covered by the foreign proceeding._

(iv) *For the purpose of reorganization or liquidation*

77. Some types of proceeding that may satisfy certain elements of the definition of foreign proceeding in article 2, subparagraph (a) may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation. They may take various forms, including proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganize the insolvency estate; proceedings designed to prevent detriment to investors rather than to all creditors (in which case the proceeding is also likely not to be a collective proceeding); or proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization, for example, the power to do no more than preserve assets.

78. Types of procedures that might not be eligible for recognition could include financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt, where the negotiations do not lead to the commencement of an insolvency proceeding conducted under the insolvency law.²⁰ Such measures would generally not satisfy the requirement for collectivity nor for control or supervision by the court (see paras. 74-76). Because they could take a potentially large number of forms, those measures would be difficult to address in a general rule on recognition.²¹ Other procedures that do not require supervision or control by the court might also be ineligible.

Interim proceeding

79. The definitions in subparagraphs (a) and (d) cover also an “interim proceeding” and a representative “appointed on an interim basis”. In a State where interim proceedings are either not known or do not meet the requisites of the definition, the question may arise whether recognition of a foreign

²⁰ Such contractual arrangements would clearly remain enforceable outside the Model Law without the need for recognition; nothing in the Model Law or *Guide to Enactment and Interpretation* is intended to restrict such enforceability.

²¹ A/CN.9/419, paras. 19 and 29.

“interim proceeding” creates a risk of allowing potentially disruptive consequences under the Model Law that the situation does not warrant. It is advisable that, irrespective of the way interim proceedings are treated in the enacting State, the reference to “interim proceeding” in subparagraph (a) and to a foreign representative appointed “on an interim basis” in subparagraph (d) be maintained. The reason is that in the practice of many countries insolvency proceedings are often, or even usually, commenced on an “interim” or “provisional” basis. Except for being labelled as interim, those proceedings meet all the other requisites of the definition in article 2, subparagraph (a). Such proceedings are often conducted for weeks or months as “interim” proceedings under the administration of persons appointed on an “interim” basis, and only some time later would the court issue an order confirming the continuation of the proceedings on a non-interim basis. The objectives of the Model Law apply fully to such “interim proceedings” (provided the requisites of subparagraphs (a) and (d) are met); therefore, these proceedings should not be distinguished from other insolvency proceedings merely because they are described as being of an interim nature. The point that an interim proceeding and the foreign representative must meet all the requirements of article 2 is emphasized in article 17, paragraph 1, according to which a foreign proceeding may be recognized only if it is “a proceeding within the meaning of subparagraph (a) of article 2” and “the foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2”.

80. Article 18 addresses a case where, after the application for recognition or after recognition, the foreign proceeding or foreign representative, whether interim or not, ceases to meet the requirements of article 2, subparagraphs (a) and (d) (see paras. 168-169 below).

Subparagraph (b) – foreign main proceeding

81. A foreign proceeding is deemed to be the “main” proceeding if it has been commenced in the State where “the debtor has the centre of its main interests”. This corresponds to the formulation in article 3 of the EC Regulation (based upon the formulation previously adopted in the European Union Convention on Insolvency Proceedings (the European Convention)), thus building on the emerging harmonization as regards the notion of a “main” proceeding. 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 and coordination of the foreign proceeding with proceedings that may be commenced in the enacting State under chapter IV and with other concurrent proceedings under chapter V.

82. The Model Law does not define the concept “centre of main interests”. However, an explanatory report (the Virgos-Schmit Report),²² prepared with respect to the European Convention, provided guidance on the concept of “main insolvency proceedings” and notwithstanding the subsequent demise of the Convention, the Report has been accepted generally as an aid to interpretation of the term “centre of main interests” in the EC Regulation. Since the formulation “centre of main interests” in the EC Regulation corresponds to that of the Model Law, albeit for different purposes (see para. 141 below), jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law.

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

“(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor’s assets. To protect the diversity of interests, this Regulation permits secondary proceedings²³ to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

“(13) The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”

84. The Virgos-Schmit Report explained the concept of “main insolvency proceedings” as follows:

“73. Main insolvency proceedings

“Article 3 (1) enables main insolvency universal proceedings to be opened in the Contracting State where the debtor has his centre of main interests. Main insolvency proceedings have universal scope. They aim at encompassing all the debtor’s assets on a world-wide basis and at affecting all creditors, wherever located.

“Only one set of main proceedings may be opened in the territory covered by the Convention.

²² M. Virgos and E. Schmit, *Report on the Convention on Insolvency Proceedings*, Brussels 3 May 1996. The report was published in July 1996 and is available from <http://aei.pitt.edu/952> (last visited 1 August 2013).

²³ The EC Regulation refers to “secondary proceedings”, while the Model Law uses “non-main proceedings”.

...

“75. The concept of ‘centre of main interests’ must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

“The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor’s potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.

“By using the term ‘interests’, the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression ‘main’ serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

“In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence.

“Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor’s centre of main interests is the place of his registered office. This place normally corresponds to the debtor’s head office.”

Centre of main interests is discussed further in the remarks on article 16.

Subparagraph (c) – foreign non-main proceeding

85. Subparagraph (c) requires that a “foreign non-main proceeding” take place in the State where the debtor has an “establishment” (see paras. 88-90 below). Thus, a foreign non-main proceeding susceptible to recognition under article 17, paragraph 2 may be only a proceeding commenced in a State where the debtor has an establishment within the meaning of article 2, subparagraph (f). This rule does not affect the provision in article 28, namely, that an insolvency proceeding may be commenced in the enacting State if the debtor has assets there. It should be noted, however, that the effects of an insolvency proceeding commenced on the basis of the presence of assets only are normally restricted to the assets located in that State; if other assets of the debtor located abroad should, under the law of the enacting State, be administered in that insolvency proceeding (as envisaged in article 28), that

cross-border issue is to be dealt with as a matter of international cooperation and coordination under articles 25-27 of the Model Law.

Subparagraph (d) – foreign representative

86. Subparagraph (d) recognizes that the foreign representative may be a person authorized in the foreign proceedings to administer those proceedings, which would include seeking recognition, relief and cooperation in another jurisdiction, or they may simply be a person authorized specifically for the purposes of representing those proceedings. The Model Law does not specify that the foreign representative must be authorized by the court (as defined in article 2, subparagraph (e)) and the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court. It also includes appointment made on an interim basis (see paras. 79-80 above). The fact of appointment of the foreign representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purposes of the Model Law; article 15 requires either a certified copy of the decision appointing the representative, a certificate affirming the appointment or other evidence of that appointment that is acceptable to the receiving court. The definition in subparagraph (d) is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings.

Subparagraph (e) – foreign court

87. A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of “foreign court” in subparagraph (e) includes also non-judicial authorities. Subparagraph (e) follows a similar definition contained in article 2, subparagraph (d) of the EC Regulation, which is also used in the *Legislative Guide* (Intro., para. 12(i)) and the *UNCITRAL Practice Guide* (Intro., paras. 7-8).

Subparagraph (f) – establishment

88. The definition of the term “establishment” was inspired by article 2, subparagraph (h) of the EC Regulation. The term is used in the Model Law in the definition of “foreign non-main proceeding” (article 2, subparagraph (c)) and in the context of article 17, paragraph 2, according to which,

for a foreign non-main proceeding to be recognized, the debtor must have an establishment in the foreign State (see also para. 85 above).

89. The Virgos-Schmit Report on that Convention provides some further explanation of “establishment”:

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

“The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an ‘establishment’. A certain stability is required. The negative formula (‘non-transitory’) aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor.”²⁴

90. Since “establishment” is a defined term, the inquiry to be made by the court as to whether the debtor has an establishment is purely factual in nature. Unlike “foreign main proceeding” there is no presumption with respect to the determination of establishment. There is a legal issue as to whether the term “non-transitory” refers to the duration of a relevant economic activity or to the specific location at which the activity is carried on. The commencement of insolvency proceedings, the existence of debts, and the presence alone of goods in isolation, of bank accounts or of property would not in principle satisfy the definition of establishment.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 152-158.

A/CN.9/419, paras. 95-117.

A/CN.9/WG.V/WP.44, pp. 7-10.

A/CN.9/422, paras. 34-65.

A/CN.9/WG.V/WP.46, pp. 5-7.

A/CN.9/433, paras. 33-41 and 147.

A/CN.9/WG.V/WP.48, pp. 6-7.

A/CN.9/435, paras. 108-113.

(b) Guide to Enactment

A/CN.9/436, paras. 43-45.

A/CN.9/442, paras. 67-75.

(c) Guide to Enactment and Interpretation

A/CN.9/715, paras. 14-15, 17-22, 32-35 and 46.

A/CN.9/738, paras. 17-19.

²⁴ Virgos-Schmit Report (see footnote 22), para. 7.1.

(c) *Guide to Enactment and Interpretation* (continued)

A/CN.9/WG.V/WP.103, paras. 67-68A, 71-72, 23-23G, 69-70, 31-31C and 73-75B.

A/CN.9/742, paras. 25-36 and 58.

A/CN.9/WG.V/WP.107, paras. 68, 23A-24G, 31 and 73-75B.

A/CN.9/763, paras. 23-25.

A/CN.9/WG.V/WP.112, paras. 68-68A, 71-72, 23-23C, 24-24G, 70, 31-31C and 73-75B.

A/CN.9/766, paras. 27-28.

Article 3. International obligations of this State

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

91. Article 3, expressing the principle of supremacy of international obligations of the enacting State over internal law, has been modelled on similar provisions in other model laws prepared by UNCITRAL.

92. In enacting the article, the legislator may wish to consider whether it would be desirable to take steps to avoid an unnecessarily broad interpretation of international treaties. For example, the article might result in giving precedence to international treaties that, while dealing with matters covered also by the Model Law (e.g. access to courts and cooperation between courts or administrative authorities), were aimed at the resolution of problems other than those the Model Law focuses on. Some of those treaties, only because of their imprecise or broad formulation, may be misunderstood as dealing also with matters dealt with by the Model Law. Such a result would compromise the goal of achieving uniformity and facilitating cross-border cooperation in insolvency matters and would reduce certainty and predictability in the application of the Model Law. The enacting State might wish to provide that, in order for article 3 to displace a provision of the national law, a sufficient link must exist between the international treaty concerned and the issue governed by the provision of the national law in question. Such a condition would avoid the inadvertent and excessive restriction of the effects of the legislation implementing the Model Law. However, such a provision should not go so far as to impose a condition that the treaty concerned has to deal specifically with insolvency matters in order to satisfy that condition.

93. While in some States binding international treaties are self-executing, in other States those treaties are, with certain exceptions, not self-executing in that they require internal legislation in order to become enforceable law. With respect to the latter group of States, in view of their normal practice in dealing with international treaties and agreements, it would be inappropriate or unnecessary to include article 3 in their legislation or it might be appropriate to include it in a modified form.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 159-162.

A/CN.9/WG.V/WP.44, p. 11.

A/CN.9/422, paras. 66-67.

A/CN.9/WG.V/WP.46, p. 7.

A/CN.9/433, paras. 42-43.

A/CN.9/WG.V/WP.48, pp. 7-8.

A/CN.9/435, paras. 114-117.

(b) Guide to Enactment

A/CN.9/436, para. 46.

A/CN.9/442, paras. 76-78.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.107, para. 78.

A/CN.9/763, para. 26.

A/CN.9/WG.V/WP.112, para. 78.

A/CN.9/766, para. 29.

Article 4. [Competent court or authority]¹

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

¹A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

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

94. If in the enacting State any of the functions mentioned in article 4 are performed by an authority other than a court, the State would insert in article 4 and in other appropriate places in the enacting legislation the name of the competent authority.

95. The competence for the various judicial functions dealt with in the Model Law may lie with different courts in the enacting State and the enacting State would tailor the text of the article to its own system of court competence. The value of article 4, as enacted in a given State, 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.

96. In defining jurisdiction in matters mentioned in article 4, the implementing legislation should not unnecessarily limit the jurisdiction of other courts in the enacting State, in particular to entertain requests by foreign representatives for provisional relief.

Footnote

97. In a number of States, insolvency legislation has entrusted certain tasks relating to the general supervision of the process of dealing with insolvency cases in the country to government-appointed officials who are typically civil servants or judicial officers and who carry out their functions on a permanent basis. The names under which they are known vary and include, for example, “official receiver”, “official trustee” or “official assignee”. The activities and the scope and nature of their duties vary from State to State. The Model Law does not restrict the authority of such officials, a point that some enacting States may wish to clarify in the law, as indicated in the footnote. However, depending on the wording that the enacting State uses in articles 25 and 26 in referring to the “title of the person or body administering a reorganization or liquidation under the law of the enacting State”, the officials may be subjected to the duty to cooperate as provided under articles 25-27.

98. In some jurisdictions, officials referred to in the preceding paragraph may also be appointed to act as insolvency representatives in individual insolvency cases. To the extent that occurs, such officials would be covered by the Model Law.

Discussion in UNCITRAL and in the Working Group

<i>(a) Model Law</i>	A/CN.9/WG.V/WP.46, p. 8.
A/52/17, paras. 163-166.	A/CN.9/433, paras. 44-45.
A/CN.9/419, para. 69.	A/CN.9/WG.V/WP.48, pp. 8-9.
A/CN.9/WG.V/WP.44, p. 11.	A/CN.9/435, paras. 118-122.
A/CN.9/422, paras. 68-69.	

(b) Guide to Enactment

A/CN.9/436, paras. 47-50.

A/CN.9/442, paras. 79-83.

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

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

99. The intent of article 5 is to equip insolvency representatives or other authorities appointed in insolvency proceedings commenced in the enacting State to act abroad as foreign representatives of those proceedings. The lack of such authorization in some States has proved to be an obstacle to effective international cooperation in cross-border cases. An enacting State in which insolvency representatives are already equipped to act as foreign representatives may decide to forgo inclusion of article 5, although retaining that article would provide clear statutory evidence of that authority and assist foreign courts and other users of the law.

100. Article 5 is formulated to make it clear that the scope of the power exercised abroad by the insolvency representative would depend upon the foreign law and courts. Action that the insolvency representative appointed in the enacting State may wish to take in a foreign country will be action of the type dealt with in the Model Law, but the authority to act in a foreign country does not depend on whether that country has enacted legislation based on the Model Law.

*Discussion in UNCITRAL and in the Working Group**(a) Model Law*

A/CN.9/WG.V/WP.46, p. 8.

A/52/17, paras. 167-169.

A/CN.9/433, paras. 46-49.

A/CN.9/419, paras. 36-39.

A/CN.9/WG.V/WP.48, p. 9.

A/CN.9/WG.V/WP.44, p. 12.

A/CN.9/435, paras. 123-124.

A/CN.9/422, paras. 70-74.

(b) *Guide to Enactment*

A/CN.9/436, paras. 51-52.

A/CN.9/442, paras. 84-85.

(c) *Guide to Enactment and Interpretation*

A/CN.9/WG.V/WP.107, para. 84.

A/CN.9/763, para. 26.

A/CN.9/WG.V/WP.112, para. 84.

A/CN.9/766, para. 30.

Article 6. Public policy exception

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

101. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 6.

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

103. For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, as well as the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if “public policy” were to be understood in an extensive manner.

104. The purpose of the expression “manifestly”, used also in many other international legal texts as a qualifier of the expression “public policy”, is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

*Discussion in UNCITRAL and in the Working Group**(a) Model Law*

A/52/17, paras. 170-173.

A/CN.9/419, para. 40.

A/CN.9/WG.V/WP.44, p. 15.

A/CN.9/422, paras. 84-85.

A/CN.9/WG.V/WP.46, p. 16.

A/CN.9/433, paras. 156-160.

A/CN.9/WG.V/WP.48, p. 9.

A/CN.9/435, paras. 125-128.

(b) Guide to Enactment

A/CN.9/436, para. 53.

A/CN.9/442, paras. 86-89.

(c) Guide to Enactment and Interpretation

A/CN.9/715, paras. 26-30.

A/CN.9/738, para. 32.

Article 7. Additional assistance under other laws

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

105. The purpose of the Model Law is to increase and harmonize cross-border assistance available in the enacting State to foreign representatives. However, since the law of the enacting State may, at the time of enacting the Law, already have in place various provisions under which a foreign representative could obtain cross-border assistance and since it is not the purpose of the Law to displace those provisions to the extent that they provide assistance that is additional to or different from the type of assistance dealt with in the Model Law, the enacting State may consider whether article 7 is needed to make that point clear.

*Discussion in UNCITRAL and in the Working Group**(a) Model Law*

A/52/17, para. 175.

(b) Guide to Enactment

A/CN.9/442, para. 90.

Article 8. Interpretation

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

106. A provision similar to the one contained in article 8 appears in a number of private law treaties (e.g. art. 7, para. 1, of the United Nations Convention on Contracts for the International Sale of Goods). More recently, it has been recognized that such a provision would also be useful in a non-treaty text such as a model law on the basis that a State enacting a model law would have an interest in its harmonized interpretation. Article 8 has been modelled on article 3, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce.

107. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and model laws emanating from UNCITRAL. (For further information about the system, see paragraph 243 below.)

*Discussion in UNCITRAL and in the Working Group**(a) Model Law*

A/52/17, para. 174.

(b) Guide to Enactment

A/CN.9/442, paras. 91-92.

(c) Guide to Enactment and Interpretation

A/CN.9/715, paras. 23-25.

A/CN.9/WG.V/WP.103, para. 92.

A/CN.9/742, paras. 37-38.

A/CN.9/WG.V/WP.107, para. 91.

A/CN.9/763, para. 26.

A/CN.9/WG.V/WP.112, para. 91.

A/CN.9/766, para. 30.

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

Article 9. Right of direct access

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

108. An important objective of the Model Law is to provide expedited and direct access for foreign representatives to the courts of the enacting State. Article 9 is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular action. Article 4 deals with court competence in the enacting State for providing relief to the foreign representative.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 176-178.

A/CN.9/419, paras. 77-79 and 172-173.

A/CN.9/422, paras. 144-151.

A/CN.9/WG.V/WP.46, p. 9.

A/CN.9/433, paras. 50-58.

A/CN.9/WG.V/WP.48, p. 10.

A/CN.9/435, paras. 129-133.

(b) Guide to Enactment

A/CN.9/436, para. 54.

A/CN.9/442, para. 93.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.103, para. 93.

A/CN.9/WG.V/WP.112, para. 93.

A/CN.9/766, para. 31.

Article 10. Limited jurisdiction

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

109. Article 10 constitutes a “safe conduct” rule aimed at ensuring that the court in the enacting State would not assume jurisdiction over all the assets of the debtor on the sole ground of the foreign representative having

made an application for recognition of a foreign proceeding. The article also makes it clear that the application alone is not sufficient ground for the court of the enacting State to assert jurisdiction over the foreign representative as to matters unrelated to insolvency. The article responds to concerns of foreign representatives and creditors about exposure to all-embracing jurisdiction triggered by an application under the Model Law.

110. The limitation on jurisdiction over the foreign representative embodied in article 10 is not absolute. It is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. It does so by providing that an appearance in the courts of the enacting State for the purpose of requesting recognition would not expose the entire estate under the supervision of the foreign representative to the jurisdiction of those courts. Other possible grounds for jurisdiction under the laws of the enacting State over the foreign representative or the assets are not affected. For example, a tort or misconduct committed by the foreign representative may provide grounds for jurisdiction to deal with the consequences of such an action by the foreign representative. Furthermore, a foreign representative who applies for relief in the enacting State will be subject to conditions that the court may order in connection with relief granted (article 22, paragraph 2).

111. Article 10 may appear superfluous in States where the rules on jurisdiction do not allow a court to assume jurisdiction over a person making an application to the court on the sole ground of the applicant's appearance. Enacting the article in those States would be useful, however, to eliminate possible concerns of foreign representatives or creditors over the possibility of jurisdiction based on the sole ground of applying to the court.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 179-182.

A/CN.9/WG.V/WP.44, p. 24.

A/CN.9/422, paras. 160-166.

A/CN.9/WG.V/WP.46, pp. 10-11.

A/CN.9/433, paras. 68-70.

A/CN.9/WG.V/WP.48, p. 10.

A/CN.9/435, paras. 134-136.

(b) Guide to Enactment

A/CN.9/436, paras. 55-56.

A/CN.9/442, paras. 94-96.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.107, para. 96.

A/CN.9/763, para. 27.

A/CN.9/WG.V/WP.112, para. 96.

A/CN.9/766, para. 31.

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

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

112. Many national laws, in enumerating persons who may request the commencement of an insolvency proceeding, do not mention a representative of a foreign insolvency proceeding; under such laws, it might be doubtful whether a foreign representative might make such a request.

113. Article 11 is designed to ensure that the foreign representative (of a foreign main or non-main proceeding) has standing²⁵ to request the commencement of an insolvency proceeding. However, the article makes it clear (by the words “if the conditions for commencing such a proceeding are otherwise met”) that it does not otherwise modify the conditions under which an insolvency proceeding may be commenced in the enacting State.

114. A foreign representative has this right without prior recognition of the foreign proceeding because the commencement of an insolvency proceeding might be crucial in cases of urgent need for preserving the assets of the debtor. Article 11 recognizes that not only a representative of a foreign main proceeding but also a representative of a foreign non-main proceeding may have a legitimate interest in the commencement of an insolvency proceeding in the enacting State. Sufficient guarantees against abusive applications are provided by the requirement that the other conditions for commencing such a proceeding under the law of the enacting State have to be met.

Discussion in UNCITRAL and in the Working Group

(a) <i>Model Law</i>	A/CN.9/WG.V/WP.46, p. 11.
A/52/17, paras. 183-187.	A/CN.9/433, paras. 71-75.
A/CN.9/WG.V/WP.44, pp. 24-25.	A/CN.9/WG.V/WP.48, p. 11.
A/CN.9/422, paras. 170-177.	A/CN.9/435, paras. 137-146.

²⁵ Also known as “procedural legitimacy”, “active legitimacy” or “legitimation”.

(b) *Guide to Enactment*

A/CN.9/436, para. 57.

A/CN.9/442, paras. 97-99.

(c) *Guide to Enactment and Interpretation*

A/CN.9/WG.V/WP.107, para. 98.

A/CN.9/763, para. 27.

A/CN.9/WG.V/WP.112, para. 98.

A/CN.9/766, para. 31.

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

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

115. The purpose of article 12 is to ensure that, when an insolvency proceeding concerning a debtor is taking place in the enacting State, the foreign representative of a proceeding concerning that debtor will be given, as an effect of recognition of the foreign proceeding, standing²⁵ to make petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding.

116. Article 12 is limited to giving the foreign representative standing and does not vest the foreign representative with any specific powers or rights. The article does not specify the kinds of motions that the foreign representative might make and does not affect the provisions in the insolvency law of the enacting State that govern the fate of any such motions.

117. If the law of the enacting State uses a term other than “participate” to express the concept, that other term may be used in enacting the provision. It should be noted, however, that article 24 already uses the term “intervene” to refer to a case where the foreign representative takes part in an individual action by or against the debtor (as opposed to a collective insolvency proceeding) (see paras. 205 and 208 below).

*Discussion in UNCITRAL and in the Working Group**(a) Model Law*

A/52/17, paras. 188-189.

A/CN.9/422, paras. 114-115,
147 and 149.

A/CN.9/WG.V/WP.46, p. 9.

A/CN.9/433, para. 58.

A/CN.9/WG.V/WP.48, p. 11.

A/CN.9/435, paras. 147-150.

(b) Guide to Enactment

A/CN.9/436, paras. 58-59.

A/CN.9/442, paras. 100-102.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.103, para. 100.

A/CN.9/WG.V/WP.107, paras. 100-102.

A/CN.9/763, para. 27.

A/CN.9/WG.V/WP.112, paras. 100-102.

A/CN.9/766, para. 31.

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

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

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

²The enacting State may wish to consider the following alternative wording to replace paragraph 2 of article 13(2):

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

118. With the exception contained in paragraph 2, article 13 embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such a proceeding, should not be treated worse than local creditors.

119. Paragraph 2 makes it clear that the principle of non-discrimination embodied in paragraph 1 leaves intact the provisions on the ranking of claims in insolvency proceedings, including any provisions that might assign a special ranking to claims of foreign creditors. Few States currently have provisions assigning special ranking to foreign creditors. However, lest the non-discrimination principle should be emptied of its meaning by provisions giving the lowest ranking to foreign claims, paragraph 2 establishes the minimum ranking for claims of foreign creditors: the rank of general unsecured claims. The exception to that minimum ranking is provided for cases where the claim in question, if it were of a domestic creditor, would be ranked lower than general unsecured claims (such low-rank claims may be, for instance, those of a State authority for financial penalties or fines, claims whose payment is deferred because of a special relationship between the debtor and the creditor or claims that have been filed after the expiry of the time period for doing so). Those special claims may rank below the general unsecured claims, for reasons other than the nationality or location of the creditor, as provided in the law of the enacting State.

120. The alternative provision in the footnote differs from the provision in the text only in that it provides wording for States that refuse to recognize foreign tax and social security claims to continue to discriminate against such claims.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 190-192.

A/CN.9/WG.V/WP.44, pp. 25-26.

A/CN.9/422, paras. 179-187.

A/CN.9/WG.V/WP.46, pp. 11-12.

A/CN.9/433, paras. 77-85.

A/CN.9/WG.V/WP.48, pp. 11-12.

A/CN.9/435, paras. 151-156.

(b) Guide to Enactment

A/CN.9/436, paras. 60-61.

A/CN.9/442, paras. 103-105.

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

1. Whenever under *[identify laws of the enacting State relating to insolvency]* notification is to be given to creditors in this State, such notification shall also

be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

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

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

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

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

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

121. The main purpose of notifying foreign creditors as provided in paragraph 1 is to inform them of the commencement of the insolvency proceeding and of the time limit to file their claims. Furthermore, as a corollary to the principle of equal treatment established by article 13, article 14 requires that foreign creditors should be notified whenever notification is required for creditors in the enacting State.

122. States have different provisions or practices regarding the methods for notifying creditors, for example, publication in the official gazette or in local newspapers, individual notices, and affixing notices within the court premises or a combination of such procedures. If the form of notification were to be left to national law, foreign creditors would be in a less advantageous situation than local creditors, since they typically do not have direct access to local publications. For that reason, paragraph 2 in principle requires individual notification for foreign creditors but leaves discretion to the court to decide otherwise in a particular case (e.g. if individual notice would entail excessive cost or would not seem feasible under the circumstances).

123. With regard to the form of individual notification, States may use special procedures for notifications that have to be served in a foreign jurisdiction (e.g. sending notifications through diplomatic channels). In the context of insolvency proceedings, those procedures would often be too cumbersome and time-consuming and their use would typically not provide foreign creditors

timely notice concerning insolvency proceedings. It is therefore advisable for those notifications to be effected by such expeditious means that the court considers adequate. Those considerations are the reason for the provision in paragraph 2 that “no letters rogatory or other, similar formality is required”.

124. Many States are party to bilateral or multilateral treaties on judicial cooperation, which often contain provisions on procedures for communicating judicial or extrajudicial documents to addressees abroad. A multilateral treaty of this kind is the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of 1965,²⁶ adopted under the auspices of the Hague Conference on Private International Law. While the procedures envisaged by those treaties may constitute a simplification as compared with traditional communication via diplomatic channels, they would often be, for reasons stated in the preceding paragraph, inappropriate for cross-border insolvency cases. The question may arise whether paragraph 2, which allows the use of letters rogatory or similar formalities to be dispensed with, is compatible with those treaties. Each State would have to consider that question in the light of its treaty obligations, but generally the provision in paragraph 2 would not be in conflict with the international obligations of the enacting State because the purpose of the treaties alluded to above is typically to facilitate communication and not to preclude use of notification procedures that are even simpler than those established by the treaty; for example, article 10 of the above-mentioned Convention reads as follows:

“Provided the State of destination does not object, the present Convention shall not interfere with —

“a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

“b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

“c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.”²⁷

To the extent that there might still be a conflict between the second sentence of paragraph 2 of article 14 and a treaty, article 3 of the Model Law provides the solution.

²⁶ United Nations, *Treaty Series*, vol. 658, No. 9432.

²⁷ *Ibid.*

125. While paragraph 2 mentions letters rogatory as a formality that is not required for a notification under article 14, in many States such notifications would never be transmitted in the form of a letter rogatory. A letter rogatory in those States would be used for other purposes, such as to request evidence in a foreign country or to request permission to perform some other judicial act abroad. Such use of letters rogatory is governed, for example, by the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970,²⁸ adopted under the auspices of the Hague Conference on Private International Law.

Paragraph 3

126. In some legal systems a secured creditor who files a claim in an insolvency proceeding is deemed to have waived the security or some of the privileges attached to the credit, while in other systems failure to file a claim results in a waiver of such security or privilege. Where such a situation may arise, it would be appropriate for the enacting State to include in paragraph 3, subparagraph (b), a requirement that the notification include information regarding the effects of filing, or failing to file, secured claims.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 193-198.

A/CN.9/419, paras. 84-87.

A/CN.9/WG.V/WP.44, pp. 19-20.

A/CN.9/422, paras. 188-191.

A/CN.9/WG.V/WP.46, pp. 11-12.

A/CN.9/433, paras. 86-98.

A/CN.9/WG.V/WP.48, pp. 12-13,
16 and 20.

A/CN.9/435, paras. 157-164.

(b) Guide to Enactment

A/CN.9/436, paras. 63-65 and 84.

A/CN.9/442, paras. 106-111 and
120-121.

²⁸ Ibid., vol. 847, No. 12140.

CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 15. Application for recognition of a foreign proceeding

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
2. An application for recognition shall be accompanied by:
 - (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
 - (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
 - (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.
3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 15 as a whole

127. The Model Law avoids the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications that might otherwise have to be used. This facilitates a coordinated, cooperative approach to cross-border insolvency and makes expedited action possible. Article 15 defines the core procedural requirements for an application by a foreign representative for recognition. In incorporating the provision into national law, it is desirable not to encumber the process with additional procedural requirements beyond those referred to. With article 15, in conjunction with article 16, the Model Law provides a simple, expeditious structure to be used by a foreign representative to obtain recognition.

128. The Model Law presumes that documents submitted in support of the application for recognition need not be authenticated in any special way, in particular by legalization: according to article 16, paragraph 2, the court is

entitled to presume that those documents are authentic whether or not they have been legalized. “Legalization” is a term often 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 signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

129. It follows from article 16, paragraph 2, (according to which the court “is entitled to presume” the authenticity of documents accompanying the application for recognition) that the court retains discretion to decline to rely on the presumption of authenticity or to conclude that evidence to the contrary prevails. This flexible solution takes into account the fact that the court may be able to assure itself that a particular document originates from a particular court even without it being legalized, but that in other cases the court may be unwilling to act on the basis of a foreign document that has not been legalized, in particular when documents emanate from a jurisdiction with which it is not familiar. The presumption is useful because legalization procedures may be cumbersome and time-consuming (e.g. also because in some States they involve various authorities at different levels).

130. In respect of the provision relaxing any requirement of legalization, the question may arise whether that is in conflict with the international obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents, such as the Convention Abolishing the Requirement of Legalisation for Foreign Documents of 1961²⁹ adopted under the auspices of the Hague Conference on Private International Law, which provides specific simplified procedures for the legalization of documents originating from signatory States. In many instances, however, the treaties on legalization of documents, like letters rogatory and similar formalities, leave in effect laws and regulations that have abolished or simplified legalization procedures; therefore a conflict is unlikely to arise. For example, as stated in article 3, paragraph 2, of the above-mentioned convention:³⁰

“However, [legalisation] cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation.”

According to article 3 of the Model Law, if there is still a conflict between the Model Law and a treaty, the treaty will prevail.

²⁹ Ibid., vol. 527, No. 7625.

³⁰ Ibid.

Subparagraph 2 (c)

131. In order not to prevent recognition because of non-compliance with a mere technicality (e.g. where the applicant is unable to submit documents that in all details meet the requirements of subparas. 2 (a) and (b)), subparagraph 2 (c) allows evidence other than that specified in subparagraphs 2 (a) and (b) to be taken into account; that provision, however, does not compromise the court's power to insist on the presentation of evidence acceptable to it. It is advisable to maintain that flexibility in enacting the Model Law. Article 16, paragraph 2, which provides that the court "is entitled to presume" the authenticity of documents accompanying the application for recognition, also applies to documents submitted under subparagraph 2 (c) (see paras. 129-130 above).

Paragraph 3

132. Paragraph 3 requires an application for recognition to be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. That information is needed by the court not so much for the decision on recognition itself, but for any decision granting relief in favour of the foreign proceeding. In order to tailor such relief appropriately and ensure the relief is consistent with any other insolvency proceeding concerning the same debtor, the court needs to be aware of all foreign proceedings concerning the debtor that may be under way in third States.

133. An express provision establishing the duty to inform is useful, firstly, because the foreign representative is likely to have more comprehensive information about the debtor's affairs in third States than the court and, secondly, because the foreign representative may be primarily concerned with obtaining relief in favour of his or her foreign proceeding and less concerned about coordination with another foreign proceeding. (The duty to inform the court about a foreign proceeding that becomes known to the foreign representative after the decision on recognition is set out in article 18; as for coordination of more than one foreign proceeding, see article 30.)

Paragraph 4

134. Paragraph 4 entitles, but does not compel, the court to require a translation of some or all documents accompanying the application for recognition. If that discretion is compatible with the procedures of the court, it may facilitate a decision being made on the application at the earliest possible

time, as contemplated by article 17, paragraph 3, if the court is in a position to consider the application without the need for translation of the documents.

Notice

135. Different solutions exist as to whether the court is required to issue notice of an application for recognition. In a number of jurisdictions, fundamental principles of due process, in some cases enshrined in the constitution, may be understood as requiring that a decision on the importance of the recognition of a foreign insolvency proceeding could only be made after hearing the affected parties. In other States, however, it is considered that applications for recognition of foreign proceedings require expeditious treatment (as they are often submitted in circumstances of imminent danger of dissipation or concealment of the assets) and that, accordingly, the issuance of notice prior to any court decision on recognition is not required. In these circumstances, imposing the requirement could cause undue delay and would be inconsistent with article 17, paragraph 3, which provides that an application for recognition of a foreign proceeding should be decided upon at the earliest possible time.

136. Procedural matters related to such notice are not resolved by the Model Law and are thus governed by other provisions of law of the enacting State. The absence of an express reference to notice of the filing of an application for recognition or of the decision to grant recognition does not preclude the court from issuing such notice, where legally required, in pursuance of its own rules on civil or insolvency proceedings. By the same token, there is nothing in the Model Law that would mandate the issuance of such notice, where such a requirement does not exist.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 199-209.

A/CN.9/419, paras. 62-69 and 178-189.

A/CN.9/WG.V/WP.44, pp. 22-23.

A/CN.9/422, paras. 76-93 and 152-159.

A/CN.9/WG.V/WP.46, pp. 9-10.

A/CN.9/433, paras. 59-67 and 99-104.

A/CN.9/WG.V/WP.48, pp. 13-15.

A/CN.9/435, paras. 165-173.

(b) Guide to Enactment

A/CN.9/436, paras. 66-69.

A/CN.9/442, paras. 112-121.

(c) *Guide to Enactment and Interpretation*

A/CN.9/WG.V/WP.103/Add.1,
para. 112.

A/CN.9/742, para. 40.

A/CN.9/WG.V/WP.107, paras. 119-120.

A/CN.9/763, para. 28.

A/CN.9/WG.V/WP.112, paras. 112
and 119-120.

A/CN.9/766, para. 32.

Article 16. Presumptions concerning recognition

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.
2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.
3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

137. Article 16 establishes presumptions that permit and encourage fast action in cases where speed may be essential. These presumptions allow the court to expedite the evidentiary process. At the same time, they do not prevent the court, in accordance with the applicable procedural law, from calling for or assessing other evidence if the conclusion suggested by the presumption is called into question.

Paragraph 1

138. Article 16, paragraph 1 creates a presumption with respect to the definitions of "foreign proceeding" and "foreign representative" in article 2. If the decision commencing the foreign proceeding and appointing the foreign representative indicates that the foreign proceeding is a proceeding within the meaning of article 2, subparagraph (a) and that the foreign representative is a person or body within the meaning of article 2, subparagraph (d), the receiving court is entitled to so presume. That presumption

has been relied upon in practice by various receiving courts when the court commencing the proceedings has included that information in its orders.³¹

139. Inclusion of information regarding the nature of the foreign proceeding and the foreign representative, defined in article 2, in the orders made by the court commencing the foreign proceeding can facilitate the task of recognition in relevant cases. Those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the requirements of article 2 are met (discussed further at paras. 152-153 below).

Paragraph 2

140. For comments on paragraph 2, which dispenses with the requirement of legalization, see paragraphs 128-130 above.

Paragraph 3

141. Although the presumption contained in article 16, paragraph 3 corresponds to the presumption in the EC Regulation, it serves a different purpose. In the Model Law, the presumption is designed to facilitate the recognition of foreign insolvency proceedings and the provision of assistance to those proceedings. Under the EC Regulation, the presumption relates to the proper place for commencement of insolvency proceedings, thus determining the applicable law, and to the automatic recognition of those proceedings by other European Union member States. Under the Regulation, the decision on centre of main interests is made by the court receiving an application for commencement of insolvency proceedings at the time of consideration of that application. Under the Model Law, a request for recognition of a foreign proceeding may be made at any time after the commencement of that proceeding; in some cases it has been made several years later. Accordingly, the court considering an application for recognition under the Model Law must determine whether the foreign proceeding for which recognition is sought is taking place in a forum that was the debtor's centre of main interests when the proceeding commenced (the issue of timing with respect to the determination of centre of main interests is discussed at paras. 157-160 below). Notwithstanding the different purpose of centre of main interests under the two instruments, the jurisprudence with respect to interpretation of that concept in the EC Regulation may be relevant to its interpretation in the Model Law.

³¹ For examples, see A/CN.9/WG.V/WP.95, paras. 15-16.

142. The presumption in article 16, paragraph 3 has given rise to considerable discussion, most commonly in the context of corporate rather than individual debtors, with the focus upon the proof required for the presumption to be rebutted. The debtor's centre of main interests may be at the same location as its place of registration and in that situation no issue concerning rebuttal of the presumption will arise.

143. However, when a foreign representative seeks recognition of a foreign proceeding as a main proceeding and there appears to be a separation between the place of the debtor's registered office and its alleged centre of main interests, the party alleging the centre of main interests is not at the place of registration will be required to satisfy the court as to the location of the centre of main interests. The court of the enacting State will be required to consider independently where the debtor's centre of main interests is located.

Centre of main interests

144. The concept of a debtor's centre of main interests is fundamental to the operation of the Model Law.³² The Model Law accords proceedings commenced in that location greater deference and, more immediate, automatic relief. The essential attributes of the debtor's centre of main interests correspond to those attributes that will enable those who deal with the debtor (especially creditors) to ascertain the place where an insolvency proceeding concerning the debtor is likely to commence. As has been noted, the Model Law establishes a presumption that the debtor's place of registration is the place that corresponds to those attributes. However, in reality, the debtor's centre of main interests may not coincide with the place of its registration and the Model Law provides for the rebuttal of the presumption where the centre of main interests is in a different location to the place of registration. In those circumstances, the centre of main interests will be identified by other factors which indicate to those who deal with the debtor (especially creditors) where the centre of main interests is. It is thus important to consider the factors that may independently indicate that a given State is the debtor's centre of main interests.

Factors relevant to the determination of centre of main interests

145. In most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the foreign proceeding has commenced is the debtor's centre of main interests. The factors are the

³²As noted in paragraph 82, the concept of centre of main interests also underlies the scheme set out in the EC Regulation.

location: (a) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors. The date at which these factors should be analysed in order to determine the location of the debtor's centre of main interests is addressed in paragraphs 157-160 below.

146. When these principal factors do not yield a ready answer regarding the debtor's centre of main interests, a number of additional factors concerning the debtor's business may be considered. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the endeavour is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's centre of main interests, as readily ascertainable by creditors.

147. The order in which the additional factors are set out below is not intended to indicate the priority or weight to be accorded to them, nor is it intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a given case. The additional factors may include the following: the location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

Movement of centre of main interests

148. A debtor's centre of main interests may move prior to commencement of insolvency proceedings, in some instances in close proximity to commencement and even between the time of the application for commencement and the actual commencement of those proceedings.³³ Whenever there is

³³In some examples, the move was intended to give the debtor access to an insolvency process, such as reorganization, that more closely met its needs than what was available under the law of its former centre of main interests. In other examples, the move of the centre of main interests may have been designed to thwart the legitimate expectations of creditors and third parties._

evidence of such a move in close proximity to the commencement of the foreign proceeding, it may be desirable for the receiving court, in determining whether to recognize those proceedings, to consider the factors identified in paragraphs 145 and 147 above more carefully and to take account of the debtor's circumstances more broadly. In particular, the test that the centre of main interests is readily ascertainable by third parties may be harder to meet if the move of the centre of main interests occurs in close proximity to the opening of proceedings.

149. It is unlikely that a debtor could move its place of registration (or habitual residence) after the commencement of insolvency proceedings, since many insolvency laws contain specific provisions preventing such a move. In any event, if this were to occur, it should not affect the decision as to centre of main interests for the purposes of the Model Law, since the date relevant to that determination is the date of commencement of the foreign proceeding (see paras. 157-159 below).

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 204-206.

A/CN.9/WG.V/WP.46, p. 13.

A/CN.9/435, paras. 170-172.

(b) Guide to Enactment

A/CN.9/442, paras. 122-123.

(c) Guide to Enactment and Interpretation

A/68/17, para. 197.

A/CN.9/715, paras. 14-15, 38-41 and 44-45.

A/CN.9/738, paras. 22-30.

A/CN.9/WG.V/WP.103, Add.1, paras. 122-122A and 123A-K.

A/CN.9/742, paras. 41-56.

A/CN.9/WG.V/WP.107, paras. 122B, 123A-123G, 123I and 123K-M.

A/CN.9/763, paras. 29-48.

A/CN.9/WG.V/WP.112, paras. 122-122B, 123A-D, F-G, I, K and M.

A/CN.9/766, paras. 33-40.

Article 17. Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:
 - (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
 - (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
 - (c) The application meets the requirements of paragraph 2 of article 15; and
 - (d) The application has been submitted to the court referred to in article 4.
2. The foreign proceeding shall be recognized:
 - (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.
3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Paragraph 1

150. The purpose of article 17 is to establish that, if recognition is not contrary to the public policy of the enacting State (see article 6) and if the application meets the requirements set out in the article, recognition will be granted as a matter of course.

151. In deciding whether a foreign proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the definition. This requires a determination that the proceedings are foreign proceedings within article 2, subparagraph (a). The Model Law makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the proceeding satisfies the requirements of article 15 and article 6 is not relevant, recognition should follow in accordance with article 17.

152. In reaching its decision on recognition, the receiving court may have due regard to any decisions and orders made by the originating court and to any information that may have been presented to the originating court. Those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the foreign proceeding meets the requirements of article 2. Nevertheless, the court is entitled to rely, pursuant to the presumptions in article 16, paragraphs 1 and 2 (see para. 138), on the information in the certificates and documents provided in support of an application for recognition. In appropriate circumstances that information would assist the receiving court in its deliberations.

153. Accordingly, recognition of a foreign proceeding would be assisted if the originating court mentioned in its orders any information that would facilitate a finding by a receiving court that the proceeding is a foreign proceeding within the meaning of article 2. This would be particularly helpful when the originating court was aware of the international character either of the debtor or its business and of the likelihood that recognition of the proceeding would be sought under the Model Law. The same considerations would apply to the appointment and recognition of the foreign representative.

Paragraph 2

154. Article 17, paragraph 2 draws the basic distinction between foreign proceedings categorized as the “main” proceedings and those foreign proceedings that are not so characterized, depending upon the jurisdictional basis of the foreign proceeding (see paragraph 88 above). The relief flowing from recognition may depend upon the category into which a foreign proceeding falls. For example, recognition of a “main” proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor (article 20, subparagraphs 1 (a) and (b)) and an automatic “freeze” of those assets (article 20, subparagraph 1 (c)), subject to certain exceptions referred to in article 20, paragraph 2.

155. It is not advisable to include more than one criterion for qualifying a foreign proceeding as a main proceeding and provide that on the basis of any of those criteria a proceeding could be deemed a main proceeding. An approach involving such “multiple criteria” would raise the risk of competing claims from foreign proceedings for recognition as the main proceeding.

156. With regard to subparagraph 2 (b), as noted in paragraph 85 above, the Model Law does not envisage recognition of a proceeding commenced in a foreign State in which the debtor has assets but no establishment as defined in article 2, subparagraph (c).

Date at which to determine centre of main interests and establishment

157. The Model Law does not expressly indicate the relevant date for determining the centre of main interests of the debtor.

158. Article 17, subparagraph 2(a) provides that the foreign proceeding is to be recognized as a main proceeding “if it *is* taking place in the State where the debtor *has* the centre of its main interests” [*emphasis added*]. The use of the present tense in article 17 does not address the question of the relevant date, but rather requires the foreign proceeding to be current or pending at the time of the recognition decision; if the proceeding for which recognition is sought is no longer current or pending in the originating State at that time (i.e. it is no longer “taking place” having been terminated or closed), there is no proceeding that would be eligible for recognition under the Model Law.

159. With respect to the date at which the centre of main interests of the debtor should to be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date.³⁴ Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor’s centre of main interests is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the centre of the debtor’s main interests by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganization where, under some laws, it is not the debtor that continues to have a centre of main interests, but rather the reorganizing entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 (a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine centre of main interests provides a test that can be applied with certainty to all insolvency proceedings.

160. The same considerations apply to the date at which any determination with respect to the existence of an establishment of the debtor should be

³⁴Under some insolvency laws, the effects of commencement are backdated to the date of the application for commencement or the date of application becomes the date of commencement by virtue of automatic commencement. In both cases, it is appropriate to refer to the date of commencement for the purposes of the centre of main interests determination, since the Model Law is concerned only with existing foreign proceedings and when they commenced.

made. Accordingly, the date of commencement of the foreign proceeding is the relevant date to be considered in making that determination.

Abuse of process

161. One issue that has arisen is whether, on a recognition application, the court should be able to take account of abuse of its processes as a ground to decline recognition. There is nothing in the UNCITRAL Model Law itself which suggests that extraneous circumstances should be taken into account on a recognition application. The Model Law envisages the application being determined by reference to the specific criteria set out in the definitions of “foreign proceeding”, “foreign main proceeding” and “foreign non-main proceeding”. Since what constitutes abuse of process depends on domestic law or procedural rules, the Model Law does not explicitly prevent receiving courts from applying domestic law or procedural rules to respond to a perceived abuse of process. However, the broader purpose of the Model Law, namely to foster international cooperation as a means of maximizing outcomes for all stakeholders, as set out in article 1, as well as the international origins of the Model Law, and the need to promote uniformity in its application, as set out in article 8, should be borne in mind. Courts considering the application of domestic laws and procedural rules might also recall that the public policy exception in article 6 (see paras. 101-104 above) is intended to be narrowly construed and invoked only when the taking of action under the Model Law would be manifestly contrary to a State’s public policy. As a general rule, article 6 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.

162. If the applicant falsely claims the centre of main interests to be in a particular State, the receiving court may determine that there has been a deliberate abuse of the process. The Model Law does not prevent receiving courts from applying domestic law or procedural rules in response to such an abuse of process.

Paragraph 3

163. The foreign representative’s ability to obtain early recognition (and the consequential ability to invoke in particular articles 20, 21, 23 and 24) is often essential for the effective protection of the assets of the debtor from dissipation and concealment. For that reason, paragraph 3 obligates the court to decide on the application “at the earliest possible time”. The phrase “at the earliest possible time” has a degree of elasticity. Some cases may be so

straightforward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, “the earliest possible time” might be measured in months. Interim relief will be available in the event that some order is necessary while the recognition application is pending.

Paragraph 4

164. A decision to recognize a foreign proceeding would normally be subject to review or rescission, as any other court decision. Paragraph 4 clarifies that the decision on recognition may be revisited if grounds for granting it were fully or partially lacking or have ceased to exist.

165. Modification or termination of the recognition decision may be a consequence of a change of circumstances after the decision on recognition, for instance, if the recognized foreign proceeding has been terminated or its nature has changed (e.g. a reorganization proceeding might be converted into a liquidation proceeding) or if the status of the foreign representative’s appointment has changed or the appointment has been terminated. Also, new facts might arise that require or justify a change of the court’s decision, for example, if the foreign representative disregarded the conditions under which the court granted relief. The court’s ability to review the recognition decision is assisted by the obligation article 18 imposes on the foreign representative to inform the court of such changed circumstances.

166. A decision on recognition may also be subject to a review of whether, in the decision-making process, the requirements for recognition were observed. Some appeal procedures give the appeal court the authority to review the merits of the case in its entirety, including factual aspects. It would be consistent with the purpose of the Model Law and with the nature of the decision granting recognition (which is limited to verifying whether the applicant fulfilled the requirements of article 17) if an appeal of the decision would be limited to the question whether the requirements of articles 15 and 16 were observed in deciding to recognize the foreign proceeding.

Notice of decision to recognize foreign proceedings

167. As noted in paragraphs 135 and 136 above, procedural matters regarding requirements of notice of the decision to grant recognition are not dealt with by the Model Law and are left to other provisions of law of the enacting State.

*Discussion in UNCITRAL and in the Working Group**(a) Model Law*

A/52/17, paras. 29-33 and 201-202.

A/CN.9/419, paras. 62-69.

A/CN.9/WG.V/WP.44, pp. 13-15.

A/CN.9/422, paras. 76-93.

A/CN.9/WG.V/WP.46, pp. 12-13.

A/CN.9/433, paras. 99-104.

A/CN.9/WG.V/WP.48, pp. 13-16.

A/CN.9/435, paras. 167 and 173.

(b) Guide to Enactment

A/CN.9/436, paras. 68-69.

A/CN.9/442, paras. 124-131.

(c) Guide to Enactment and Interpretation

A/CN.9/715, paras. 14-15 and 32-35.

A/CN.9/738, paras. 33-35.

A/CN.9/WG.V/WP.103/Add.1,
paras. 124-124C, 126, 128A-E,
125 and 129-130.

A/CN.9/742, paras. 57-62.

A/CN.9/WG.V/WP.107, paras. 124B-C,
128A, 128C, 123J, 125 and 130-131.

A/CN.9/763, paras. 49-55.

A/CN.9/WG.V/WP.112, paras. 124-
124C, 128A-D, 123J and L, 125
and 129-131.

A/CN.9/766, paras. 41-44.

Article 18. Subsequent information

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

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

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

Subparagraph (a)

168. Article 18 obligates the foreign representative to inform the court promptly, after the time of filing the application for recognition of the foreign proceeding, of “any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative’s appointment”. The purpose of the obligation is to allow the court to modify or terminate the consequences of recognition. As noted above, it is possible that, after the application for recognition or after recognition, changes occur in the foreign proceeding that would have affected the decision on recognition or the relief

granted on the basis of recognition, such as termination of the foreign proceeding or conversion from one type of proceeding to another. Subparagraph (a) takes into account the fact that technical modifications in the status of the proceedings or the foreign representative's appointment are frequent, but that only some of those modifications would affect the decision granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information of "substantial" changes. It is of particular importance that the court be informed of such modifications when its decision on recognition concerns a foreign "interim proceeding" or a foreign representative has been "appointed on an interim basis" (see article 2, subparagraphs (a) and (d)).

Subparagraph (b)

169. Article 15, paragraph 3, requires an application for recognition to be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. Article 18, subparagraph (b), extends that duty to the time after the application for recognition has been filed. That information will allow the court to consider whether relief already granted should be coordinated with insolvency proceedings commenced after the decision on recognition (see article 30) and to facilitate cooperation under chapter IV.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 113-116, 201-202 and 207.

A/CN.9/WG.V/WP.48, p. 15.

(b) Guide to Enactment

A/CN.9/442, paras. 133-134.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.103/Add.1, paras. 133-134.

A/CN.9/742, para. 63.

A/CN.9/WG.V/WP.107, paras. 133-134.

A/CN.9/763, para. 56.

A/CN.9/WG.V/WP.112, paras. 133-134.

A/CN.9/766, para. 45.

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

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

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

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

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

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

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

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

170. Article 19 deals with “urgently needed” relief that may be ordered at the discretion of the court and is available as of the moment of the application for recognition (unlike relief under article 21, which is also discretionary but available only upon recognition).

171. Article 19 authorizes the court to grant the type of relief that is usually available only in collective insolvency proceedings (i.e. the same type of relief available under article 21), as opposed to the “individual” type of relief that may be granted before the commencement of insolvency proceedings under rules of civil procedure (i.e. measures covering specific assets identified by a creditor). However, the discretionary “collective” relief under article 19 is somewhat narrower than the relief under article 21.

172. The reason for the availability of collective measures, albeit in a restricted form, is that relief of a collective nature may be urgently needed before the decision on recognition in order to protect the assets of the debtor and the interests of the creditors. Exclusion of collective relief would

frustrate those objectives. On the other hand, recognition has not yet been granted and, therefore, the collective relief is restricted to urgent and provisional measures. The urgency of the measures is alluded to in the opening words of paragraph 1, while subparagraph (a) restricts the stay to execution proceedings and the measure referred to in subparagraph (b) is restricted to perishable assets and assets susceptible to devaluation or otherwise in jeopardy. Otherwise, the measures available under article 19 are essentially the same as those available under article 21.

Paragraph 2

173. Laws of many States contain requirements for notice to be given (either by the insolvency representative upon the order of the court or by the court itself) when relief of the type mentioned in article 19 is granted. Paragraph 2 is the appropriate place for the enacting State to make provision for such notice.

Paragraph 3

174. Relief available under article 19 is provisional in that, as provided in paragraph 3, it terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure, as provided in article 21, subparagraph 1 (f). The court might wish to do so, for example, to avoid a hiatus between the provisional measure issued before recognition and the measure issued after recognition.

Paragraph 4

175. Article 19, paragraph 4, pursues the same objective as the one underlying article 30, subparagraph (a), namely that, if a foreign main proceeding is pending, any relief granted in favour of a foreign non-main proceeding must be consistent (or should not interfere) with the foreign main proceeding. In order to foster such coordination of pre-recognition relief with any foreign main proceeding, the foreign representative applying for recognition is required, by article 15, paragraph 3, to attach to the application for recognition a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 34-46.

A/CN.9/419, paras. 174-177.

A/CN.9/WG.V/WP.44, pp. 22-23.

A/CN.9/422, paras. 116, 119 and 122-123.

A/CN.9/WG.V/WP.46, pp. 9, 13-16.

A/CN.9/433, paras. 110-114.

A/CN.9/435, paras. 17-23.

(b) Guide to Enactment

A/CN.9/436, paras. 71-75.

A/CN.9/442, paras. 135-140.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.107, paras. 135-140.

A/CN.9/763, para. 57.

A/CN.9/WG.V/WP.48, pp. 16-17.

A/CN.9/WG.V/WP.112, paras. 135-140.

A/CN.9/766, para. 46.

Article 20. Effects of recognition of a foreign main proceeding

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

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

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

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

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

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

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

176. While relief under articles 19 and 21 is discretionary, the effects provided by article 20 are not, for they flow automatically from recognition of the foreign main proceeding. Another difference between discretionary relief under articles 19 and 21 and the effects under article 20 is that discretionary relief may be issued in favour of main and non-main proceedings, while the automatic effects apply only to main proceedings. Additional effects of recognition are contained in articles 14, 23 and 24.

177. In States where an appropriate court order is needed for the effects of article 20 to become operative, the enacting State, in order to achieve the purpose of the article, should include (perhaps in the opening words of paragraph 1) language directing the court to issue an order putting into effect the consequences specified in subparagraphs (a)-(c) of that paragraph.

178. The automatic consequences envisaged in article 20 are necessary to allow steps to be taken to organize an orderly and fair cross-border insolvency proceeding. In order to achieve those benefits, the imposition on the insolvent debtor of the consequences of article 20 in the enacting State (i.e. the country where it maintains a limited business presence) is justified, even if the State where the centre of the debtor's main interests is situated poses different (possibly less stringent) conditions for the commencement of insolvency proceedings or even if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20 in the enacting State. This approach reflects a basic principle underlying the Model Law according to which recognition of foreign proceedings by the court of the enacting State produces effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency. Recognition, therefore, has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State. If, in a given case, recognition should produce results that would be contrary to the legitimate interests of a party in interest, including the debtor, the law of the enacting State should include appropriate protections, as indicated in article 20, paragraph 2 (and discussed in paragraph 184 below).

179. By virtue of article 2, subparagraph (a), the effects of recognition extend to foreign "interim proceedings". That solution is necessary since, as explained in paragraph 79 above, interim proceedings (provided they meet the requisites of article 2, subparagraph (a)), should not be distinguished from other insolvency proceedings merely because they are of an interim nature. If after recognition the foreign "interim proceeding" ceases to have a sufficient basis for the automatic effects of article 20, the automatic stay could be terminated pursuant to the law of the enacting State, as indicated in article 20, paragraph 2. (See also article 18, which deals with the obligation of the foreign representative "to inform the court promptly of any

substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment".)

180. Subparagraph 1 (a), by not distinguishing between various kinds of individual action, also covers actions before an arbitral tribunal. Thus, article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement. This limitation is added to other possible limitations restricting the freedom of the parties to agree to arbitration that may exist under national law (e.g. limits as to arbitrability or as to the capacity to conclude an arbitration agreement). Such limitations are not contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.³⁵ However, bearing in mind the particularities of international arbitration, in particular its relative independence from the legal system of the State where the arbitral proceeding takes place, it might not always be possible, in practical terms, to implement the automatic stay of arbitral proceedings. For example, if the arbitration does not take place in either the enacting State or the State of the main proceeding, it may be difficult to enforce the stay of the arbitral proceedings. Apart from that, the interests of the parties may be a reason for allowing an arbitral proceeding to continue, a possibility that is envisaged in paragraph 2 and left to the law of the enacting State.

181. Subparagraph 1 (a) refers not only to "individual actions" but also to "individual proceedings" in order to cover, in addition to "actions" instituted by creditors in a court against the debtor or its assets, enforcement measures initiated by creditors outside the court system, being measures that creditors are allowed to take under certain conditions in some States. Subparagraph 1 (b) has been added to make it abundantly clear that executions against the assets of the debtor are covered by the stay.

182. The Model Law does not deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under article 20, subparagraph 1 (c). Those sanctions vary, depending on the legal system; they might include criminal sanctions, penalties and fines or the acts themselves might be void or capable of being set aside. From the viewpoint of creditors, the main purpose of such sanctions is to facilitate recovery for the insolvency proceeding of any assets improperly transferred by the debtor and, for that purpose, the setting aside of such transactions is preferable to the imposition of criminal or administrative sanctions on the debtor.

³⁵ United Nations, *Treaty Series*, vol. 330, No. 4739.

Paragraph 2

183. Notwithstanding the “automatic” or “mandatory” nature of the effects under article 20, it is expressly provided that the scope of those effects depends on exceptions or limitations that may exist in the law of the enacting State. Those exceptions may be, for example, the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, initiation of court action for claims that have arisen after the commencement of the insolvency proceeding (or after recognition of a foreign main proceeding) or completion of open financial-market transactions.

184. Sometimes it may be desirable for the court to modify or terminate the effects of article 20. The rules governing the power of the court to do so vary. In some legal systems the courts are authorized to make individual exceptions upon request by an interested party, under conditions prescribed by local law, while in others the courts do not have that power, in line with the principle that, in general, courts do not have the power to set aside the application of a statutory rule of law. If courts are to be given such a power, some legal systems would normally require the grounds on which the court could modify or terminate the mandatory effects of recognition under article 20, paragraph 1 to be specified. In view of that situation, article 20, paragraph 2, provides that the modification or termination of the stay and the suspension provided in the article is subject to the provisions of law of the enacting State relating to insolvency.

185. Generally, it is useful for persons that are adversely affected by the stay or suspension under article 20, paragraph 1, to have an opportunity to be heard by the court, which should then be allowed to modify or terminate those effects. It would be consistent with the objectives of the Model Law if the enacting State were to spell out, or refer to, the provisions that govern this question.

Paragraph 3

186. The Model Law does not cover the question of whether the limitation period for a claim ceases to run when the claimant is unable to commence individual proceedings as a result of the application of article 20, subparagraph 1 (a). A harmonized rule on that question would not be feasible; however, since it is necessary to protect creditors from losing their claims because of a stay pursuant to subparagraph 1 (a), paragraph 3 has been added to authorize the commencement of individual action to the extent necessary to preserve claims against the debtor. Once the claim has been preserved, the action continues to be covered by the stay.

187. Paragraph 3 might seem unnecessary in a State where a demand for payment or performance served by the creditor on the debtor causes the cessation of the running of the limitation period or where the stay of the kind envisaged in subparagraph 1 (a) triggers such cessation. However, paragraph 3 may still be useful in such States because the question of the cessation of the running of the limitation period might be governed, pursuant to rules concerning conflict of laws, by the law of a State other than the enacting State. Furthermore, the paragraph would be useful as an assurance to foreign claimants that their claims would not be prejudiced in the enacting State.

Paragraph 4

188. Paragraph 4 clarifies that the automatic stay and suspension pursuant to article 20 do not prevent anyone, including the foreign representative or foreign creditors, from requesting the commencement of a local insolvency proceeding and from participating in that proceeding. The right to apply to commence a local insolvency proceeding and to participate in it is in a general way dealt with in articles 11-13. If a local proceeding is indeed initiated, article 29 deals with the coordination of the foreign and the local proceedings.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 47-60.

A/CN.9/419, paras. 137-143.

A/CN.9/WG.V/WP.44, pp. 15-19.

A/CN.9/422, paras. 94-110.

A/CN.9/WG.V/WP.46, pp. 13-16.

A/CN.9/433, paras. 115-126.

A/CN.9/WG.V/WP.48, pp. 17-18.

A/CN.9/435, paras. 24-48.

(b) Guide to Enactment

A/CN.9/436, paras. 76-79.

A/CN.9/442, paras. 141-153.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.103/Add.1, paras. 141 and 143.

A/CN.9/742, para. 64.

A/CN.9/WG.V/WP.107, paras. 144-146, 149 and 151-153.

A/CN.9/763, para. 58.

A/CN.9/WG.V/WP.112, paras. 141, 143, 144-146, 149, 151-153.

A/CN.9/766, para. 47.

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

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

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

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

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

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

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

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

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

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

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

189. In addition to the mandatory stay and suspension under article 20, the Model Law authorizes the court, following recognition of a foreign proceeding, to grant relief for the benefit of that proceeding. This post-recognition relief under article 21 is discretionary, as is pre-recognition relief

under article 19. The types of relief listed in article 21, paragraph 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.

190. The explanation relating to the use of the expressions “individual actions” and “individual proceedings” in article 20, subparagraph 1 (a), and to coverage of execution proceedings (see paras. 180-181 above) applies also to article 21, subparagraph 1 (a).

191. It is in the nature of discretionary relief that the court may tailor it to the case at hand. This idea is reinforced by article 22, paragraph 2, according to which the court may subject the relief granted to any conditions it considers appropriate.

Paragraph 2

192. The “turnover” of assets to the foreign representative (or another person), as envisaged in paragraph 2, is discretionary. It should be noted that the Model Law contains several safeguards designed to ensure the protection of local interests before assets are turned over to the foreign representative. Those safeguards include the following: the general statement of the principle of protection of local interests in article 22, paragraph 1; the provision in article 21, paragraph 2, that the court should not authorize the turnover of assets until it is assured that the local creditors’ interests are protected; and article 22, paragraph 2, according to which the court may subject the relief that it grants to conditions it considers appropriate.

Paragraph 3

193. One salient factor to be taken into account in tailoring the relief is whether it is for a foreign main or non-main proceeding. The interests and the authority of a representative of a foreign non-main proceeding are typically narrower than the interests and the authority of a representative of a foreign main proceeding, who normally seeks to gain control over all assets of the insolvent debtor. Paragraph 3 reflects that idea by providing (a) that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding, and (b) that, if the foreign representative seeks information concerning the debtor’s assets or affairs, the relief must concern information required in that non-main proceeding. The objective is to advise the court that relief in favour of a

foreign non-main proceeding should not give unnecessarily broad powers to the foreign representative and that such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

194. The proviso “under the law of this State” 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.

195. The idea underlying article 21, paragraph 3, is also reflected in article 19, paragraph 4 (pre-recognition relief), article 29, subparagraph (c) (coordination of a foreign proceeding with a local proceeding) and article 30 (coordination of more than one foreign proceeding).

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 61-73.

A/CN.9/419, paras. 148-152 and 154-166.

A/CN.9/WG.V/WP.44, pp. 15-19.

A/CN.9/422, paras. 111-113.

A/CN.9/WG.V/WP.46, pp. 13-16.

A/CN.9/433, paras. 127-134 and 138-139.

A/CN.9/435, paras. 49-61.

(b) Guide to Enactment

A/CN.9/436, paras. 80-83.

A/CN.9/442, 154-159.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.103/Add.1, para. 154.

A/CN.9/742, para. 65.

A/CN.9/WG.V/WP.48, pp. 18-19.

A/CN.9/WG.V/WP.107, paras. 154, 156, 158 and 160.

A/CN.9/763, para. 59.

A/CN.9/WG.V/WP.112, paras. 154, 156, 158 and 160.

A/CN.9/766, para. 48.

Article 22. Protection of creditors and other interested persons

1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.
2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.
3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

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

197. The reference to the interests of creditors, the debtor and other interested parties in article 22, paragraph 1, provides useful elements to guide the court in exercising its powers under articles 19 and 21. In order to allow the court to tailor the relief appropriately, the court is clearly authorized to subject the relief to conditions (paragraph 2) and to modify or terminate the relief granted (paragraph 3). An additional feature of paragraph 3 is that it expressly gives standing to the parties who may be affected by the consequences of articles 19 and 21 to petition the court to modify and terminate those consequences. Apart from that, article 22 is intended to operate in the context of the procedural system of the enacting State.

198. In many cases the affected creditors will be “local” creditors. Nevertheless, in enacting article 22, it is not advisable to attempt to limit it to local creditors. Any express reference to local creditors in paragraph 1 would require a definition of those creditors. An attempt to draft such a definition (and to establish criteria according to which a particular category of creditors might receive special treatment) would not only show the difficulty of crafting an appropriate text but would also reveal that there is no justification for discriminating against creditors on the basis of criteria such as place of business or nationality.

199. Protection of all interested persons is linked to provisions in national laws on notification requirements; those may be general publicity requirements,

designed to notify potentially interested persons (e.g. local creditors or local agents of a debtor) that a foreign proceeding has been recognized or there may be requirements for individual notifications that the court, under its own procedural rules, has to issue to persons that would be directly affected by recognition or relief granted by the court. National laws vary as to the form, time and content of notice required to be given of the recognition of foreign proceedings and the Model Law does not attempt to modify those laws (see also para. 167 above).

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 82-93.

A/CN.9/422, para. 113.

A/CN.9/WG.V/WP.46, pp. 15-16.

A/CN.9/433, paras. 140-146.

A/CN.9/WG.V/WP.48, p. 21.

A/CN.9/435, paras. 72-78.

(c) Guide to Enactment and Interpretation

A/CN.9/715, para. 39.

A/CN.9/WG.V/WP.107, paras. 162-164.

A/CN.9/763, para. 60.

A/CN.9/WG.V/WP.112, paras. 162-164.

A/CN.9/766, para. 49.

(b) Guide to Enactment

A/CN.9/436, para. 85.

A/CN.9/442, paras. 161-164.

Article 23. Actions to avoid acts detrimental to creditors

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

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

200. Under many national laws both individual creditors and insolvency representatives have a right to bring actions to avoid or otherwise render ineffective acts detrimental to creditors. Such a right, insofar as it pertains to individual creditors, is often not governed by insolvency law but by general provisions of law (such as the civil code); the right is not necessarily

tied to the existence of an insolvency proceeding against the debtor so that the action may be instituted prior to the commencement of such a proceeding. The person having such a right is typically only an affected creditor and not another person such as the insolvency representative. Furthermore, the conditions for these individual-creditor actions are different from the conditions applicable to similar actions that might be initiated by an insolvency representative. The standing²⁵ conferred by article 23 extends only to actions that are available to the local insolvency representative in the context of an insolvency proceeding, and the article does not equate the foreign representative with individual creditors who may have similar rights under a different set of conditions. Such actions of individual creditors fall outside the scope of article 23.

201. Article 23, paragraph 1 expressly provides that, as an effect of recognition of the foreign proceeding under article 17, a foreign representative has standing²⁵ to initiate actions under the law of the enacting State to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is drafted narrowly in that it neither creates any substantive right regarding such actions nor provides any solution involving conflict of laws; the Model Law does not address the right of a foreign representative to bring such an action in the enacting State under the law of the State in which the foreign proceeding is taking place. The effect of article 17 is that a foreign representative is not prevented from initiating such actions by the sole fact that the foreign representative is not the insolvency representative appointed in the enacting State.

202. When the foreign proceeding has been recognized as a “non-main proceeding”, it is necessary for the court to consider specifically whether any action to be taken under the article 23 authority relates to assets that “should be administered in the foreign non-main proceeding” (article 23, paragraph 2). Again, this distinguishes the nature of a “main” proceeding from that of a “non-main” proceeding and emphasizes that the relief in a “non-main” proceeding is likely to be more restrictive than for a “main” proceeding.

203. Granting standing²⁵ to the foreign representative to institute such actions is not without difficulty. In particular, such actions might not be looked upon favourably because of their potential for creating uncertainty about concluded or performed transactions. However, since the right to commence such actions is essential to protect the integrity of the assets of the debtor and is often the only realistic way to achieve such protection, it has been considered important to ensure that such right would not be denied to a foreign representative on the sole ground that he or she has not been locally appointed.

*Discussion in UNCITRAL and in the Working Group**(a) Model Law*

A/52/17, paras. 210-216.

A/CN.9/433, para. 134.

A/CN.9/WG.V/WP.48, p. 19.

A/CN.9/435, paras. 62-66.

(b) Guide to Enactment

A/CN.9/436, paras. 86-88.

A/CN.9/442, paras. 165-167.

(c) Guide to Enactment and Interpretation

A/68/17, para. 197.

A/CN.9/WG.V/WP.103/Add.1,
paras. 165-167.

A/CN.9/742, para. 66.

A/CN.9/WG.V/WP.107, paras. 165-167.

A/CN.9/763, para. 61.

A/CN.9/WG.V/WP.112, paras. 165-167.

A/CN.9/766, para. 50.

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

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

204. The purpose of article 24 is to avoid the denial of standing²⁵ to the foreign representative to intervene in proceedings merely because the procedural legislation may not have contemplated the foreign representative among those having such standing. The article applies to foreign representatives of both main and non-main proceedings.

205. The word “intervene” in the context of article 20 is intended to refer to cases where the foreign representative appears in court and makes representations in proceedings, whether those proceedings be individual court actions or other proceedings (including extrajudicial proceedings) instituted by the debtor against a third party or proceedings instituted by a third party against the debtor. The proceedings where the foreign representative might intervene could only be those which have not been stayed under article 20, subparagraph 1 (a), or article 21, subparagraph 1 (a).

206. Article 24, which is limited to providing standing,²⁵ makes it clear (by stating “provided the requirements of the law of this State are met”) that all other conditions of the local law for a person to be able to intervene remain intact.

207. Many if not all national procedural laws contemplate cases where a party (the foreign representative in this article) who demonstrates a legal interest in the outcome of a dispute between two other parties may be permitted by the court to be heard in the proceedings. Those procedural laws use different expressions to refer to such situations, the expression “intervention” being frequently used. If the enacting State uses another expression for that concept, the use of such other expression in enacting article 24 would be appropriate.

208. The word “participate” as used in the context of article 12 refers to cases where the foreign representative makes representations in a collective insolvency proceeding (see para. 117 above), whereas the word “intervene” as used in article 24 covers cases where the foreign representative takes part in proceedings concerning an individual action by or against the debtor.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 117-123.

A/CN.9/422, paras. 148-149.

A/CN.9/433, paras. 51 and 58.

A/CN.9/WG.V/WP.48, p. 21.

A/CN.9/435, paras. 79-84.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.107, para. 170.

A/CN.9/763, para. 62.

A/CN.9/WG.V/WP.112, para. 170.

A/CN.9/766, para. 51.

(b) Guide to Enactment

A/CN.9/436, paras. 89-90.

A/CN.9/442, paras. 168-172.

CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

209. A widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvency is derived from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authority, for pursuing cooperation with foreign courts.

210. Experience has shown that, irrespective of the discretion courts may traditionally enjoy in a State, the passage of a specific legislative framework is useful for promoting international cooperation in cross-border cases. Accordingly, the Model Law fills the gap found in many national laws by expressly empowering courts to extend cooperation in the areas covered by the Model Law (articles 25-27).

211. Chapter IV (articles 25-27), on cross-border cooperation, is thus a core element of the Model Law. Its objective is to enable courts and insolvency representatives from two or more countries to be efficient and achieve optimal results. Cooperation as described in the chapter is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets (e.g. when items of production equipment located in two States are worth more if sold together than if sold separately) or to find the best solutions for the reorganization of the enterprise.

212. Cooperation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere (see also article 5). Cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph (a) that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets. Such a provision may be useful when that proceeding is commenced in the enacting State and assistance is sought elsewhere. That provision may also be relevant when the enacting State, in addition to the Model Law, has other laws facilitating coordination and cooperation with foreign proceedings (see article 7).

213. Articles 25 and 26 not only authorize cross-border cooperation, they also mandate it by providing that the court and the insolvency representative “shall cooperate to the maximum extent possible”. The articles are designed to overcome the widespread problem of national laws lacking rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies. Enactment of such a legal basis would be particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. However, even in jurisdictions in which there is a tradition of wider judicial latitude, enactment of a legislative framework for cooperation has proved to be useful.

214. To the extent that cross-border judicial cooperation in the enacting State is based on the principle of comity among nations, the enactment of articles 25-27 offers an opportunity for making that principle more concrete and adapting it to the particular circumstances of cross-border insolvencies.

215. In the States in which the proper legal basis for international cooperation in the area of cross-border insolvency is not the principle of comity, but an international agreement (e.g. a bilateral or multilateral treaty or an exchange of letters between the cooperating authorities) based on the principle of reciprocity, chapter IV of the Model Law may serve as a model for the development of such international cooperation agreements.

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

217. The importance of granting the courts flexibility and discretion in cooperating with foreign courts or foreign representatives was emphasized at the Second UNCITRAL/INSOL Multinational Judicial Colloquium on Cross-Border Insolvency. At that Colloquium, reports of a number of cases in which judicial cooperation in fact occurred were given by the judges involved in the cases. From those reports a number of points emerged that might be summarized as follows: (a) communication between courts is possible but should be done carefully and with appropriate safeguards for the protection of substantive and procedural rights of the parties; (b) communication should be done openly, in the presence of the parties involved (except in extreme circumstances), who should be given advance notice; (c) communications that might be exchanged are various and include, for example, exchanges of formal court orders or judgements; supply of informal writings of general information, questions and observations; and transmission of transcripts of court proceedings; (d) means of communication include, for example, telephone, facsimile, electronic mail facilities and video; and (e) where communication is necessary and is intelligently used, there could be considerable benefits for the persons involved in, and affected by, the cross-border insolvency.

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

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

218. The ability of courts, with appropriate involvement of the parties, to communicate “directly” and to request information and assistance “directly” from foreign courts or foreign representatives is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. This ability is critical when the courts consider that they should act with urgency. In order to emphasize the flexible and potentially urgent character of cooperation, the enacting State may find it useful to include in the enactment of the Model Law an express provision that would authorize the courts, when they engage in cross-border communications under article 25, to forgo use of the formalities (e.g. communication via higher courts, letters rogatory or other diplomatic or consular channels) that are inconsistent with the policy behind the provision.

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

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

219. Article 26 on international cooperation between persons who are appointed to administer assets of insolvent debtors reflects the important role that such persons can play in devising and implementing cooperative arrangements, within the parameters of their authority. The provision makes it clear that an insolvency representative acts under the overall supervision of the competent court (by stating “in the exercise of its functions and subject to the supervision of the court”). The Model Law does not modify the rules already existing in the insolvency law of the enacting State on the supervisory functions of the court over the activities of the insolvency representative. Generally, a certain degree of latitude and initiative on the part of insolvency representatives, within the broad confines of judicial supervision, are mainstays of cooperation in practical terms; it is therefore advisable that the enacting State does not change that in enacting the Model Law. In particular, there should be no suggestion that ad hoc authorization would be needed for each communication between the insolvency representative and a foreign body.

Article 27. Forms of cooperation

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

- (a) Appointment of a person or body to act at the direction of the court;
- (b) Communication of information by any means considered appropriate by the court;
- (c) Coordination of the administration and supervision of the debtor’s assets and affairs;
- (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) Coordination of concurrent proceedings regarding the same debtor;
- (f) [*The enacting State may wish to list additional forms or examples of cooperation*].

220. Article 27 is suggested for use by the enacting State to provide courts with an indicative list of the types of cooperation that are authorized by articles 25 and 26. Such an indicative listing may be particularly helpful in States with a limited tradition of direct cross-border judicial cooperation and in States where judicial discretion has traditionally been limited and, as an indicative list, leaves the legislator an opportunity to include other forms of cooperation. Any listing of forms of possible cooperation should be illustrative rather than exhaustive, to avoid inadvertently precluding certain forms

of appropriate cooperation and limiting the ability of courts to fashion remedies in keeping with specific circumstances.

221. The implementation of cooperation would be subject to any mandatory rules applicable in the enacting State; for example, in the case of requests for information, rules restricting the communication of information (e.g. for reasons of protection of privacy) would apply.

222. Subparagraph (f) of article 27 offers the enacting State the opportunity to include additional forms of possible cooperation. Those might include, for example, suspension or termination of existing proceedings in the enacting State.

223. The *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* expands upon the forms of cooperation mentioned in article 27 and, in particular, compiles practice and experience with the use of cross-border insolvency agreements.³⁶

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 124-129.

A/CN.9/419, paras. 75-76, 80-83 and 118-133.

A/CN.9/WG.V/WP.44, pp. 21-22.

A/CN.9/422, paras. 129-143.

A/CN.9/WG.V/WP.46, p. 17.

A/CN.9/433, paras. 164-172.

A/CN.9/WG.V/WP.48, p. 22.

A/CN.9/435, paras. 85-94.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.103/Add.1, paras. 173-175, 177, 181 and 183A.

A/CN.9/742, paras. 67-68.

A/CN.9/WG.V/WP.107, paras. 183-183A.

A/CN.9/763, para. 63.

A/CN.9/WG.V/WP.112, paras. 173A, 181 and 183-183A.

A/CN.9/766, para. 52.

(b) Guide to Enactment

A/CN.9/436, paras. 91-95.

A/CN.9/442, paras. 173-183.

³⁶See footnote 15. The Model Law applies to individual debtors whether corporate or natural. Part three of the *Legislative Guide on Insolvency Law*, however, addresses the treatment of enterprise groups in insolvency and recommendations 240 to 254 focus on cooperation and communication to facilitate the conduct of cross-border insolvency proceedings where they concern members of an enterprise group. Part three of the *Legislative Guide* is available from http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html

CHAPTER V. CONCURRENT PROCEEDINGS

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

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

224. The Model Law imposes virtually no limitations on the jurisdiction of the courts in the enacting State to commence or continue insolvency proceedings. Article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of a local insolvency proceeding concerning the same debtor as long as the debtor has assets in the State.

225. The position taken in article 28 is in substance the same as the position taken in a number of States. In some States, however, for the court to have jurisdiction to commence a local insolvency proceeding, the mere presence of assets in the State is not sufficient. For such jurisdiction to exist, the debtor must be engaged in an economic activity in the State (to use the terminology of the Model Law, the debtor must have an “establishment” in the State, as defined in article 2, subparagraph (f)). In article 28, the less restrictive solution was chosen in a context where the debtor is already involved in a foreign main proceeding. While the solution leaves a broad ground for commencing a local proceeding after recognition of a foreign main proceeding, it serves the purpose of indicating that, if the debtor has no assets in the State, there is no jurisdiction for commencing an insolvency proceeding.

226. Nevertheless, the enacting State may wish to adopt the more restrictive solution of allowing the initiation of the local proceeding only if the debtor has an establishment in the State. The adoption of such a restriction would not be contrary to the policy underlying the Model Law. The rationale may be that, when the assets in the enacting State are not part of an establishment, the commencement of a local proceeding would typically not be the most efficient way to protect the creditors, including local creditors. By tailoring the relief to be granted to the foreign main proceeding and cooperating with

the foreign court and foreign representative, the court in the enacting State would have sufficient opportunity to ensure the assets in the State would be administered in such a way that local interests would be adequately protected. Therefore, the enacting State would act in line with the philosophy of the Model Law if it enacted the article by replacing the words “only if the debtor has assets in this State”, as they currently appear in article 28, with the words “only if the debtor has an establishment in this State”.

227. Ordinarily, the local proceeding of the kind envisaged in article 28 would be limited to the assets located in the State. In some situations, however, a meaningful administration of the local insolvency proceeding may have to include certain assets abroad, especially when there is no foreign proceeding necessary or available in the State where the assets are situated (for example, where the local establishment would have an operating plant in a foreign jurisdiction, where it would be possible to sell the debtor’s assets in the enacting State and the assets abroad as a “going concern”, or where assets were fraudulently transferred abroad from the enacting State). In order to allow such limited cross-border reach of a local proceeding, the article includes the words “and ... to other assets of the debtor that ... should be administered in that proceeding”. Two restrictions have been included in the article concerning the possible extension of effects of a local proceeding to assets located abroad: firstly, the extension is permissible “to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27”; and, secondly, those foreign assets must be subject to administration in the enacting State “under the law of [the enacting State]”. Those restrictions are useful in order to avoid creating an open-ended ability to extend the effects of a local proceeding to assets located abroad, a result that would generate uncertainty as to the application of the provision and that might lead to conflicts of jurisdiction.

228. Where under the law of the enacting State the debtor must be insolvent to commence an insolvency proceeding, the Model Law establishes a rebuttable presumption that recognition of a foreign main proceeding constitutes the requisite proof of insolvency of the debtor for that purpose (article 31) (see paras. 235-238).

Discussion in UNCITRAL and in the Working Group

(a) <i>Model Law</i>	A/CN.9/WG.V/WP.46, p. 18.
A/52/17, paras. 94-101.	A/CN.9/433, paras. 173-181.
A/CN.9/WG.V/WP.44, pp. 26-29.	A/CN.9/WG.V/WP.48, p. 23.
A/CN.9/422, paras. 192-197.	A/CN.9/435, paras. 180-183.

(b) *Guide to Enactment*

A/CN.9/436, para. 96.

A/CN.9/442, paras. 184-187.

(c) *Guide to Enactment and Interpretation*

A/CN.9/WG.V/WP.103/Add.1,
paras. 184 and 186-187A.

A/CN.9/742, para. 69.

A/CN.9/WG.V/WP.107, paras. 185 and
187A.

A/CN.9/763, para. 64.

A/CN.9/WG.V/WP.112, paras. 184-186
and 187A.

A/CN.9/766, para. 53.

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

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

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

- (i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and
- (ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;

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

- (i) Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and
- (ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in this State;

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

229. Article 29 gives guidance to the court that deals with cases where the debtor is subject to a foreign proceeding and a local proceeding at the same time. The objective of this article and article 30 is to foster coordinated decisions that would best achieve the objectives of both proceedings (e.g. maximization of the value of the debtor's assets or the most advantageous reorganization of the enterprise). The opening words of article 29 direct the court that in all such cases it must seek cooperation and coordination pursuant to chapter IV (articles 25, 26 and 27) of the Model Law.

230. The salient principle embodied in article 29 is that the commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. This principle is essential for achieving the objectives of the Model Law in that it allows the court in the enacting State in all circumstances to provide relief in favour of the foreign proceeding.

231. However, the article maintains a pre-eminence of the local proceeding over the foreign proceeding. This has been done in the following ways: firstly, any relief to be granted to the foreign proceeding must be consistent with the local proceeding (article 29, subparagraph (a) (i)); secondly, any relief that has already been granted to the foreign proceeding must be reviewed and modified or terminated to ensure consistency with the local proceeding (article 29, subparagraph (b) (i)); thirdly, if the foreign proceeding is a main proceeding, the automatic effects pursuant to article 20 are to be modified and terminated if inconsistent with the local proceeding (those automatic effects do not terminate automatically since they may be beneficial, and the court may wish to maintain them) (article 29, subparagraph (b) (ii)); and fourthly, where a local proceeding is pending at the time a foreign proceeding is recognized as a main proceeding, the foreign proceeding does not enjoy the automatic effects of article 20 (article 29, subparagraph (a) (ii)). Article 29 avoids establishing a rigid hierarchy between the proceedings since that would unnecessarily hinder the ability of the court to cooperate and exercise its discretion under articles 19 and 21. It is desirable not to restrict that latitude of the court when article 29 is enacted.

232. Article 29, subparagraph (c), incorporates the principle that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding or must concern information required in that proceeding. That principle is expressed in article 21, paragraph 3, which deals in a general way with the type of relief that may be granted to a foreign representative, and is restated in article 29, which deals with coordination of local and foreign proceedings. Article 19, paragraph 4, on pre-recognition relief, and article 30, on coordination of more than one foreign proceeding, are inspired by the same principle (see also the comments in para. 175 above).

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 106-110.

A/CN.9/435, paras. 190-191.

(b) Guide to Enactment

A/CN.9/442, paras. 188-191.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.103/Add.1,
para. 188.

A/CN.9/742, para. 70.

A/CN.9/WG.V/WP.112, para. 188.

A/CN.9/766, para. 53.

Article 30. Coordination of more than one foreign proceeding

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

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

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

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

233. Article 30 deals with cases where the debtor is subject to insolvency proceedings in more than one foreign State and foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State. The provision applies whether or not an insolvency proceeding is pending in the enacting State. If, in addition to two or more foreign proceedings, there is a proceeding in the enacting State, the court will have to act pursuant to both article 29 and article 30.

234. The objective of article 30 is similar to the objective of article 29 in that the key issue in the case of concurrent proceedings is to promote

cooperation, coordination and consistency of the relief granted to different proceedings. Such consistency will be achieved by appropriate tailoring of the relief to be granted or by modifying or terminating relief already granted. Unlike article 29 (which, as a matter of principle, gives primacy to the local proceeding), article 30 gives preference to the foreign main proceeding if there is one. In the case of more than one foreign non-main proceeding, the provision does not a priori treat any foreign proceeding preferentially. Priority for the foreign main proceeding is reflected in the requirement that any relief in favour of a foreign non-main proceeding (whether already granted or to be granted) must be consistent with the foreign main proceeding (article 30, subparagraphs (a) and (b)).

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 111-112.

(b) Guide to Enactment

A/CN.9/442, paras. 192-193.

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

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

235. In some jurisdictions, proof that the debtor is insolvent is required for the commencement of insolvency proceedings. In other jurisdictions, insolvency proceedings may be commenced under specific circumstances defined by law that do not necessarily mean that the debtor is in fact insolvent; those circumstances may be, for example, cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissipation of its assets or abandonment of its establishment.

236. In jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of a foreign main proceeding, a rebuttable presumption of insolvency of the debtor for the purposes of commencing an insolvency proceeding in the enacting State. The presumption does not apply if the foreign proceeding is a non-main proceeding. The reason is that an insolvency proceeding commenced in a State other than the State where the debtor has the centre of its main interests does not necessarily mean that the debtor is to be subject to laws relating to insolvency in other States.

237. For the national laws where proof that the debtor is insolvent is not required for the commencement of insolvency proceedings, the presumption established in article 31 may be of little practical significance and the enacting State may decide not to enact it.

238. This rule, however, would be helpful in those legal systems in which commencement of an insolvency proceeding requires proof that the debtor is in fact insolvent. Article 31 would have particular significance when proving insolvency as the prerequisite for an insolvency proceeding would be a time-consuming exercise and of little additional benefit bearing in mind that the debtor is already in an insolvency proceeding in the State where it has the centre of its main interests and the commencement of a local proceeding may be urgently needed for the protection of local creditors. Nonetheless, the court of the enacting State is not bound by the decision of the foreign court, and local criteria for demonstrating insolvency remain operative, as is clarified by the words “in the absence of evidence to the contrary”.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 94 and 102-105.

A/CN.9/WG.V/WP.44, p. 27.

A/CN.9/422, para. 196.

A/CN.9/WG.V/WP.46, p. 18.

A/CN.9/433, paras. 173 and 180-181.

A/CN.9/WG.V/WP.48, p. 23.

A/CN.9/435, paras. 180 and 184.

(b) Guide to Enactment

A/CN.9/436, para. 97.

A/CN.9/442, paras. 194-197.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.103/Add.1,
para. 197.

A/CN.9/742, para. 71.

A/CN.9/WG.V/WP.112, para. 197.

A/CN.9/766, para. 53.

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [*identify laws of the enacting State relating to insolvency*] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

239. The rule set forth in article 32 (sometimes referred to as the hotch-potch rule) is a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to avoid situations in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. For example, an unsecured creditor has received 5 per cent of its claim in a foreign insolvency proceeding; that creditor also participates in the insolvency proceeding in the enacting State, where the rate of distribution is 15 per cent; in order to put the creditor in the equal position as the other creditors in the enacting State, the creditor would receive 10 per cent of its claim in the enacting State.

240. Article 32 does not affect the ranking of claims as established by the law of the enacting State and is solely intended to establish the equal treatment of creditors of the same class. To the extent claims of secured creditors or creditors with rights *in rem* are paid in full (a matter that depends on the law of the State where the proceeding is conducted), those claims are not affected by the provision.

241. The words “secured claims” are used to refer generally to claims guaranteed by particular assets, while the words “rights *in rem*” are intended to indicate rights relating to a particular property that are enforceable also against third parties. A given right may fall within the ambit of both expressions, depending on the classification and terminology of the applicable law. The enacting State may use another term or terms for expressing those concepts.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 130-134.

A/CN.9/419, paras. 89-93.

A/CN.9/WG.V/WP.44, pp. 29-30.

A/CN.9/422, paras. 198-199.

A/CN.9/WG.V/WP.46, p. 18.

A/CN.9/433, paras. 182-183.

A/CN.9/WG.V/WP.48, p. 23.

A/CN.9/435, paras. 96 and 197-198.

(b) Guide to Enactment

A/CN.9/436, para. 98.

A/CN.9/442, paras. 198-200.

VI. Assistance from the UNCITRAL Secretariat

A. Assistance in drafting legislation

242. The UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. Further information may be obtained from the UNCITRAL secretariat (mailing address: Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060-4060; facsimile: (+43-1) 26060-5813; e-mail: uncitral@uncitral.org; Internet home page: <http://www.uncitral.org>).

B. Information on the interpretation of legislation based on the Model Law

243. The Model Law is included in the Case Law on UNCITRAL Texts (CLOUT) information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws developed by UNCITRAL. The purpose of the system is to promote international awareness of those legislative texts and to facilitate their uniform interpretation and application. The secretariat publishes abstracts of decisions in the six official languages of the United Nations and the full, original decisions are available, upon request. The system is explained in a user's guide that is available on the above-mentioned Internet home page of UNCITRAL.

Annex I

General Assembly resolution 52/158 of 15 December 1997

52/158. Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it created the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Noting that increased cross-border trade and investment leads to greater incidence of cases where enterprises and individuals have assets in more than one State,

Noting also that when a debtor with assets in more than one State becomes subject to an insolvency proceeding, there often exists an urgent need for cross-border cooperation and coordination in the supervision and administration of the insolvent debtor's assets and affairs,

Considering that inadequate coordination and cooperation in cases of cross-border insolvency reduce the possibility of rescuing financially troubled but viable businesses, impede a fair and efficient administration of cross-border insolvencies, make it more likely that the debtor's assets would be concealed or dissipated and hinder reorganizations or liquidations of debtors' assets and affairs that would be the most advantageous for the creditors and other interested persons, including the debtors and the debtors' employees,

Noting that many States lack a legislative framework that would make possible or facilitate effective cross-border coordination and cooperation,

Convinced that fair and internationally harmonized legislation on cross-border insolvency that respects the national procedural and judicial systems and is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,

Considering that a set of internationally harmonized model legislative provisions on cross-border insolvency is needed to assist States in modernizing their legislation governing cross-border insolvency,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Cross-Border Insolvency contained in the annex to the present resolution;^a

2. *Requests* the Secretary-General to transmit the text of the Model Law, together with the Guide to Enactment of the Model Law prepared by the Secretariat, to Governments and interested bodies;

3. *Recommends* that all States review their legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system and, in that review, give favourable consideration to the Model Law, bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency;

4. *Recommends also* that all efforts be made to ensure that the Model Law, together with the Guide, become generally known and available.

72nd plenary meeting

15 December 1997

^aThe *UNCITRAL Model Law on Cross-Border Insolvency* is presented in part one of the present publication.

Annex II

Decision of the United Nations Commission on International Trade Law

At its 973rd meeting on 18 July 2013, the Commission adopted the following decision:

The United Nations Commission on International Trade Law,

“*Noting* that legislation based upon the UNCITRAL Model Law on Cross-Border Insolvency³⁷ has been enacted in some 20 States,

“*Noting also* the widespread increase in the incidence of cross-border insolvency proceedings and, accordingly, the growing opportunities for use and application of the Model Law in cross-border insolvency proceedings and the development of international jurisprudence interpreting its provisions,

“*Noting further* that courts frequently have reference to the Guide to Enactment of the Model Law³⁸ for guidance on the background to the drafting and interpretation of its provisions,

“*Recognizing* that some uncertainty with respect to the interpretation of certain provisions of the Model Law has emerged in the jurisprudence arising from its application in practice,

“*Convinced* of the desirability, in interpretation of those provisions, of regard to the international origin of the Model Law and the need to promote uniformity in its application,

“*Convinced also* of the desirability of providing additional guidance through revision of the Guide to Enactment of the Model Law with respect to the interpretation and application of selected aspects of the Model Law to facilitate that uniform interpretation,

“*Appreciating* the support for and the participation of international inter-governmental and non-governmental organizations active in the field of insolvency law reform in the revision of the Guide to Enactment of the Model Law,

³⁷ General Assembly resolution 52/158, annex (model law only).

³⁸ A/CN.9/442, annex.

“Expressing its appreciation to Working Group V (Insolvency Law) for its work in revising the Guide to Enactment of the Model Law,

“1. *Adopts the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* contained in document A/CN.9/WG.V/WP.112, as revised by the Working Group at its forty-third session (set forth in document A/CN.9/766) and by the Commission at its current session,³⁹ and authorizes the Secretariat to edit and finalize the text of the Guide to Enactment and Interpretation in the light of those revisions;

“2. *Requests* the Secretary-General to publish, including electronically, the revised text of the Guide to Enactment and Interpretation of the Model Law, together with the text of the Model Law, and to transmit it to Governments and interested bodies, so that it becomes widely known and available;

“3. *Recommends* also that the *Guide to Enactment and Interpretation of the Model Law* be given due consideration, as appropriate, by legislators, policy makers, judges, insolvency practitioners and other individuals concerned with cross-border insolvency laws and proceedings; and

“4. *Recommends* that all States continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency and invites States that have enacted legislation based upon the Model Law to advise the Commission accordingly.”

³⁹ *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 17 (A/68/17)*, para. 197.



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Closed consultation

Implementation of two UNCITRAL Model Laws on Insolvency Consultation

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Introduction

Executive Summary

This consultation proposes the implementation into UK law of two “model laws” adopted by the United Nations Commission on International Trade Law (“UNCITRAL”), further developing the international framework for the management of cross-border insolvencies. By being amongst the first countries to consider their implementation, the UK will signal its ongoing commitment to mutual cooperation and international best practice.

The [Model Law on Recognition and Enforcement of Insolvency-Related Judgments](https://uncitral.un.org/en/texts/insolvency/modellaw/mlj) (<https://uncitral.un.org/en/texts/insolvency/modellaw/mlj>) deals with cross-border recognition of judgments that are associated with insolvency proceedings. The [Model Law on Enterprise Group Insolvency](https://uncitral.un.org/en/MLEGI) (<https://uncitral.un.org/en/MLEGI>) provides tools to manage and coordinate insolvencies within corporate groups, while respecting that each company within the group remains a separate legal entity. These two model laws would join and complement the [Model Law on Cross-Border Insolvency](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency) (https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency), which provides a grounding framework for international cooperation in respect of insolvency proceedings, and which the UK implemented in 2006 and 2007.

Cooperation between nations on insolvency related matters is generally mutually beneficial. Avoiding unnecessary insolvency proceedings and the piecemeal destruction of viable businesses helps to preserve value throughout the insolvency, increase returns to creditors and protect employees’ jobs. International recognition of insolvency proceedings and related legal decisions makes the different national insolvency regimes accessible to business, allowing them to choose the most appropriate jurisdiction in which to restructure or liquidate based on their needs and the requirements of their creditors.

Implementation of the model laws can be achieved through a power introduced in the Private International Law (Implementation of Agreements) Act 2020. This consultation highlights one issue in particular that affects the Model Law on Recognition and Enforcement of Insolvency-Related Judgments: its interaction with the unique position that contracts governed by the law of England and Wales currently hold. We are proposing that this model law should be partially implemented, in a way that reserves that issue for future consideration. The Model Law on Enterprise Group Insolvency is proposed to be implemented in full.

Glossary

This consultation makes use of a number of uncommon abbreviations, which are introduced at various points throughout the text. For convenience these are also reproduced below:

CBIR

the Cross-Border Insolvency Regulations 2006, and the Cross-Border Insolvency Regulations (Northern Ireland) 2007, which together provide a basis for the recognition of foreign insolvency proceedings in the UK, and for assistance to be provided to foreign insolvency officeholders.

MLCBI

The UNCITRAL Model Law on Cross-Border Insolvency, which has been implemented in the UK through the CBIR.

MLEG

the UNCITRAL Model Law on Enterprise Group Insolvency.

MLIJ

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

UNCITRAL

the United Nations Commission on International Trade Law.

The UNCITRAL Model Laws on Insolvency

The United Nations Commission on International Trade Law (“UNCITRAL”) was established in 1966 to “further the progressive harmonization and modernization of the law of international trade” through the development of legislative and non-legislative instruments in several key areas of commercial law. Its 60 members are drawn from the member states of the United Nations, elected for six year terms by the General Assembly, with membership allocated so as to include representation from various geographical regions and the principal economic and legal systems throughout the world. The UK is actively involved in the Commission’s work and was re-elected as a member in 2019. The Commission’s work has included insolvency law since 1995: notably publishing the UNCITRAL Model Law on Cross-Border Insolvency in 1997, as well as a [legislative guide on insolvency law](https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law) (https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law) to assist states in implementing international best practice, initially in 2004.

The model law has been implemented in 48 states worldwide and represents a significant step forward in international cooperation on insolvency matters. It provides a template for the implementing states, with their separate legal systems, to subscribe to a common framework for the recognition and enforcement of foreign insolvency proceedings.

Where there is a foreign insolvency, this framework makes the process of handling of assets located within the implementing state more predictable for the foreign insolvency practitioner. This allows the insolvency to proceed as efficiently as possible, reducing costs and so increasing returns to creditors, and promoting trade between nations. Mutually implementing states benefit, as their insolvency professionals can cooperate in dealing with the insolvency of a cross-border or multi-national entity under a set of rules that are understood in both jurisdictions. The original Model Law was implemented in UK through the Cross-Border Insolvency Regulations 2006 (which apply to England, Wales and Scotland); and the Cross-Border Insolvency Regulations (Northern Ireland) 2007. These supplement the other means of obtaining assistance that may be available in respect of foreign insolvencies under the common law, or in England and Wales for example through court to court cooperation under section 426 of the Insolvency Act.

UNCITRAL's work on insolvency has continued, and the Commission has recently adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (in 2018) and the Model Law on Enterprise Group Insolvency (in 2019). These both expand and further develop the framework provided by the original Model Law.

Recognising insolvency-related judgments

A foreign court's involvement with insolvency proceedings does not always end with its opening of the proceedings in its jurisdiction. Further orders or judgments may be necessary in order to manage the insolvency effectively: this occurs most obviously in the event of disputed assets where the ownership or most appropriate disposal is in doubt, but could happen in relation to almost any aspect of the case.

The original Model Law on Cross-Border Insolvency did not explicitly specify the extent to which insolvency-related judgments can be recognised and enforced under its rules. As a result, how this works has depended in part on the implementing jurisdiction. In the UK for example, the Cross-Border Insolvency Regulations have been interpreted as only allowing the court to provide the relief that would be available in domestic insolvency proceedings under UK law [Pan Ocean Co Ltd – also known as Fibria Celulose S/A v Pan Ocean [2014] EWHC 2124 (Ch)]. A foreign insolvency judgment cannot currently be enforced here under the Cross-Border Insolvency Regulations; while more generally, common law holds that foreign judgments cannot be enforced in England and Wales unless the parties were present in or in some sense submitted to the foreign jurisdiction [Rubin v Eurofinance SA [2012] UKSC 46]. The ambiguity in the original Model Law leaves a gap in the coordination of

international insolvency proceedings, with different countries taking different approaches as to what is acceptable, thus making the proceedings less efficient and their outcome less certain.

The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments takes steps towards resolving this situation. It provides a stand-alone framework that, while building in the necessary safeguards against situations that would compromise public policy, allows the implementing state to recognise and enforce foreign insolvency-related judgments in a predictable way. An optional provision excludes judgments that relate to insolvency proceedings that cannot be recognised under the original Model Law: for example, if the judgment does not originate in a jurisdiction where the insolvent debtor has their centre of main interests or an establishment. This balances the efficiency of operating a single global set of insolvency proceedings against the need to ensure that those proceedings are fair and safeguard the interests of local creditors. The judgments Model Law also offers an alternative approach to the recognition of judgments for states that have already implemented the original Model Law, through the explicit clarification that it is possible for the court to recognise and enforce a judgment as part of the assistance available to foreign officeholders under that law.

Insolvency in corporate groups

The UNCITRAL Model Law on Enterprise Group Insolvency expands the system under the original Model Law on Cross-Border Insolvency to deal with situations affecting interlinked groups of enterprises. The original Model Law provides a framework for international cooperation as regards the insolvency of a single entity, and the rules provided by this new Model Law address situations where, for example, several companies share the same owners and are operated as a group, and one or more of those businesses enters insolvency.

The new Model Law aims to promote cooperation and coordination between the courts, insolvency practitioners and other bodies dealing with the insolvency of group members, with a focus on the development of group proposals that will protect, preserve, realise or enhance the overall combined value of the members.

The value of international cooperation to the UK

One of the primary drivers for the development of efficient insolvency proceedings is the preservation of economic value, and its return to the marketplace to spur further growth. In implementing any new rules in this area, it is important to consider the impact on the UK's own commercial environment and any effect on our insolvency sector carrying out that work.

Such an economic analysis is not straightforward. Restructuring can occur within formal insolvency proceedings, which in the UK may be initiated in or out of court with varying levels of judicial oversight and publicity. As the arrangements reached between debtors and their creditors can be commercially sensitive, the detail may not always be made public. At the same time, it is possible for a company to reach an agreement with its creditors against the backdrop of the UK's insolvency framework without entering formal insolvency. In those cases where formal insolvency proceedings are commenced, any cross-border element may not be readily apparent to an outside observer, making the capture of relevant cases for examination a difficult task in its own right. With this in mind, it is not possible to accurately measure the impact of any changes to the insolvency framework in this area in monetary terms.

There is, however, strong reason to suggest that the UK's participation in systems of global cooperation on insolvency matters is widely beneficial, both to the UK and its international partners. Efficient insolvency proceedings mean greater returns to creditors. That strengthens economic activity, both within the UK and abroad. By removing the barriers that prevent insolvencies from being dealt with in a holistic fashion, rather than piecemeal in each jurisdiction, the value that is present in a business as a going concern can be better preserved: direct returns from insolvency are boosted, and jobs and livelihoods maintained; the economic disruption from the business failure is minimised. Cooperation between jurisdictions in this way helps to bolster international trade by setting clear expectations as to how matters will be handled in the event that one of the parties to a contract becomes insolvent.

The UK's insolvency regime is highly respected internationally for its flexibility, efficiency and reliable outcomes, while our courts and legal and insolvency practitioners are valued for their professional expertise and experience. Global cooperation allows international businesses to choose to restructure in the UK, knowing that this will lead to the best result for their creditors, shareholders and management, with confidence that the outcome will be accepted both in their local courts and across the world. As Britain faces outward following its departure from the EU, we remain well-placed to continue to lead the way in this area.

Implementing the new model laws

Together, the two new model laws represent useful additions to the international toolbox for cooperation in respect of insolvency proceedings. By taking a place among the first countries to consider their implementation, the UK continues to signal its commitment to that cooperation and the sponsoring of international best practice.

In making the necessary choices regarding the implementation of the Model Law dealing with insolvency-related judgments, we have taken account of concerns that have been raised regarding its interaction with other UK law. These are discussed briefly below. There is a risk that the full implementation of the Model Law could have as yet unanticipated effects upon domestic contract law. We consider that we should

proceed with caution in its implementation, and preserve flexibility for UK courts to choose to recognise judgments issued in foreign jurisdictions based on the full circumstances of each case.

We have therefore chosen not to implement the system of recognition provided by the full “judgments” Model Law. We instead propose to implement its “article X”. This would introduce the concept of recognition of insolvency-related judgments under the UNCITRAL Model Laws to the UK in a way that minimises the impact on our existing legal framework. In doing this we will draw upon other parts of the Model Law in order to provide guidance to the courts, detailed later in this document.

The Model Law on enterprise group insolvency provides additional options to the UK’s courts and insolvency professionals. As it does not have the same wider implications as the other new judgment Model Law, we propose to implement it in full as soon as possible.

The practical implementation of the model laws is facilitated by the powers under the Private International Law (Implementation of Agreements) Act 2020 [Section 2(13), “Implementation of other agreements on private international law”]. This allows the implementation of international model laws through secondary legislation, rather than requiring a further Act of Parliament. Subject to the outcome of this consultation, we will make use of this power to implement both “article X” of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments and the Model Law on Enterprise Group Insolvency.

We have set out below details of the approach that we propose to take in implementing each of the model laws, and their impact on the UK’s existing legal framework: this consultation will help us to understand the views of the insolvency sector and others who may be affected by the change.

Impact on Devolved Administrations

Insolvency policy is devolved to Northern Ireland, which is not directly affected by the outcome of this consultation.

Insolvency law is part devolved to Scotland, and the consultation touches on a range of reserved and devolved matters. The implementing power that we expect to use requires that the Secretary of State acts with the consent of Scottish Ministers in making regulations that have effect in Scotland.

Insolvency is a reserved area of policy as regards Wales.

Notwithstanding the areas in which insolvency policy is devolved, we consider that it is important to maintain a unified approach to the recognition of foreign insolvency proceedings and judgments throughout the UK. The changes proposed in the consultation will be further discussed with the devolved administrations in Northern Ireland and Scotland in order to facilitate this.

About this Consultation

Who this is for

This consultation is intended to be read by, and seeks responses from, anyone with an interest in the UK's adoption of the two model laws. It may be relevant to anyone affected by the UK's recognition of foreign insolvency proceedings and related judgments; or the management of the insolvency of corporate groups.

This may include:

- Insolvency practitioners
- The legal profession
- Directors
- Creditors
- Business and consumer groups

Responses are particularly sought from individuals and organisations dealing with cross-border insolvency work.

How to respond

Responses to the consultation should be addressed to Andrew Shore at the Insolvency Service. We would encourage all responses to be sent by email rather than physical post, for the attention of Andrew Shore, to Policy.Unit@insolvency.gov.uk.

Physical written correspondence may be sent (please use the full address below):

FAO Andrew Shore, Policy
The Insolvency Service
16th Floor, 1 Westfield Avenue
London
E20 1HZ

Please include, when responding, your background or interest in this area (e.g. if you are an insolvency practitioner and/or a legal professional). If you are responding on behalf of an organisation or group, please indicate this.

Enquiries

Please address all enquiries to Andrew Shore using the above contact details.

Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential please tell us, but please be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

We will process your personal data in accordance with all applicable data protection laws. See our [privacy policy \(https://www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy/about/personal-information-charter\)](https://www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy/about/personal-information-charter).

We will summarise responses and publish this summary on GOV.UK. The summary will include a list of names of organisations that responded, but not people's personal names, addresses or other contact details.

What happens next?

This consultation addresses the requirement for public consultation in the Private International Law (Implementation of Agreements) Act 2020, allowing regulations to implement the model laws to be brought forward under that Act. In order to maintain a unified framework within the UK, such legislation will require further discussion, agreement and coordination with the devolved administrations as highlighted above.

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

The Government accepts that it is not appropriate to implement the model law on insolvency-related judgments in full at the present time. Implementing “article X”, will enable the courts to recognise foreign insolvency-related judgments as relief under the UK UNCITRAL Model Law on Cross-Border Insolvency. We will provide a framework for the courts to use, in deciding whether to recognise an insolvency-related judgment in this way, that reflects elements of the full model law.

Background

The Model Law on Recognition and Enforcement of Insolvency-Related Judgments (“MLIJ”) addresses the disparity in the handling of insolvency-related judgments that arises due to the legal differences between different jurisdictions, by providing a simple, straightforward and harmonised procedure to complement and clarify the original Model Law on Cross-Border Insolvency (“MLCBI”) and assist with the conduct of cross-border insolvency proceedings. It was developed with reference to the documents published by the “Hague Conference on Private International Law”, the principal organisation that sets international best practice on the recognition of non-insolvency foreign judgments. Although the Hague Conference’s instruments exclude insolvency proceedings from their scope, maintaining a compatible approach between the two is in the interests of moving towards a consistent international framework for private international law as a whole.

The MLIJ sets out rules under which an implementing country can recognise and enforce foreign insolvency-related judgments in a predictable way. These stand alone and (aside from “article X” which is covered below), separately from the MLCBI’s own rules regarding the assistance that can be provided in respect of foreign insolvency proceedings. For the purposes of the model law, insolvency-related judgments are those judgments, issued on or after the commencement of insolvency proceedings, that arise as a consequence of, or are “materially associated” with, the proceedings. The judgment that opened the proceedings is excluded and dealt with under the MLCBI, and together the two model laws provide a comprehensive approach to the recognition and enforcement of both insolvency proceedings and subsequent related judgments.

The MLIJ aims to provide:

- A simple, clear-cut process for the recognition and enforcement of insolvency-related judgments originating from foreign jurisdictions.
- The option for the court to provide interim relief (e.g. ordering steps for the immediate protection of an asset that is affected by the foreign judgment) while it is deciding whether to recognise a judgment, preserving assets and value that might otherwise be lost.
- As much certainty as possible that insolvency-related judgments will be recognised and enforced, where they do not contravene the implementing country’s public policy, by mandating that foreign judgments will be accepted unless several specific requirements for refusal are met.
- An option to refuse recognition where the insolvency proceeding to which the judgment in question relates could not be recognised under the MLCBI.

- **Severability:** where only one element of a multi-part judgment can be recognised and enforced (e.g. as other parts of the judgment relate to matters that fall out of scope) that element will still be recognised and enforced in isolation from the rest of the judgment.

The MLIJ includes one provision, “article X”, that is intended to be added to the MLCBI. Article X states that the recognition of insolvency-related judgments is a form of assistance that can be granted under the MLCBI. It removes the ambiguity previously present in the MLCBI in that area, and confirms a regime for the recognition of insolvency-related judgments through the MLCBI. That system differs in some particulars from that of the “full” MLIJ. Most importantly, relief granted under the MLCBI is always at the discretion of the receiving court, in contrast to the generally mandatory recognition that the MLIJ rules impose.

In our view the differences between the full MLIJ system and the system provided by article X (when it is added to the MLCBI) require states that are considering the implementation of both model laws, and that wish to maintain a single coherent approach, to make choices between the two. These are further explored below.

Further detail regarding the MLIJ and additional resources can be obtained via the UNCITRAL page at:

<https://uncitral.un.org/en/texts/insolvency/modellaw/mlij>
(<https://uncitral.un.org/en/texts/insolvency/modellaw/mlij>)

Legal impact in the UK

The MLIJ is a free-standing model law focusing only on the recognition and enforcement of insolvency related judgments. Importantly, while it is designed to complement and clarify the MLCBI, it is not dependent on the prior or simultaneous adoption of that earlier model law.

The MLIJ has effect in two areas. Firstly, it addresses the question of whether the recognition and enforcement of an insolvency related judgment is a relief available to assist foreign insolvency representatives under (article 21 of) the MLCBI.

Article X of the MLIJ relates directly to this issue:

“Notwithstanding any prior interpretation to the contrary, the relief available under [... article 21 of the UNCITRAL Model Law on Cross-Border Insolvency] includes recognition and enforcement of a judgment.”

With this provision UNCITRAL makes clear that under the MLCBI it is envisaged that the relief available under article 21 does include the recognition and enforcement of a judgment. We expect that the effect would be to set aside the approach taken in the

previous judgment of the Supreme Court in *Rubin v Eurofinance* in respect of the recognition of foreign insolvency-related judgments, i.e. article 21 of the MLCBI did not encompass their recognition and enforcement.

The MLIJ's main focus though is to make specific freestanding provision for the recognition and enforcement of insolvency related judgments. It sets a framework for the recognition and enforcement of judgments and for the instances when the courts are to be able to refuse recognition and enforcement on jurisdictional or on other grounds.

Crucially it deals only with what is in effect a subset of the reliefs available under article 21 of the MLCBI (because the reliefs available are now known to include the enforcement of insolvency related judgments). In this regard there now seem to be two ways to adopt model laws relating to insolvency-related judgments, and the impact in the UK of implementation of both parts of the Model Law would be the creation of two different systems for the recognition and enforcement of insolvency-related judgments. The system described in the full MLIJ is not a straightforward duplication or restatement of the system that would be created in the MLCBI through the adoption of article X. In our view, therefore, implementing both systems would represent unnecessary and confusing duplication.

The approach adopted by article 14(g) of the MLIJ is different from that taken by the MLCBI in respect of the rules as to jurisdiction of the foreign court. Instead of requiring the debtor to have a centre of main interests or establishment in the jurisdiction of the court of the foreign judgment, the requirements are that one of four criteria are met (for example that the affected party consented, or that they submitted to the proceedings).

Under the MLIJ if a judgment is recognised it must be enforced.

As previously indicated, the MLCBI and MLIJ are designed to be free-standing. There is no "Guide to Enactment" regarding the joint enactment of these model laws together. It is clear however that states wishing to provide a unified framework for the recognition and enforcement of insolvency-related judgments will need to make certain choices.

The "Rule in Gibbs"

One consequence of implementing the full MLIJ would be to undermine the "rule in Gibbs", which was first established in a case brought by Antony Gibbs & Sons [Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399] in 1890. This long-standing caselaw in England and Wales holds that where a contract specifies that it is governed by a particular country's law, it cannot be compromised or discharged by insolvency proceedings under a different law. As many international contracts specify the law of England and Wales as their governing law, in the eyes of the courts of England and Wales a restructuring using insolvency

proceedings in a foreign jurisdiction cannot be effective against the debts owed under those contracts, unless the affected parties have taken part in the proceedings or otherwise submitted to them. Such debts remain outstanding after the foreign insolvency proceeding concludes, and can then be pursued against any assets the insolvent company or individual may hold here.

The Gibbs rule may cause particular difficulty for foreign companies that are seeking to restructure their debts in their native jurisdiction, if they also have interests in the UK and contracts governed by the law of England and Wales. This can lead to convoluted and inefficient results. In proceedings relating to the OJSC International Bank of Azerbaijan [OJSC International Bank of Azerbaijan v Sberbank of Russia [2018] EWCA Civ 2802 (also known as: Bakhshiyeva v Sberbank of Russia)], the courts of England and Wales' refusal to stay the creditors' rights to enforce their debts beyond the end of Azerbaijani restructuring proceedings led to those proceedings remaining open indefinitely. In some cases a separate scheme of arrangement governed by the law of England and Wales might be entered into in order to resolve the issues the rule in Gibbs creates, but with consequent duplication of effort, higher costs and reduced returns to creditors.

In many situations, knowing the law that a contract will be adjudicated under provides greater certainty of outcomes for the contracting parties, and so supports international trade. By contrast, the inefficiency of enforcing this jurisdictional rule in insolvency scenarios, over the more commonly recognised test of where the insolvent's "centre of main interests" is located, could be considered to have the opposite effect. The approach of the law of England and Wales to this issue pre-dates modern thinking on the management of cross-border insolvencies, and its emphasis on the value of cooperation between jurisdictions for the benefit of creditors. The discrepancy has been the subject of negative commentary internationally, including from courts in Singapore [See Pacific Andes Resources Development Ltd and other matters [2016] SGHC 210] and the United States [See In Re Agrokor d.d., 591 B.R. 163 (Bankr. S.D.N.Y. 2018)], which have taken an opposite view to that of the courts of England and Wales.

Implementation of the MLIJ in full in the UK would provide foreign courts with the means to override the rule in Gibbs, through an "insolvency-related" judgment regarding the contracts governed by the law of England and Wales, provided that they are exercising their jurisdiction in a way that is compatible with the law of England and Wales and none of the other grounds for refusing recognition apply.

The addition of article X to the MLCBI clarifies the interpretation of Article 21 of that model law. However, without the implementation of the rest of the MLIJ it will not itself override the rule in Gibbs (see "Proposals", below).

Additional impacts

The MLIJ could have further consequences that are particular to the UK's legal system and the popular use of contracts governed by the law of England and Wales for international business, including financial contracts (such as those governing international swaps and derivatives [As of 2018 ISDA noted that “virtually all” of the ISDA master agreements entered into between counterparties based in the EU or EEA were governed by the law of England and Wales. This position may change, following the UK's exit from the EU and ISDA's issue of French- and Irish- law governed master agreements.]). Contracts governed by the law of England and Wales hold a unique position in their widespread international use combined with the certainty that the rule in Gibbs provides to the contracting parties.

We are not aware of any evidence to demonstrate the extent to which this certainty has played a part in the choice of the law of England and Wales for particular contracts or types of contract; nor the impact that the loss of that certainty might have.. Although the rule in Gibbs was effectively negated as regards European restructurings by the EU's Insolvency Regulation and remains subject to reinterpretation and review by the courts as the caselaw develops, this remains an area of concern.

The long-term economic value of the UK's ongoing participation in international systems of cooperation in this area, and the efficient management of insolvency proceedings have to be balanced against the short-term disruption that the MLIJ would create for our insolvency sector.

There is a tension between the need to develop new ways of cooperating internationally, especially following our departure from the EU, and the need to retain as much as possible of the existing certainty in how insolvencies are managed in the current global economic climate following the pandemic. We need to strike a balance between offering some certainty to the sector whilst at the same time forging new relationships and enhancing our ability to deal with cross border insolvencies.

Proposals

The UK remains committed to the development of international cooperation in insolvency matters. However, in order to maintain some certainty, we do not consider that it would be appropriate to implement the full MLIJ at the present time.

We therefore propose to give effect to “article X” in the Cross-Border Insolvency Regulations 2006, i.e. the UK's implementation of the MLCBI. This will enhance the UK version of the MLCBI by allowing the courts discretionary power to recognise and enforce foreign insolvency-related judgments where it is appropriate to do so.

Implementing this change will require secondary legislation, using the power contained in the Private International Law (Implementation of Agreements) Act 2020.

Article X

This provision of the MLIJ is intended to be added to the MLCBI, to create greater uniformity in interpreting the assistance that can be provided to foreign insolvency proceedings:

Article X. Recognition of an insolvency-related judgment under [the Cross-Border Insolvency Regulations 2006]

Notwithstanding any prior interpretation to the contrary, the relief available under [article 21 of schedule 1 to the Cross-Border Insolvency Regulations 2006] includes recognition and enforcement of a judgment.

Implementing article X will provide a new route for foreign insolvency-related judgments to be recognised in the UK. We expect it will set aside the ruling in *Rubin v. Eurofinance* to the extent that it was held that article 21 of the Cross-Border Insolvency Regulations 2006 does not extend to the recognition of a judgment, and our intention is that it should be possible for a foreign insolvency-related judgment to be recognised in the UK where this will assist foreign insolvency proceedings that have also been recognised.

Recognition of the judgment in this manner will be at the court's discretion. In applying article X, we expect that UK courts will continue to have regard to other UK law and to apply the safeguards specified in the Cross-Border Insolvency Regulations. For this reason we do not anticipate, and it is not our intention, that the addition of article X will affect the application of the rule in *Gibbs* to the rights of creditors who have contracted with the insolvent under the law of England and Wales.

In order to give effect to article X in the UK, we will add a reference to it on the list of documents specified in regulation 2(2) of the Cross-Border Insolvency Regulations 2006, which implement MLCBI in Great Britain. Regulation 2(2) lists documents to which the courts in Great Britain may look in ascertaining the meaning of the MLCBI. Currently these documents are specified as the MLCBI itself, UNCITRAL documents relating to the preparation of the MLCBI, and the original Guide to Enactment from 1997.

We will also take the opportunity to update the same regulation to take account of the publication by UNCITRAL of "The Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation" (the updated Guide to Enactment of the MLCBI) in 2014. This incorporates updated guidance on the interpretation of the insolvent's "centre of main interests" and other clarifications to the earlier guidance issued in 1999.

As well as these additions to the list of documents under regulation 2(2), we will insert a new regulation that will provide a list of discretionary, illustrative, and non-exhaustive grounds of refusal, that courts can rely on when deciding whether or not to recognise and enforce a foreign judgment under article 21 of the MLCBI. This list will build on article 14 of the MLIJ (see "Process of recognition", below).

Process of recognition

Under the MLCBI there is an established process for the recognition and enforcement of a foreign insolvency proceeding.

An application will be made by the foreign representative; the court will consider whether interim relief to assist in managing the insolvent's affairs is appropriate while the matter is examined

Article X stipulates that relief can include the recognition of a foreign judgment relating to the insolvency. As article X states that this relief is available under article 21 of the MLCBI, which is the provision that allows relief to be granted following the recognition of a foreign insolvency proceeding, the recognition of judgments is only explicitly available once a related insolvency proceeding has itself been recognised.

Neither the MLCBI nor article X address the question of whether a judgment should, or should not, be recognised. The approach taken in the wider MLIJ is helpful in this regard, and we therefore propose to provide a non-exhaustive list of factors that the court may take into account when deciding whether or not to recognise a judgment. These will be based primarily on article 14 of the MLIJ, which states that recognition may be refused where (in short):

- A defending party was not given sufficient notice to arrange their defence;
- The judgment was obtained by fraud;
- The judgment is inconsistent with a UK court's judgment in respect of the same parties;
- The judgment is inconsistent with an earlier judgment in another foreign jurisdiction that would also be recognised in the UK;
- The enforcement of the judgment would interfere with the administration of the debtor's insolvency proceedings;
- Creditors' rights were not adequately protected; or
- The defending party did not submit to the foreign jurisdiction and the originating court did not otherwise exercise jurisdiction on a basis that is compatible with UK law.

In addition, the court will be required to have regard to public policy in the UK.

In contrast to the system contained in the full MLIJ, the court will retain its discretion as to the relief granted. The court will retain discretion to recognise a judgment even if one of the above factors applies, if that is appropriate, or to apply another relevant factor in deciding not to recognise a judgment.

Further review

In a number of areas, greater clarity may be expected in the coming years. We will continue to monitor the situation in the expectation that, in due course, , it will be right to re-examine the rule in Gibbs and its impact. We will also provide the opportunity for affected parties to assess their risk and make additional representations to us, by returning to this subject in a future call for evidence.

Questions

As explained above, we propose to:

1. Allow the recognition and enforcement of insolvency-related judgments in the UK by adding article X of the MLIJ to the list of documents in regulation 2 of the Cross-Border Insolvency Regulations 2006;
2. Provide the court with a non-prescriptive list of possible grounds for refusal to recognise and enforce an insolvency-related judgment, based primarily on article 14 of the MLIJ; and
3. Update regulation 2 of the Cross-Border Insolvency Regulations 2006 to take account of the clarifying guidance issued by UNCITRAL in 2014.

We will issue a further call for evidence on the rule in Gibbs in due course

We welcome views on the above proposals, and responses to the specific questions below.

Q1. What is your view on the proposal to partially implement the MLIJ in the UK by adopting article X?

Q2. What is your view on the proposal to provide the court with a non-exhaustive list of factors that it may take into account when deciding whether to recognise an insolvency-related judgment?

Q3. In your opinion, what approach is needed to create the legal effect we are seeking?

Q4. What is your view of updating the list of documents to which the court can refer, to take account of the guidance issued by UNCITRAL in 2014?

UNCITRAL Model Law on Enterprise Group Insolvency

The Government recognises the value of the tools provided by the enterprise group model law, and proposes to bring forward legislation to implement it.

Background

The Model Law on Enterprise Group Insolvency (“MLEG”) deals with insolvency where it affects two or more of a group of related enterprises, where the financial and business affairs of the group’s different members are interlinked. It addresses situations where the best results can be obtained by considering several members together or the group as a whole rather than the individual parts.

In the UK this might be, for example, a business that operates through a group of companies, with different parts of the corporate group being responsible for different aspects of the business. The tools offered by the MLEG complement and expand upon the rules for recognition of insolvency proceedings found in the MLCBI, although they can be applied both in an international context where the participating group members are distributed between two or more jurisdictions, and to wholly domestic groups whose participating members are all present in one country.

The MLEG aims to provide:

- A legal framework to enable cross-border cooperation to manage the insolvency of enterprise groups, providing legal authority for insolvency practitioners, judges and others to work together towards a common outcome.
- The coordination of multiple insolvency proceedings affecting different group members through the development and implementation of an appropriate group plan.
- Cross-border recognition of the group plan within each relevant jurisdiction.
- Avoidance of unnecessary insolvency proceedings through the use of legally enforceable undertakings to creditors.

The concept of the coordinating plan or “group insolvency solution” is central to the approach taken in the MLEG, and many of its provisions are intended to ensure that the group members can cooperate effectively in implementing the plan regardless of where they may be based. While this coordination will be carried out by a “group representative” who must also be authorised to represent insolvency proceedings in respect of one or more of the group members, solvent group members may take part in the plan (and in many cases their participation will be crucial to its success). Such plans are entirely voluntary in nature, with each part of the group independently choosing to be included, and do not themselves interfere with other requirements of national law.

The benefit offered by the MLEG is that the proceedings can be coordinated so as to deal with the business of the group as a whole, so producing a greater return for all of the creditors involved than if each part of the group was handled separately. This can include avoiding insolvency proceedings where practicable, and managing the interdependencies between group members to preserve the greater economic value that is present in the group as a whole.

While the plan will not itself affect the order of payment of creditors, the MLEG's provisions that aim to avoid unnecessary insolvency proceedings allow for a limited modification to the priority of payments where that will be helpful. Those provisions allow the insolvency practitioner responsible for a main insolvency proceeding, with the court's approval, to treat creditors according to the insolvency law of another country – making payment to them as if they had opened an additional local insolvency proceeding but without actually requiring them to do so. As a result, where creditors could recover more money by making their claims in another country against the assets there, this can be accommodated without the expense of opening a second insolvency proceeding. This improves efficiency and returns from the insolvency, and enables it to be coordinated in one place.

A supplemental part of the MLEG allows this concept of synthetic insolvency proceedings to be further extended, allowing insolvency practitioners to give similar undertakings to those mentioned above even where the foreign insolvency proceeding would have been a main proceeding. This makes possible centralised management of the insolvency of a group member in the most convenient jurisdiction for the benefit of the creditors, and assists a single insolvency practitioner to manage the insolvencies of two or more group members based in multiple countries in a single jurisdiction.

The text of the MLEG can be obtained via the UNCITRAL page at:

[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlegi_advance_pre-published_version-e.pdf]
(https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlegi_advance_pre-published_version-_e.pdf)

Legal impact in the UK

The failure of large multinational firms in recent decades has already seen the need for international insolvency regimes to develop methods for handling complex multiple insolvency proceedings simultaneously. The administration of Maxwell Communication Corporation, which commenced in 1991, met this challenge by developing a protocol between English and US courts, which aimed to manage proceedings in both jurisdictions without conflict. The protocol also proposed a common system for the distribution of assets to avoid creditors having to claim in both jurisdictions. A cross border insolvency protocol was also used in the complex proceedings arising from the collapse of Lehman Brothers in 2008, in which several US Lehman entities agreed on principles of cooperation, communication and data

sharing, to preserve and enhance assets for creditors and to resolve intercompany claims. Both of these protocols were non-legally binding, and were made possible by the flexibility of common law jurisdictions.

The approach of the courts of England and Wales under the Model Law on Cross Border Insolvency and the European Insolvency Regulation to group insolvency has been based on finding the mutual COMI in one jurisdiction, allowing for multiple members to be considered within the same jurisdiction, although each group member still has to be treated as a single entity. That approach has recently been followed in the case of *Re Agrokor DD* [2017] EWHC 2791 (Ch), in which the Court recognised Croatian group proceedings under the Cross Border Insolvency Regulations 2006 (“CBIR”) but only in relation to one of the members of the group, confirming that group proceedings as a whole are out of scope of the CBIR.

The same reasoning was also adopted in case of *Leite v Amicorp (UK) Ltd* [2020] EWHC 3560 (Ch), where the Court held that the pooling of Brazilian assets from several companies did not preclude the proceedings from being collective proceedings, unlike in case of *Re Stanford International Bank* [2011] EWCA Civ 137 where assets were pooled for the benefit of only one set of creditors.

None of these cases, however, established a common approach to group proceedings in which the various group members are treated as a whole. The path taken relied either on the group members all having a mutual COMI, or being situated in common law jurisdictions which afford the courts the necessary flexibility to be able to consider pooled assets or to follow a non-binding group process. The MLEG provides a more expansive formal framework, introducing the concept of “planning proceedings” that can be used to coordinate the management of the insolvency between the members of the group, and associated group insolvency solutions.

A planning proceeding originating in the UK will require an application to the UK court under a new process, to initiate the proceeding alongside a qualifying UK insolvency proceeding (under articles 2(g) and 19). The court may then grant appropriate relief in order to facilitate the planning proceeding and the development and execution of a group insolvency solution, under article 20. A foreign planning proceeding which requires assistance from the UK court in order to proceed will first need to seek recognition under article 21 (another new court process), at which point the court may order relief under articles 22 and 24 as appropriate.

The decision to participate in a planning proceeding will be taken by each company’s directors, by the affected individual in the case of a sole trader business, or by an appointed insolvency practitioner as appropriate.

Article 26 further provides that the effects of a group insolvency solution must be approved under the law of each state, for each affected group member with its centre of main interests or an establishment in that state. In the UK, where there is a relevant insolvency proceeding, approval must therefore be obtained from creditors; or if there is no insolvency proceeding then from the individual concerned or the company’s

directors. Where the centre of main interests is elsewhere and there is no establishment in the UK, the group insolvency solution can be given effect through the court granting relief where necessary (following recognition of the planning proceeding, in the case of a foreign proceeding). The court's involvement will not be required where the plan has the agreement of all the relevant parties, and can simply proceed.

It should be noted that nothing in the Model Law can affect the law of a country that has not implemented it, and it is not intended to do so. The enforcement in a foreign jurisdiction of a group insolvency solution originating in the UK – or the enforcement of a group insolvency solution, originating in one foreign country, in another foreign country – are matters for the receiving jurisdiction rather than the UK courts. We anticipate that in granting relief, in appropriate cases, the UK courts will nevertheless wish to consider whether the group insolvency solution will be effective in other relevant jurisdictions, in order to ensure that their orders meet the requirements of the Model Law.

The relief that the court might order in the UK includes the stay of individual creditors' actions to enforce their debts against an enterprise group member. This is limited by the requirements of article 27, i.e. that the interests of creditors be adequately protected. Where there are insolvency proceedings in the UK, the interests of minority dissenting creditors are protected against unfair prejudice or harm arising from those proceedings (for example, in administration, under paragraph 74 of schedule B1 to the Insolvency Act 1986) and we expect similar consideration would be required as regards the available relief under the Model Law.

If there is no relevant insolvency proceeding in the UK, before agreeing to grant relief the court will need to consider whether the relief sought would prejudice dissenting creditors' other rights (for example the right to enforce a debt under a contract governed by the law of England and Wales, a right which a UK insolvency might curtail).

Proposals

Although much of the MLEG is a standard template, its implementation into UK law requires that various details be amended appropriately to complement our existing legal framework. This section outlines the approach that will be taken, with reference to the relevant parts of the Model Law. Other than where explicit reference is made below, the articles of the Model Law will be implemented as published by UNCITRAL.

Preamble

As with the MLCBI, and in accordance with the usual approach to legislation in the UK, the preamble to the MLEG that sets out the purpose of the law will not be included in the legal text.

Scope (article 1)

The scope will exclude the entities listed in paragraph 2 of schedule 1 to the Cross-Border Insolvency Regulations 2006.

This provides consistency of approach, aligning the MLEG with the MLCBI and ensuring that it does not encompass entities that are excluded from the latter.

Definitions (article 2)

The MLEG does not define “significant ownership”. We are satisfied that it is nevertheless clear what is meant by this phrase, and we expect that “significant ownership” may be demonstrated with reference to the definition of people with significant control found in Schedule 1A to the Companies Act 2006, as well as the definitions of parent and subsidiary undertakings in that Act.

The definition of “insolvency proceeding” contained in the MLEG is:

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

We consider that the above definition is wide enough to encompass company and individual voluntary arrangements. The status of Companies Act schemes of arrangement (and restructuring plans introduced by the Corporate Insolvency and Governance Act 2020) may vary from one jurisdiction to another and between specific cases. We do not expect that a scheme of arrangement will fall within the definition of “insolvency proceeding” for these purposes in the UK, and so will not satisfy the requirements necessary for a “planning proceeding” to be initiated under the MLEG; but a scheme of arrangement may nevertheless feature as part of a “group insolvency solution” developed using the MLEG tools. The status of restructuring plans as insolvency proceedings has been the subject of judicial comment and it may be that they will meet the requirements for a planning proceeding to be initiated. We consider that it will be most appropriate for this to be determined by the courts, as the status of restructuring plans is settled, rather than explicitly in the implementation of the MLEG (which could otherwise create a mismatch between the treatment of restructuring plans under the MLEG and more generally).

It is our intention that any “group representative” appointed within the UK should be a qualified insolvency practitioner, who will have the necessary skills and knowledge to undertake this role effectively. We will include explicit provision to this effect within the UK implementation of the MLEG in order to remove any ambiguity regarding what is appropriate. This does not affect the appointment of group representatives in foreign planning proceedings outside of the UK.

The role of a group representative, as defined, is separate to that of insolvency officeholder. Due to the voluntary nature of participation in planning proceedings under the MLEG, it may be possible for a single insolvency practitioner to occupy both roles without creating a conflict of interest. This could be the most expedient approach, but is not required: alternatively, separate independent individuals could undertake each role, especially if there otherwise might be a perception that the single insolvency practitioner was conflicted. Insolvency officeholders will need to carefully consider whether planning proceedings are in the interests of creditors before agreeing to participate, regardless of their origin.

The MLEG does not stipulate a process by which the work of the group representative is to be funded or fees are to be agreed, although fees might be negotiated alongside the group insolvency solution, according to the individual circumstances of each case. Where this involves payments from a UK insolvency that are not to independent third parties (which might be the case in respect of the group representative's fees, for example) the regulatory rules to which insolvency practitioners are subject require the payments to be appropriately approved [See Statement of Insolvency Practice 9; category 2 disbursements should be approved by those responsible for approving remuneration].

Competent court (article 5)

Taking into account the nature of the work that the court will be required to do, including ruling on questions involving large international insolvencies; and taking into account the placement of other similar work; applications under the MLEG should be heard before the High Court of Justice in England and Wales and its equivalent in Scotland.

Cooperation (articles 10 and 15)

We consider that the list of examples provided in articles 10 and 15 that demonstrate how cooperation might be implemented, and the flexibility available to courts and insolvency practitioners in the UK, is sufficient to enable effective cooperation.

Agreements (article 16)

Insolvency practitioners in the UK are already able to enter into agreements where this is necessary to the management of the insolvency, and may seek directions from the court in appropriate cases. We do not consider it necessary to require the court's approval in every case where an agreement is reached under article 16.

Appointment of single representative (article 17)

The appointment of a single insolvency practitioner to manage related insolvencies is already permitted in UK law; this article makes explicit provision for cooperation between courts for that purpose. Any potential conflicts of interest are managed by existing systems, e.g. under the Insolvency Practitioner Code of Ethics.

This does not override the requirements in UK law as to the necessary authorisation, qualifications and experience for an individual to act as an insolvency practitioner.

Participation (article 18)

Any data shared between participating enterprise group members will be subject to the existing regimes of data protection as well as any confidentiality requirements agreed between the members.

Appointment of group representative (article 19)

As noted above (article 2), we consider that only authorised insolvency practitioners can take such appointments and we will make explicit provision to this effect in the UK's implementation of the MLEG.

Provisional relief (article 22)

The notice requirements for relief hearings will be in line with those of schedule 1 of the Cross-Border Insolvency Regulations, which in the first instance require notice to be served upon relevant parties not less than five business days before the date of the hearing; but which allow the court in cases of urgency (as is likely to be the case when dealing with provisional relief) to hear the application immediately either with or without notice, or to authorise a shorter period of notice.

Questions

We welcome views on the above proposals, and responses to the specific questions below:

Q5. What impact do you think the MLEG will have, particularly on our insolvency regime and the insolvency sector, if it is implemented in the UK?

Q6. What are your views on the approach to implementation that we have outlined above?

Q7. The proposal does not prescribe how the work of the group representative is to be funded, leaving that to be discussed in each case between the prospective group representative and the group members who expect to participate. What are your thoughts on this?

Q8. What more, if anything, needs to be done to ensure that the MLEG does not undermine the rights of minority and dissenting creditors, including rights to enforce contracts governed by the law of England and Wales in the UK?

[1] See Statement of Insolvency Practice 9; category 2 disbursements should be approved by those responsible for approving remuneration.

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