AMERICAN BANKRUPTCY INSTITUTE

2019 New York City Bankruptcy Conference

Cross-Border Bankruptcy Issues

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REFERENCE MATERIALS

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IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 134 OF 2018

IN THE MATTER of Order 63, rules 4(1)(b)-(c) of the Rules of the High Court (Cap 4A); and the Court's inherent jurisdiction

and

IN THE MATTER of China Fishery Group Limited in Companies Winding-Up Proceedings No 367 of 2015 in Hong Kong

and

IN THE MATTER of China Fisheries International Limited in Companies Winding-Up Proceedings No 368 of 2015 in Hong Kong

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Before: Hon Harris J in Chambers

Date of Hearing: 11 September 2018

Date of Decision: 17 September 2018

Date of Reasons for Decision: 14 January 2019

REASONS FOR DECISION

The Application

1. On 30 January 2018 William A Brandt Jr, the Chapter 11 Trustee of CFG Peru Investments Pte Limited (Singapore) ("**Trustee**"), issued an *ex parte* originating summons for leave to use the Decision of Deputy High Court Judge Kenneth Kwok, SC ("**the DHCJ**") made on 5 January 2016 in HCCW 367 and 368 of 2015 issued by The Hongkong and Shanghai Banking Corporation Limited ("**HSBC**") ("**winding-up proceedings**") discharging the joint and provisional liquidators appointed by me over China Fishery Group Limited ("**CFG**") and China Fisheries International Limited ("**CFI**") (collectively the "**Companies**") and the Reasons for Decision handed down on 17 March 2016, in Chapter 11 proceedings in the United States Bankruptcy Court of the Southern District of New York bearing the caption *In re* China Fishery Group Limited (Cayman), *et al*.[1]

2. Leave is required because, as is normal in the case of an application for the appointment of provisional liquidators, the hearing before the DHCJ was in chambers not open to the public and the Reasons for Decision are marked "*Not Open to the Public*" and "*No search, inspection or publication without leave of the court*". In addition in a similar application to that made by the Trustee in which the Companies sought leave to disclose the judgment amongst other documents generated as part of the winding-up proceedings, I ordered that the parties whether themselves or through their agents, must not without my leave provide to any persons any of the documents referred to in the Companies' summons.[2]

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1 Case No. 16-11895 (JLG) (Bankr. S.D.N.Y. Oct 28, 2016), [ECF No. 203].

2 (Unrep, HCCW 367 and 368/2015 [heard together], 23 May 2017).

3. Although the application is not framed as an application for judicial assistance by a foreign office holder charged with administering a corporate liquidation, before me Mr Dennis Kwok argued that the character of the Trustee's office justified this Court assessing the application with regard to the common law principles governing judicial assistance, which Mr Kwok argued bolstered the application, which was principally framed as one based on the open justice principle. It was not, however, necessary he argued for the court to be satisfied that the common law principles of judicial assistance are engaged in the present case in order for the Trustee to succeed.

4. HSBC opposes the application on two grounds. First, that the Trustee has failed to demonstrate sufficiently good reasons for the release of the Decision. Secondly, as the appeal against the Decision was explicitly withdrawn (as I explain in detail in [7]) because of undertakings given by the Companies to both HSBC and the court, which were then contumeliously breached by the Companies petitioning under Chapter 11 for the undisputed purpose of preventing HSBC from enforcing the undertakings, the court should not exercise its discretion to permit the application as it would allow the Companies to benefit from their egregious conduct,[3] the undertakings having been given, it is also not disputed by the Trustee, although the management of the Companies had no intention of complying with them.[4]

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[3] The finding of Garrity J at [39] of his judgment of 28 October 2016 in the Chapter 11 Proceedings.

[4] *Ibid* this is apparent from the findings at 359 to 360.

5. Before identifying the issues that in my view this application requires the court to determine, it will be helpful if I set out the relevant factual background to what is an unusual case.

Background

6. CFG is incorporated in the Cayman Islands. CFI is incorporated in Samoa. They are part of the China Fisheries Group ("**Group**"), which is engaged in the business of fisheries and fishmeal processing in Peru for wholesale distribution. The Group experienced serious financial difficulties in 2014 and 2015. Restructuring discussions took place with their various bankers. HSBC was not satisfied with the progress of the discussions, and became aware of matters which it believed demonstrated financial misconduct by the management of the Group. On 25 November 2015, HSBC issued a petition seeking the winding up of CFG on the grounds of insolvency and applied *ex parte* to me for the appointment of provisional liquidators. I granted the application. I was not available to hear the continuation summonses. It was heard by the DHCJ on 30 and 31 December 2015 and 4 January 2016. On 5 January 2016 the DHCJ set aside the appointments.

7. HSBC issued a notice of appeal on 8 January 2016. HSBC considered seeking an expedited hearing, but did not do because it anticipated that the Companies would be wound up at the hearing of the petitions on 27 January 2016. However, following discussions with the Companies' management a deed of undertaking ("**Deed**") was signed on 20 January 2016 pursuant to which HSBC agreed to withdraw all proceedings in Hong Kong and similar proceedings in the Cayman Islands against CFG in which provisional liquidators had been appointed and

remained in place. The Deed, which is governed by Hong Kong law and contains an exclusive Hong Kong jurisdiction clause, required the following the Companies to do:

> "(1) repay certain indebtedness from the proceeds of a sale of CFGL's [China Fishery Group Limited's] Peruvian subsidiaries which was to be carried out through a strict timetable of a six-month sales process ('**Sale Process**'), this being the length of time the Companies had themselves sought to implement such sale, and to provide HSBC and other creditors with updates of the Sales Process on a full and transparent basis. The date of repayment was set at 20.7.2016;
>
> (2) appoint Mr. Paul Brough ('**Mr. Brough**') as the CRO [Chief Restructuring Officer] of the CF Group [China Fisheries Group] (to which the Companies belonged) and as a director of CFGL;
>
> (3) provide Mr. Brough with full cooperation to allow him to carry out his role as CRO and to implement the Sale Process as soon as practicable;
>
> (4) appoint Grant Thornton as independent reporting accountants, with full access to the affairs of the CF Group and with CFGL responsible for payment of all fess reasonably incurred by Grant Thornton; and
>
> (5) consent to any subsequent application by HSBC [The Hongkong and Shanghai Banking Corporation Limited] (or BoA [Bank of America, N.A.]) for the immediate re-appointment of provisional liquidators in the Cayman Islands if the sale of the Peruvian OpCos' operations and the repayment of the debt owed to HSBC had not occurred by 20.7.2016."

8. The petitions in Hong Kong and the Cayman Islands were also withdrawn.

9. The Deed was given additional force by orders of the courts both in Hong Kong and the Cayman Islands. The orders in Hong Kong

which are dated 1 February 2016 contain the following undertakings to the court:

> "AND UPON undertakings of [China Fishery Group Limited / China Fisheries International Limited] (the 'Company') providing to the Court as set out in Clauses 2.3 and 2.4 of the Deed of Undertaking dated 20 January 2016 entered into between the Petitioner, the Company and [China Fisheries International Limited / China Fishery Group Limited], a copy of which is appended at Schedule 1 to this Order (the 'Deed of Undertaking')"

Clauses 2.3 and 2.4 contain the provisions for the payments to HSBC summarised in [6] above. It is not disputed by the Trustee that HSBC withdrew its appeal in reliance on the Deed and the orders containing the undertakings to this Court. Neither do I understand it to be seriously disputed that it is likely the Companies would have been wound up on 27 January 2016 in Hong Kong and that it is also likely that CFG would have been wound up in the Cayman Islands.

10. Following signing of the Deed, the Companies were supposed to be engaged in the sale of assets and HSBC and others were due to be repaid by 20 July 2016. On 30 June 2016 various members of the Group including the Companies filed under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. The Companies and the Group (and other companies falling within the definition of "Debtors" in the Trustee's evidence) had no operations in, or connection with, the United States. Jurisdiction was based on the payment of a retainer to the Debtors' counsel in December 2015, which I understand is a not uncommon basis for giving the Bankruptcy Court jurisdiction, and a New York governing law clause in certain notes issued by one of the Debtors. Upon making the filing, section 362 of the United States Bankruptcy Code provides for an automatic stay prohibiting

the commencement or continuation of proceedings against the Debtors worldwide. It, therefore, prevented HSBC from taking action for breach of the Order and Deed in Hong Kong.

11. On 10 November 2016, upon the hearing of the motion of Cooperative Rabobank U A, Standard Chartered Bank (Hong Kong) Limited and DBS Bank (Hong Kong) Limited for the appointment of a Chapter 11 trustee for the Debtors in the Chapter 11 Cases, Garrity J appointed the Trustee over CFG Peru Investments Pte Limited (Singapore) only. The reason for not appointing the Trustee over other Debtors was explained by Garrity J at p 50 of his decision:

> "There are sixteen Debtors in these Chapter 11 cases. As noted, most of them are dormant, non-operating companies and a few are holding companies to other operating, non-debtor affiliates and businesses. It makes little practical or economic sense to appoint a trustee for each Debtor in these cases. That is particularly so where, as here, among other things, it is uncertain what impact such an appointment would have on (i) the Debtors' other businesses and affiliates (including non-debtor operating subsidiaries) and their creditors and constituents, and (ii) the corporate governance of the affected Debtor and non-debtor entities in foreign jurisdictions (including the publicly traded companies). Moreover, it is not clear whether an appointed Chapter 11 trustee will be recognized under applicable foreign law as the authorized representative of the Debtors."

12. The Trustee has sought and obtained from Garrity J an order for discovery against HSBC that covered the Decision. HSBC attempted unsuccessfully to appeal the Garrity J's decision.

13. In his first affidavit in support of his application the Trustee summarised his reasons for wanting to leave to obtain and use the Decision (which the Trustee subsequently found amongst the Group's papers that came into his possession and as a result he is now aware its contents) to

determine whether the Debtors may have any claims against HSBC and investigate whether HSBC's conduct might give rise to defences by the Debtors' estates, for example, avoidance transfers and equitable subordination under section 510(c) of the Bankruptcy Code, or other theories of lender liability, and potentially other claims against HSBC.

14. The Trustee did not wait for determination of this application before deciding to commence proceedings against HSBC in New York. On 29 June 2018, the Trustee filed a complaint ("**Complaint**") in which in [9] it is asserted that "*HSBC's claims against the estates totalling more than $100 million should be equitably subordinated or disallowed given the extent to which HSBC exceeded the confines of permissible conduct and the damage it caused.*" As I understand it, the Trustee suggests that the impermissible conduct extends to the application for the appointment of provisional liquidators and the reasons for the Decision support the suggestion. It is for that reason that the Trustee wishes to be able to use the Decision in the Complaint.

15. There are two other factual matters that are relevant to the application. The first concerns the solvency of the Companies and the Group. It is not clear from the Trustee's evidence whether or not he believes either the Companies or the Group to be solvent. I asked Mr Kwok (the Trustee was in court during the hearing) what the Trustee believed the position to be. Although, the position does not appear to be clear, as I understand it the Trustee anticipates that the Group is solvent. The Group is owned by the Ng Family, who thus stand to benefit if the Group's debt and operations can be restructured and continue successfully under its present ownership. It is not suggested by the Trustee that the financial state of the Group and the Companies are so parlous that the

shareholders have no economic interest in the Group and the outcome of the Chapter 11 proceedings.

16. The second concerns the circumstances in which the Trustee came to be appointed. The company, CFG Peru Investments Pte Limited (Singapore), over which the Trustee came to be appointed is a wholly owned subsidiary of CFG. On the basis of the evidence before me it seems highly probable, that but for the signing of the Deed CFG would have been wound up along with CFI on 27 January 2016 or possibly provisional liquidators reappointed for a period while the creditors considered alternatives to liquidation. What seems to be clear is that the Trustee's appointment was only possible as a consequence of what Garrity J has found to be a conscious decision by the owners of the Companies and the Group, the Ng Family, to sign the Deed and, importantly, give undertakings to this Court that they had no intention of honouring. Viewed from this Court's perspective the Chapter 11 filings by the Companies and the Group were, therefore, unconscionable and an abuse and it was only as a result of this objectionable conduct that the application to appoint the Trustee became possible.

17. It is common ground that it is not for me to assess whether or not the DHCJ was wrong to set aside the order appointing provisional liquidators and that I should deal with this application on the basis that the appeal was brought in good faith and arguable. I would, however, note that the Companies did not dispute before the DHCJ that the first of the two criteria, which a petitioner has to satisfy before the Companies Court will appoint provisional liquidators, namely, that the evidence demonstrated a *prima facie* case for granting of a winding-up order had been satisfied. However, the DHCJ did find in [60]–[62] of the Decision that the Group

was balance sheet insolvent although he does not explain the relevance of this in his reasons or how, if at all, it factored into his decision. There was no suggestion before me that the Companies had any basis in December 2015 for disputing the debts owed to HSBC or the petitions, which as I have noted were to come on before me on 27 January 2016 and, therefore, applying normal principles HSBC would be entitled to winding-up orders *debito justitiae*. However, the DHCJ did in [65]–[67] of the Decision find that the Group (at least that is how I read [65]) were involved in a restructuring exercise and that it was in the interests of "stakeholders" that there was an orderly disposal of assets rather than a compulsory winding up and that this was a reason for discharging an order. The DHCJ did not explain how he reconciled this reasoning with the acceptance by the Companies that the first criteria had been satisfied and the application of the normal principles, which would suggest that the Companies would be wound up only a month after the hearing before him. It would appear from the evidence given before Garrity J and Garrity J's findings that the Companies were aware that unless they agreed some form of rescheduling of the debt owed to HSBC they were likely to be wound up on 27 January, which was why they agreed the Deed on 20 January 2016.

Open Justice Principle

18. The court has an inherent jurisdiction to control access to documents in its possession as a consequence of proceedings before it. Various authorities discuss the principle by reference to which the court determines whether access should be restricted. They establish that the judicial process should be conducted openly and that it should only be

restricted if substantial and relevant reasons are demonstrated for so doing.[5] General considerations such as privacy and confidentiality are not relevant reasons. In *TCWF v LKKS*[6] Lam JA refers with approval in [45-6] to the principles to be found in the English *Practice Guidance (Interim Non-disclosure Orders).*[7] In the context of non-disclosure orders, the principle is clear: it can only be justified when strictly necessary to secure the proper administration of justice.

19. In the Companies Court context it is generally accepted that certain restrictions are necessary in order to ensure the proper and just administration of certain types of matters that regularly come before the Companies Court. Schedule 2 of *Practice Direction 25.1* lists certain proceedings which are not usually open to the public. The justification is contained in [4(a)]:

> "The proceedings listed in Schedule 2 would usually not be open to the public. In relation to such proceedings, it is considered that having regard to their nature, one or more of the reasons for excluding the press and the public laid down in Article 10 of the Hong Kong Bill of Rights Ordinance, Cap. 383 ('Article 10') are usually satisfied. Accordingly, such proceedings would usually not be open to the public."

20. Part 3 of Schedule 2 contains a list of proceedings relating to companies winding-up and bankruptcy and the list includes applications for the appointment of provisional liquidators. The principal justification for this, as I understand it, is avoidance of the commercial damage that might result from an unjustified application becoming general knowledge. It is for this reason that the Decision is marked not open to the public and

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5 *SJ v FTCW* [2014] 1 HKLRD 849, Lam JA [28, 114]; *ATV v Communications Authority* [2013] 3 HKC 66, Cheung CJHC [19-32].

6 [2013] HKFLR 456.

7 [2012] 1 WLR 1003.

this application is necessary. If a hearing is not open to the public this would generally be a good reason for the decision also not to be available.[8]

21. What emerges in my view from the statements of general principle in the authorities and the practice of the High Court is an approach, which whilst recognising that the starting point is that the courts should conduct and decide proceedings openly, also recognises that in practice there are situations in which it is to be assumed that balancing the considerations giving rise to the general principle and those considerations commonly engaged for particular types of sensitive applications, there should be restrictions on who can attend certain hearings and have access to the decision and the court file. Applications under *section 193* of the *Companies (Winding-up and Miscellaneous Proceedings) Ordinance* is one such case. In such a case it is necessary for the applicant to justify why the normal approach is not justified. In some cases it may be straightforward and the court readily accepts that there is no justification for qualifying or restricting the general right to have proceedings conducted openly and access granted to the public. Others may not be.

22. Although this is not quite how Mr Kwok put his case, in my view the presumption that justified holding the application in private has ended. It, therefore, becomes necessary to consider the position afresh. This would normally involve focusing on the reasons why it is suggested that the restrictions should not be lifted. However, given the unusual circumstances in which this application comes to be made, in my view the appropriate starting point is to consider the status of the applicant and the reasons why he seeks to lift the restriction. I say this because the

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[8] *Huang Hsin Yang v Bank of China (Hong Kong) Ltd* (unrep, CACV 186/2007, 13 November 2007), Tang VP [8].

circumstances in which the Chapter 11 proceedings in which the Trustee came to be appointed are central to HSBC's grounds for opposing the application. I would note before considering these matters that in my view insufficient attention has been paid by the Parties to relevance of the Chapter 11 proceedings and the Trustee's status for reasons, which will become apparent in the following paragraphs.

The Trustee's Status

23. Put at its simplest, it is the Trustee's case that he has a substantial and *bona fide* reason for wanting to be able to use the Decision and this being the case the application of the open justice principle clearly entitles him to the order he seeks. As the Trustee's written submissions implicitly acknowledge, the Trustee's argument that he has a substantial reason for seeking the Decision is founded on his mandate under the US Bankruptcy Code. However, the Trustee's written submissions do not develop an argument explaining how the Trustee's position is relevant to an assessment of the application beyond making the general submission that the court has at common law a power to recognise and provide assistance to foreign insolvency proceedings and persons appointed to conduct them, which is uncontentious. The justification for this power was explained in the following way by Lord Sumption in *Singularis Holdings Ltd v PricewaterhouseCoopers*[9] at [23]:

> "... The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that

[9] [2015] AC 1675; cited by me in *Re BJB Career Education Co Ltd* [2017] 1 HKRLD 113, [12].

> companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally.... The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can."

24. However, the courts of common law jurisdictions do not recognise and assist all foreign proceedings and holders of offices associated with insolvency or some form of corporate rehabilitation and the common law on the circumstances in which foreign insolvency proceedings will be recognised and assisted varies to some degree from jurisdiction to jurisdiction. For example, courts have differed on whether or not at common law recognition should be limited to liquidators or equivalent office holders appointed by the courts of the place of incorporation. Significant differences are to be found in the decisions of Lord Hoffman (preferred in Singapore[10]) in *Re HIH Casualty and General Insurance Ltd*[11] and those of Lord Collins writing for the majority in *Rubin v Eurofinance SA*[12] on this issue, with the current position in England and Wales appearing to be that the common law should not be

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[10] *Re Opti-Medix* [2016] SGHC 108; see also the judgement of Seagal J in the Court of the Grand Cayman, *China Agrotech Holdings Ltd*, FSD 157/2017 in which he held that recognition could be extended to the Hong Kong insolvency proceedings in respect of the Cayman incorporated company. Seagal J's decision contains a useful and comprehensive consideration of the pertinent authorities in various jurisdictions. I would observe in passing that in [32-33] Seagal J found that submission to the foreign jurisdiction could be sufficient to justify recognition for certain purposes. Although, it is not necessary for me to decide this I have reservations about the proposition that submission by a company to a foreign jurisdiction resulting from the company itself commencing insolvency proceedings, for example to avail itself of the Chapter 11 process, is by itself sufficient to justify recognition. The immediate reason is that as this case demonstrates it can be open to abuse. I would also note that Seagal J's analysis [34] seems to suggest that the test for submission to the jurisdiction of the Hong Kong court for the purposes of assessing whether or not Hong Kong proceedings should be recognised are less stringent than the tests applied by the Hong Kong court in assessing whether or not it should exercise its insolvency jurisdiction over a foreign incorporated company, which is surprising. Registration by a foreign company in Hong Kong is not of itself sufficient to engage the jurisdiction.

[11] [2008] 1 WLR 852, [31].

[12] [2013] 1 AC 236.

extended beyond the established criteria that a liquidator appointed in the place of incorporation should be recognised.

25. There is one case in Hong Kong, *BCCI (Overseas) Ltd v BCCI (Overseas) Ltd (Macau Branch)*,[13] a decision of the Court of Appeal, which touches on this issue. BCCI (Overseas) Ltd was incorporated in the Cayman Islands and had opened a branch in Macau. Officers of the Macau branch has placed monies with a bank in Hong Kong. The company was put into liquidation both in the Cayman Islands, its place of incorporation, and in Macau. The liquidators in both jurisdictions claimed the funds in Hong Kong. The court allowed the Macau liquidators to be represented and take part in an application by the Cayman liquidators seeking an order for a transfer of the funds in the Hong Kong bank account to them. The application was successful. However, it would appear from the report that very limited consideration was given to the Macau liquidators' status and none to whether the Macau insolvency process should be recognised. The position in Hong Kong, therefore, remains undecided and this is not an appropriate case to determine it or express a view on the view the Companies Court might take.

26. Similar differences exist in relation to the recognition of liquidators appointed in voluntary liquidations. In *Singularis* the majority suggest *obiter* that the common law power to recognise and assist foreign insolvency proceedings would not extend to voluntary liquidations.[14]

[13] [1997] 1 HKLRD 304.
[14] *Ibid* [25].

Singularis has not been followed in Singapore.[15] I declined to follow it in *Supreme Tycoon Ltd*.[16]

27. It is not, therefore, helpful to think of the significance of the Trustee's office in the broad, unfocused way advanced by Mr Kwok. A more disciplined approach is required.

28. It is generally accepted in common law jurisdictions that determining whether or not a foreign office holder should be recognised and assisted requires a consideration of the following matters:

(1) Whether the office holder had been appointed in collective insolvency proceedings.[17]

(2) Whether the foreign jurisdiction in which the office holder has been appointed and the company have a relevant connection.[18]

(3) If the answer to these first two questions is in the affirmative one would normally expect the foreign proceedings to be recognised.

(4) If the foreign proceedings are recognised one would normally expect the office holder to be recognised unless the local court considers that there has been some irregularity in the office holder's appointment.

(5) If a foreign office holder is recognised one would normally expect assistance, which may extend to granting orders that give the foreign office holder substantially similar powers to, for example, investigate the affairs of the company as would

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[15] *Gulf Pacific Shipping Ltd* [2016] SGHC 287, Abdullah J [10].

[16] [2018] 2 HKC 485, [2018] HKCFI 277.

[17] *Ibid* [15].

[18] This follows from reasoning in cases such as *Singularis*, *Gulf Pacific* and *Supreme Tycoon* and is uncontroversial.

be available to a local liquidator if the foreign jurisdiction has similar provisions in its insolvency regime.[19]

29. As I have already noted the issues that I have just considered were not fully canvassed before me and it is neither appropriate nor necessary for me to explore fully how the Hong Kong Companies Court would approach an application for recognition of Chapter 11 proceedings; an issue on which as I explained in [25] there is no local authority and so far as I am aware limited authority in other common law jurisdictions. The reason why I say it is unnecessary is because it seems to me clear that the Trustee could never have satisfied the relevant criteria; and perhaps this is why no such application has been made. I say this for the following reasons.

30. I accept for present purposes that the Chapter 11 proceedings are collective insolvency proceedings. However, there is no relevant connection between CFG Peru Investments Pte Limited (Singapore) and the jurisdiction of the United States Bankruptcy Court for the Southern District of New York or any other court in the United States. The company is incorporated in Singapore. Even if one takes the view that the recognition is not limited to the jurisdiction of incorporation and that some more flexible test is to be applied such as the location of the company's centre of main interest, to use the term found in the UNCITRAL Model Law and EU Insolvency Regulation ("**COMI**"), the COMI was not in the United States at the time of filing the Chapter 11 proceedings and it is not suggested that the COMI has shifted to the United States subsequently. The same is true of the other members of the China Fisheries Group. Jurisdictions in which the location of the COMI is a relevant

[19] *Ibid* [12].

consideration differ on the time at which it is to be assessed, but as I have demonstrated it matters not for present purposes what time is considered to be relevant, the Trustee cannot satisfy it.

31. It follows that there is no basis for recognising the Trustee's office or providing assistance to him. The relevance of the applicant being a Trustee appointed in the Chapter 11 proceedings is limited to it explaining why he is interested in the Decision and has made the application. However, it does seem to me that the Chapter 11 proceedings have a further relevance. As I have explained it seems clear that they were commenced in order to prevent enforcement by HSBC of the Deed. The Deed contained undertakings to this Court. It is self-evidently objectionable and an affront to this Court for the Companies having submitted to this jurisdiction by signing the Deed which contains a Hong Kong governing law clause and given undertakings to this Court, to commence proceedings in another jurisdiction with a view to hindering enforcement of the Deed. Even if the Trustee had applied for recognition and been able to satisfy the criteria summarised in [28] I would have declined to provide assistance in the form of the order sought in this application and it is quite likely refused to recognise the Chapter 11 proceedings on the grounds that to do so would be contrary to public policy.

Public Policy Considerations

32. The relevance of public policy issues to an application for recognition is usefully illustrated by *Re Zetta Jet Pte Ltd*,[20] another decision of Aedit Abdullah J. The court was faced with an application for recognition of a Chapter 11 bankruptcy under section 354B and the

[20] [2018] 4 SLR 801.

Tenth Schedule of the Companies Act (Cap 50, 2006 Rev Ed). At the material time, by 2017 amendments to the Companies Act, the UNCITRAL Model Law on Cross-Border Insolvency applied in Singapore. The Judge proceeded on the basis that the requirements of the version of the Model Law enacted in Singapore required recognition unless he concluded that to do so would manifestly be against public policy. Shortly after the Chapter 11 proceedings had been commenced a shareholder of Zetta Jet obtained an injunction enjoining Zetta Jet and its shareholders from carrying out any further steps in the Chapter 11 proceedings until further order of the Singapore court. The Company did not comply. The Chapter 11 proceedings were subsequently converted into Chapter 7 proceedings. The application for recognition was made by the Chapter 7 trustee. In rejecting recognition on the grounds of public policy Abdullah J said this:

> "Recognising the Chapter 7 Trustee despite the breach by the pursuit of the US proceedings in the face of the Singapore injunction undermines the administration of justice in Singapore. That injunction remains in force and prohibited the pursuit of the very proceedings that were the basis of the Trustee's appointment. It is furthermore an order made by a court of coordinate jurisdiction. There is nothing before me to show any error leading to the ordering of the Singapore injunction, but even if there were, the proper course would be to apply to set it aside or appeal. I cannot ignore or overlook the Singapore injunction. But that would be the effect of granting general recognition of the Chapter 7 Trustee."

33. He did, however, grant recognition to the extent of allowing the Trustee to apply to set-aside the injunction or appeal it. Abdullah J took the view that this was consonant with the philosophy and objective of the Singapore Model Law including giving due weight to the international basis of the Model Law.

34. Although there is no recognition application before me, in my view a similar position exists in the present case. The Trustee was appointed in Chapter 11 proceedings, which were commenced to thwart HSBC taking action on the Deed in this jurisdiction. If the Companies had not done so HSBC would have taken action here which would, presumably, have prevented, or at least inhibited, the commencement of Chapter 11 proceedings in New York. It would have been the Hong Kong courts which had to determine how to deal with the Companies failure to honour the Deed and new winding-up proceedings. Although the Trustee is not appointed over the Companies, it is difficult to see how if HSBC had been free to take action for breach of the Deed and the undertakings to this Court, the Trustee would have been in a position to justify his need for the Decision on grounds relied on in the present application. This application invites me to overlook the Companies conduct and proceed on the basis that it has nothing to do with the Trustee. It seems to me that this approach ignores the fact that the Chapter 11 proceedings, and consequently the Trustee's appointment, is the consequence of what appears to be a conscious fraud on the part of the Ng family on HSBC and this Court. Public policy considerations weigh heavily in favour of declining to provide any form of assistance to a process that arises in this way. These public policy considerations in my view more than outweigh the more general public policy reasons that underpin the open justice principle and which might normally, I accept, justify making the order that is sought by the Trustee.

35. Mr Kwok has suggested that the appropriate course if HSBC is aggrieved by the impact of the Chapter 11 proceedings is for it to make an application in New York, which permits it to take action on the Deed. I disagree. There is no suggestion that the Trustee would agree to such an

application. His aggressive action against HSBC clearly suggests that he would not. Further, I see no reason why, as HSBC's complaint is that it has been hampered in enforcing its right in Hong Kong on a Deed governed by Hong Kong law and containing undertakings given to this Court, that it should have to do so.

Conclusion

36. It is for these reasons that I declined the application, which is dismissed. I make a costs order *nisi* that the Trustee pays HSBC's costs of these proceedings.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Dennis W H Kwok and Mr Jun Lee, instructed by John C H Suen & Co, for the applicant

Mr Eugene Fung SC and Ms Elizabeth Cheung, instructed by Linklaters, for the respondent

Re: Zetta Jet Pte Ltd and Others [2019] SGHC 53

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 53

Originating Summons No 1391 of 2017

In the matter of Section 354B and the Tenth Schedule of the Companies Act (Cap. 50)

And

In the matter of Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency

And

In the matter of the Appointment of Chapter 7 Trustee in the United States Bankruptcy Court in the Central District of California – Los Angeles Division Lead Case No.: 2:17-bk-21386-SK (Zetta Jet USA, Inc., a California Corporation) jointly administered with 2:17-bk-21387-SK (Zetta Jet Pte. Ltd., a Singaporean corporation) dated 29 September 2017

And

In the matter of ZETTA JET PTE. LTD. and ZETTA JET USA, INC

(1) ZETTA JET PTE. LTD.
(2) ZETTA JET USA, INC
(3) Jonathan D. King, solely in his capacity as the duly appointed US Bankruptcy Trustee of Zetta Jet Pte. Ltd. and Zetta Jet USA, Inc

... *Applicants*

And

Asia Aviation Holdings Pte Ltd

... *Intervener*

JUDGMENT

[Insolvency Law] - [Cross-border insolvency] [Recognition of foreign insolvency proceedings]

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Re: Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)

[2019] SGHC 53

High Court — Originating Summons No 1391 of 2017
Aedit Abdullah J
19 November 2018

4 March 2019 Judgment reserved.

Aedit Abdullah J:

Introduction

1 The present case follows on from my earlier decision in *Re Zetta Jet Pte Ltd and Others* [2018] SGHC 16 ("*Zetta Jet (No 1)*"), in which I granted only limited recognition on an application by a US Bankruptcy Trustee for recognition of US bankruptcy proceedings under the UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) ("the Model Law"). The Model Law has the force of law in Singapore pursuant to s 354B of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), as enacted under the Tenth Schedule of the Companies Act ("the Singapore Model Law").

2 In *Zetta Jet (No 1)* at [36], limited recognition was given to allow the US Bankruptcy Trustee to apply to set aside or otherwise appeal a separate injunction granted by the High Court that enjoined bankruptcy proceedings in the US. I gave parties the liberty to revisit the issue of wider recognition upon

the conclusion of the injunction proceedings. As it was, the injunction was discharged by consent. The applicants now seek full recognition of the US bankruptcy proceedings.

Facts

3 The background to this application is set out in *Zetta Jet (No 1)* at [2]–[10], and will be briefly recounted here.

Parties

4 Zetta Jet Pte Ltd ("Zetta Jet Singapore") is a Singapore-incorporated company that wholly owns Zetta Jet USA, Inc ("Zetta Jet USA"), a company organised under the laws of the State of California. The principal business of Zetta Jet Singapore and Zetta Jet USA (collectively "the Zetta Entities") is in aircraft rental and charter. Jonathan D. King ("King", used interchangeably with "the Trustee") is the Chapter 7 Trustee of the Zetta Entities.

5 The Zetta Entities are part of a wider group consisting of 16 other entities organised under the laws of the British Virgin Islands ("BVI"). The wider group will be referred to as "the Zetta Jet Group".[1]

6 The intervener in this application, Asia Aviation Holdings Pte Ltd ("AAH", used interchangeably with "the Intervener"), is a 34% shareholder of Zetta Jet Singapore. Zetta Jet Singapore's shareholders are AAH, Truly Great Global Limited ("TGGL"), Stephen Matthew Walter ("Walter") and James Noel Halstead Seagrim ("Seagrim"). Their relationship is governed by a Shareholders' Agreement dated 26 February 2016 ("the SHA").

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1 Seagrim's OS 1391 Affidavit at para 21(b).

Background to the dispute

7 In 2017, voluntary Chapter 11 bankruptcy proceedings were filed against the Zetta Entities in the US Bankruptcy Court in the Central District of California – Los Angeles Division. A worldwide automatic moratorium in the US came into effect. Shortly thereafter, AAH and TGGL commenced an action by way of Suit No 864 of 2017 ("S 864/2017") in Singapore against Zetta Jet Singapore, Walter and Seagrim for commencing the Chapter 11 proceedings in alleged breach of the SHA.

8 On 19 September 2017, AAH and TGGL obtained an injunction to prevent Zetta Jet Singapore, Seagrim and Walter from taking further steps in relation to the bankruptcy filings in the US Bankruptcy Court ("the Singapore injunction"). On 1 November 2017, TGGL discontinued its action, leaving AAH as the sole plaintiff in S 864/2017.

9 Notwithstanding the issuance of the Singapore injunction, the US bankruptcy proceedings continued. On 5 October 2017, King was appointed the Chapter 11 Trustee of the Zetta Entities in the US bankruptcy proceedings. The proceedings were subsequently converted to Chapter 7 proceedings and King was appointed the Chapter 7 Trustee in the proceedings. On 11 December 2017, the US Bankruptcy Court authorised the Trustee to commence recognition proceedings in Singapore. The Trustee did so on 13 December 2017.

10 In *Zetta Jet (No 1)*, I found that the flouting of the Singapore injunction undermined the administration of justice in Singapore: at [25] and [29]. I therefore ordered that recognition would be denied under Art 6 of the Singapore Model Law, save for limited recognition only for the purposes of allowing the Trustee to apply to set aside the Singapore injunction: at [34] and [36].

11 On 9 March 2018, Zetta Jet Singapore filed an application to set aside the Singapore injunction. On 12 July 2018, the injunction was discharged by consent of the parties involved. The consequences of such discharge by consent on recognition is disputed in the present application before me.

The parties' cases

The legal framework

12 The applicants have applied under Art 15 of the Singapore Model Law for recognition of the US bankruptcy proceedings in which King has been appointed as Trustee. Under Art 17 of the Singapore Model Law, the court must recognise a foreign proceeding if the stipulated conditions under Art 17(1) are met. Article 17(1) of the Singapore Model Law is subject to Art 6, which allows a Singapore court to refuse recognition if such recognition would be "contrary" to the public policy of Singapore.

13 Under Art 17(2) of the Singapore Model Law, the foreign proceeding must be recognised as a foreign *main* proceeding if it is taking place in the State where the debtor has its centre of main interests ("COMI"); the foreign proceeding is recognised as a foreign *non-main* proceeding if the debtor has an establishment within the meaning of Art 2(*d*) in the foreign State.

14 The focus of the parties' cases has been on the location of Zetta Jet Singapore's COMI. No issue arises in respect of Zetta Jet USA, which was incorporated in the US. Unless otherwise specified, any references in this judgment to disputed COMI issues generally should be taken as a reference to Zetta Jet Singapore's COMI only.

Summary of the applicants' case

15 The applicants note that no issue has arisen in relation to Zetta Jet USA's COMI (see *Zetta Jet (No 1)* at [20]). Zetta Jet USA's COMI is the US. On that basis, the US bankruptcy proceedings in relation to Zetta Jet USA should be granted recognition as a foreign main proceeding under Art 17(1) read with Art 17(2)(*a*) of the Singapore Model Law.[2]

16 The applicants ask the court to revisit the question of where Zetta Jet Singapore's COMI is located. If found that it is also in the US, the US bankruptcy proceedings in relation to Zetta Jet Singapore should also be recognised as a foreign main proceeding under Art 17(1) read with Art 17(2)(*a*) of the Singapore Model Law.[3]

17 The applicants argue that there is no public policy issue which would require the court to refuse to recognise the US bankruptcy proceedings in relation to Zetta Jet Singapore and the Trustee appointed for those proceedings. AAH did not enter any appearance in the US bankruptcy proceedings, despite informing the judge who granted the injunction in S 864/2017 that it would take steps to resist the US bankruptcy proceedings in the US Bankruptcy Court. In any event, the most important public policy consideration in this case is to ensure the orderly and efficient recovery of assets for the benefit of Zetta Jet Singapore's creditors: *In re ABC Learning Centres Ltd* 728 F 3d 301 (3rd Cir, 2013). Public policy also requires the court to have regard to the international basis of the Model Law and the promotion of its uniform application, as required under Art 8 of the Singapore Model Law.[4]

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2 Applicant's Further Submissions at paras 34–36.

3 Applicants' Further Submissions at paras 37–39.

4 Applicants' Further Submissions at paras 40–58.

18 Next, the applicants submit that whatever test is applied to ascertain Zetta Jet Singapore's COMI and whichever date is taken to be operative in this determination, Zetta Jet Singapore's COMI would be found to be in the US. That said, the applicants favour the US approach in assessing COMI as at the time of the filing of the recognition application to the recognising court.[5]

19 In the alternative, the applicants submit that even if the US proceedings in relation to Zetta Jet Singapore are not a foreign main proceeding, the court had earlier found that Zetta Jet Singapore had an establishment within the meaning of Art 2(*d*) of the Singapore Model Law in the US (see *Zetta Jet (No 1)* at [20]). Accordingly, the US bankruptcy proceedings in respect of it should be recognised as a foreign non-main proceeding under Art 17(1) read with Art 17(2)(*b*) of the Singapore Model Law.[6]

20 Following from these submissions, in the event that the US bankruptcy proceedings relating to the Zetta Entities are recognised, the applicants submit that the various orders prayed for should also be granted, including orders under the Singapore Model Law for:

(a) the Trustee's recognition as a foreign representative within the meaning of Art 2(*i*);[7]

(b) the stay of proceedings under Arts 20(1) and 20(2);[8]

(c) the Trustee's empowerment to examine witnesses, take evidence and obtain delivery of information under Art 21(1)(*d*);[9]

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5 Applicants' Further Submissions at paras 61–127.

6 Applicants' Further Submissions at paras 145–148.

7 Applicants' Further Submissions at paras 149–166.

8 Applicants' Further Submissions at paras 149–166.

(d) the Trustee's entrustment with the administration and realisation of assets of the Zetta Entities;

(e) the Trustee's empowerment to appoint of a local representative under Art 21(1)(*e*);[10]

(f) the Trustee's standing to make applications under Art 23(1);[11] and

(g) the granting of additional reliefs available to a liquidator appointed in Singapore under Art 21(1)(*g*).[12]

Summary of the Intervener's case

21 In respect of the determination of Zetta Jet Singapore's COMI, the Intervener relies on its previous arguments in *Zetta Jet (No 1)*: Zetta Jet Singapore's senior management, employees, facilities, operations, business and creditors were all located in Singapore. These factors also indicate that the company had no establishment in the US. Accordingly, the US bankruptcy proceedings in relation to Zetta Jet Singapore are neither foreign main nor non-main proceedings under Art 17(2) of the Singapore Model Law.[13]

22 As for the question of recognition, the Intervener argues that the Trustee's breach of the Singapore injunction in continuing the US bankruptcy proceedings amounted to contempt, and remained so even after the discharge of the injunction. The Intervener cites *Pertamina Energy Trading Ltd v Karaha*

9 Applicants' Further Submissions at paras 167–180.

10 Applicants' Further Submissions at paras 181–193.

11 Applicants' Further Submissions at paras 194–203.

12 Applicants' Further Submissions at paras 204–237.

13 Intervener's Submissions dated 12 January 2018 at para 76.

Bodas Co LLC and others [2007] 2 SLR(R) 518 ("*Pertamina*"), which is to be preferred to contrary authority in *Nikkomann Co Pte Ltd and others v Yulean Trading Pte Ltd* [1992] 2 SLR(R) 328 ("*Nikkomann*").[14] The Intervener also notes that it had consented to the discharge of the injunction: (a) on the basis that it was accepted that *Pertamina* was the correct statement of the law; and (b) in view of the implicit concessions that the Trustee had made that showed that he was aware or wilfully blind that he had breached and continued to breach the Singapore injunction.[15]

My decision

23 I accept that Zetta Jet Singapore's COMI is to be determined as at the date of the recognition application, following the US position. In any event, the evidence before me indicates that whichever alternative date is considered, its COMI was in the US. No reason remains to deny recognition on the basis of public policy following the consensual discharge of the injunction. Accordingly, the US bankruptcy proceedings in relation to Zetta Jet Singapore are to be recognised as a foreign main proceeding.

24 Aside from the matters examined below, I am satisfied that the other provisions of the Singapore Model Law are met.

Issue 1: Whether the US proceedings are a "foreign proceeding" under the Singapore Model Law

25 The US bankruptcy proceedings in relation to the Zetta Entities were originally restructuring proceedings under Chapter 11 of the Bankruptcy Code 11 USC (US) (1978) ("the US Bankruptcy Code"), but were subsequently

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14 Intervener's Submissions dated 16 November 2018 at paras 15–16.

15 Intervener's Submissions dated 16 November 2018 at para 17.

converted to Chapter 7 proceedings, *ie*, liquidation proceedings. These are clearly a "foreign proceeding" within the meaning of Art 2(*h*) of the Singapore Model Law.

Issue 2: Zetta Jet Singapore's COMI

26 There are two issues to be discussed in relation to the determination of Zetta Jet Singapore's COMI:

(a) The date at which such assessment is to be made, namely, whether the court should assess the location of the debtor's COMI on the date of the foreign application commencing foreign insolvency proceedings; the date when recognition is applied for; or the date the recognising court hears the issue of whether recognition should be granted.

(b) The approach to be taken in assessing what constitutes the COMI of a particular debtor company.

27 I am of the view that the determination of the debtor's COMI is to be made as at the date of the application to this court for recognition, and that in assessing where the COMI lies, the court's focus would be on where the primary commercial decisions are made for the debtor. This would generally be the place of registration unless otherwise shown in a particular case. The enquiry would be dependent on the circumstances of each case and no general rule can be laid down. In many cases, it may be that the factors relevant in the assessment essentially balance each other out; in such cases, the presumption under Art 16(3) of the Singapore Model Law in favour of the place of the debtor's registered office would have to come into play.

The interpretative approach to be adopted

28 The concept of the COMI lies at the heart of the regime created by the Model Law, in force in Singapore with certain modifications to adapt it for application in Singapore, as enacted under the Tenth Schedule of the Companies Act pursuant to s 354B of the Companies Act. The location of the debtor's COMI determines whether foreign insolvency proceedings qualify as a "foreign main proceeding" within the meaning of Art 2 of the Singapore Model Law:

> **Article 2. Definitions**
>
> 2. For the purposes of this Law —
>
> ...
>
> (f) "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has its centre of main interests;
>
> (g) "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;
>
> ...

Foreign main proceedings qualify for more extensive reliefs than foreign non-main proceedings: only foreign main proceedings qualify for automatic reliefs under Art 20(1) of the Singapore Model Law.

29 The term "COMI" is not, however, defined in the Model Law or the Singapore Model Law. There is only a presumption under Art 16(3) of the Singapore Model Law that the place of the debtor's registered office is its COMI:

> **Article 16. Presumptions concerning recognition**
>
> ...
>
> 3. In the absence of proof to the contrary, the debtor's registered office is presumed to be the debtor's centre of main interests.

30 While there is reference to a presumption here, I do not read Art 16(3) of the Singapore Model Law to constitute a rebuttable presumption of law in the typical sense, which would require the party rebutting the presumption to prove on the balance of probabilities that the presumption does not apply. I see nothing in the Model Law itself, as enacted in the legislative materials, or in the commentaries to the Model Law which would require such an approach.

31 Considering the text of Art 16 of the Model Law and the Singapore Model Law, the guides to enactment provided by UNCITRAL, and the fact that the Model Law is to operate across jurisdictions, I am of the view that the usual rule generally requiring that rebuttal of a legal presumption is to be made out on the balance of probabilities does not apply here. Instead, I regard the presumption under Art 16 to operate as a starting point subject to displacement by other factors depending on the circumstances of the specific case. Art 16 refers to "the absence of proof to the contrary", which to my mind does not require proof on the balance of probabilities; it allows for the presumption to be rebutted simply on the presence of proof, *ie*, evidence, to the contrary.

32 I do note that the Singapore legislation did not adopt the same language as the US enactment which does refer to "evidence". US Bankruptcy Code § 1516(c), which incorporates Art 16(3) of the Model Law into US law, reads:

> (c) In the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the center [*sic*] of the debtor's main interests.

I do not, however, understand that difference to mean that the Singapore courts adopt a stricter standard in respect of the Art 16(3) presumption.

33 I have noted that there is language in the US cases which may seem to require some weighing of the evidence when considering if the presumption

should be rebutted. In so far as these cases establish that there needs to be consideration and assessment of the evidence, I would, with respect, agree. I understand the US cases to require that there be proof of the debtor's COMI, but not that the presumption is rebutted on the preponderance of the evidence as required in Singapore law generally. For example, in *In re Fairfield Sentry Ltd*, 440 BR 60 at 63–64 (Bkrtcy SDNY, 2010) ("*Fairfield Sentry (Bankruptcy Court)*"), Judge Burton R. Lifland at first instance referred to the applicant's burden in that case to "persuade the Court by a preponderance of the evidence" that the debtor's COMI was in the BVI. Judge Lifland noted that although US Bankruptcy Code § 1516 created a rebuttable presumption in favour of the BVI as the COMI, the court could not "rely solely upon this presumption, but rather must consider all the relevant evidence": at 64. Judge Lifland's approach did not appear to be disturbed on appeal: see *In re Fairfield Sentry Ltd*, 714 F 3d 127 at 137–139 (2nd Cir, 2013) ("*Fairfield Sentry (CA)*").

34 Given the absence of actual statutory guidance under the Model Law beyond the presumption in Art 16(3) as to what constitutes the debtor's COMI, resort has to be had to guidance issued by UNCITRAL as well as case law from other jurisdictions. In respect of the latter, I am mindful that there may be differences in legislative backgrounds, particularly as regards European and English cases. These jurisdictions additionally consider the applicable EU legislative materials:

(a) the ***Regulation on insolvency proceedings***, EC Council Regulation No 1346/2000, [2000] OJ L 160/1 <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32000R1346> (accessed 19 November 2018) ("the EIR"); and

(b) the ***Regulation on insolvency proceedings (recast)***, EU Parliament and Council Regulation No 2015/848, [2015] OJ L 141/19 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848> (accessed 19 November 2018) ("the Recast EIR"), which replaced and supersedes the EIR, and applies to insolvency proceedings opened after 26 June 2017.

35 I note that the Model Law concept of COMI owes much to the EU Convention on Insolvency Proceedings (23 November 1995), 35 ILM 1223 ("EU Convention on Insolvency Proceedings"), which was subsequently adopted by and reproduced as the EIR: see *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* vol 1 (Look Chan Ho gen ed) (Globe Law and Business, 4th Ed, 2017) ("*Cross-Border Insolvency: A Commentary*") at p 171. That being said, there are differences in the structure of the UNCITRAL and EU regimes, which, on occasion, may lead to different nuances at least. I am also mindful that there are variations in the enactment of the Model Law itself, in various jurisdictions, which may be material.

36 Guidance may also be taken from the guides issued by UNCITRAL:

(a) the "Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency", UNCITRAL, 30th Sess, UN Doc A/CN.9/442 (1997) ("the 1997 Guide"); and

(b) the "UNCITRAL Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency" (2013) <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (accessed 19 November 2018) ("the 2013 Guide").

These guides will collectively be referred to as "the Guides".

37 Section 354B(2) of the Companies Act refers to the 1997 Guide as a relevant document in the interpretation of the Singapore Model Law. This is of course a deliberate legislative endorsement of the 1997 Guide; the 2013 Guide which introduced a number of amendments is not given official status in Singapore law. Nonetheless, the 2013 Guide should not be entirely ignored. Consistency and comity should be pursued as far as possible in the interpretation of the provisions of the Model Law. Where there is any conflict between the two Guides, the 1997 Guide trumps. But where the 1997 Guide is silent, the court may consider the 2013 Guide in its interpretation of the Singapore Model Law and in assessing its statutory objectives.

38 Finally, I bear in mind the preamble to the Singapore Model Law, emphasising cooperation and efficiency between the courts of states involved in cross-border insolvency, and Art 8 of the Singapore Model Law, which requires regard to be paid to the Singapore Model Law's international origin and the promotion of uniformity in its application. I am of the view that the Singapore courts should attempt to tack as closely as possible to the general interpretive trends taken in other jurisdictions that apply the Model Law in its various enactments.

Relevant date for determining the COMI

39 Different approaches exist as to the relevant date for determining COMI. The applicants canvass each approach, arguing that whichever date is chosen, Zetta Jet Singapore's COMI will be found to be in the US. No issue arises as to Zetta Jet USA's COMI.

The English (and European) position

40 The English approach is as laid down in cases such as *In the Matter of Videology Limited v In the Matter of the Cross-Border Insolvency Regulations 2006* [2018] EWHC 2186 (Ch) ("*Videology*") and *In re Stanford International Bank Ltd and another* [2010] 3 WLR 941. Applying the Model Law as incorporated into English law in Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK) Sch 1 and the Recast EIR, English courts determine the debtor's COMI as at the date of the application to open insolvency proceedings abroad.

41 The applicants argue that this approach is influenced by the fact that the Recast EIR uses the COMI concept to determine (a) if the proceeding is one to which the Recast EIR applies; and (b) which EU Member State the proceeding may be commenced in. This view is supported by Recital (23) of the Preamble to the Recast EIR, which states that the "[Recast EIR] enables the main insolvency proceedings to be opened in the Member State where the debtor has [its COMI]".[16] Additionally, Art 3(1) of the Recast EIR states:

> *Article 3.* **International jurisdiction**
>
> 1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interest shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

42 The applicants thus argue that the COMI concept is used differently in the Recast EIR and in the Model Law. The Model Law uses the COMI concept at a later stage, as a means of determining the relief to be granted to the relevant foreign proceedings if so recognised: see Art 20(1) of the Model Law.

[16] Applicants' Further Submissions at para 84.

Furthermore, citing *Cross-Border Insolvency: A Commentary* at p 172, the use of the present tense in Arts 2(*f*) and 17(2)(*a*) of the Model Law indicates that "COMI is to be determined at the time of the application for recognition".[17]

43 I have considered the reasoning in two cases discussed in the applicants' submissions:[18]

(a) In *Videology*, Mr Justice Snowden stated that under the Recast EIR, the date at which the company's COMI must be determined is that at which the request to open insolvency proceedings is made: at [49], citing *Interedil Srl v Fallimento Interedil Srl* Case C-369/09, [2011] ECR I-9939 at [55], [2012] Bus LR 1582, <http://europa.eu.int/eur-lex/en/index.html> (accessed 19 November 2018) ("*Interedil*"), a decision by the European Court of Justice ("ECJ").

(b) In *Interedil* at [54], the ECJ noted that in light of Art 3(1) of the Recast EIR, the last place in which a debtor's COMI was located is to be regarded as the relevant place for the purpose of determining the court having jurisdiction to open the main insolvency proceedings. The ECJ at [55] then referred to the case of *Susanne Staubitz-Schreiber* Case C-1/04, [2006] ECR I-701 at [29], <http://europa.eu.int/eur-lex/en/index.html> (accessed 19 November 2018) ("*Staubitz*"), which held that the courts of the Member State in which the COMI was situated at the time when the request was launched retains jurisdiction to rule on the proceedings, even where the COMI is transferred after the request to open insolvency proceedings is lodged. This led to the conclusion that it is the location of the debtor's COMI at the time the debtor lodges the

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17 Applicants' Further Submissions at paras 85–87.

18 Applicants' Further Submissions at paras 81–82.

request to open insolvency proceedings that is relevant to determine the court having jurisdiction.

44 In view of this analysis of *Interedil* and *Videology*, I am satisfied that the applicants' submissions are correct. The English position regarding the relevant date flows from the European position, which utilises the COMI concept to determine which EU Member State's courts have jurisdiction to open the main insolvency proceedings. These considerations and requirements do not apply under the Model Law and in Singapore. There is thus no constraint requiring a Singapore court to adopt the English position.

The Australian position

45 Australia applies the Model Law as incorporated into Australian law under Cross-Border Insolvency Act 2008 (Cth) sch 1. The debtor's COMI is determined as at the time of the hearing of the recognition application, but regard may be had to historical facts which led to the position at the time: *Moore, as Debtor-in-Possession of Australian Equity Investors v Australian Equity Investors* [2012] FCA 1002 ("*Moore*") at [18]–[19], and applied in *Legend International Holdings Inc (as debtor in possession of the assets of Legend International Holdings Inc) v Legend International Holdings Inc* [2016] VSC 308 ("*Legend*") at [96], and *Wood v Astra Resources Ltd (UK Company No 07620218)* [2016] FCA 1192 at [12].

46 The basis of the Australian position appears to be that the debtor's COMI is to be determined at the point the court is required to give a decision on recognition. I consider the merits of this position in greater detail below.

The US position

47 Chapter 15 of the US Bankruptcy Code incorporates the Model Law into US law. The US cases are consistently clear that the debtor's COMI should be determined as at the filing of the application for recognition: *In re Betcorp Ltd* 400 BR 266 at 290–292 (Bkrtcy D Nev, 2009), *In re Ran* 607 F 3d 1017 at 1025–1026 (5th Cir, 2010) ("*Ran*"). This approach considers the language adopted in US Bankruptcy Code § 1502, which defines a "foreign main proceeding" as "a proceeding in the country where the debtor has the center [*sic*] of its main interests". In *Ran*, the US Court of Appeals for the Fifth Circuit noted that Congress's use of the present tense required the courts to view the COMI determination in the present, *ie*, "at the time the petition for recognition was filed".[19]

48 The Court in *Ran* put forward an additional reason for adopting this approach: examining a debtor's COMI at the time the petition for recognition is filed allows for the harmonisation of transnational insolvency proceedings. Limiting the inquiry to the time of filing avoids a detailed examination of the operational history of the applicant, which may entail conflicting COMI determinations by different courts.[20]

49 The applicants note that this position has been maintained in subsequent cases including *Fairfield Sentry (CA)* at 137 and *In re Ocean Rig UDW Inc* 570 BR 687 at 704 (Bkrtcy SDNY, 2017).[21] I note that the US position has the advantages of simplicity and adherence to the plain language of the Model Law.

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19 Applicants' Further Submissions at paras 96–99.

20 Applicants' Further Submissions at para 100.

21 Applicants' Further Submissions at paras 101–102.

The 1997 and 2013 Guides

50 The applicants note that the 1997 Guide, which is silent on the relevant date for the COMI determination, is the guide which the Singapore Parliament considered when enacting the Singapore Model Law.[22] Conversely, the 2013 Guide expressly states at para 31 that a debtor's COMI should be determined as at the date of the commencement of the foreign insolvency proceedings. Taking the date of commencement to determine the COMI provides a test that can be applied with certainty to all insolvency proceedings: see paras 159–160 of the 2013 Guide.

51 At this point, I should note that these Guides can provide such guidance as to promote the uniform and consistent interpretation of the Model Law. However, they must always be subject to the interpretation of the Model Law provisions as enacted in each jurisdiction, and the relevant considerations of policy which may point in favour of one outcome or another. I have reservations about adopting the approach advocated in the 2013 Guide, which is essentially that adopted by Europe and England. Certainty is also well-served by the adoption of the US position, though possibly, with respect, not the Australian position.

The preferred approach

52 The positions regarding the relevant date to determine COMI are:

(a) **The English and European position and the position taken in the 2013 Guide**: The date of the commencement of the foreign insolvency proceedings.

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22 Applicants' Further Submissions at paras 111–112.

(b) **The Australian position**: The date of the hearing of the recognition application.

(c) **The US position**: The date the application for recognition is filed.

53 Having considered parties' submissions and the above analyses, I accept that determining the debtor's COMI as at the date the recognition application is filed, *ie*, the US position, provides greater certainty and better accords with commercial realities and the language of the provisions of the Model Law.

54 The applicants point to three reasons for preferring the US position:[23]

(a) Arts 2(*f*) and 2(g) of the Singapore Model Law, which define foreign main and non-main proceedings, refer to proceedings that are "taking place". The use of the present tense contemplates that foreign proceedings are underway at the time the debtor's COMI is being ascertained. This is in line with the US position.

(b) The US position would allow the court to account for shifts in the debtor's COMI in the period between the commencement of the foreign insolvency proceeding and the date the recognition application is filed.

(c) The debtor's operational history should not be considered as part of the COMI determination, so as to avoid a meandering inquiry.

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23 Applicants' Further Submissions at paras 122–141.

55 Considering the applicants' submissions, I note the following factors that militate in favour of Singapore's adoption of the US position over the English position.

56 First, the definitions in Art 2 of the Singapore Model Law do not expressly specify the date at which COMI is to be ascertained. The definitions do, however, use the present tense, which seems to indicate that what matters is the situation at the point of the application for recognition.

57 Second, postponing the COMI determination until the application for recognition is made accepts that, in contemporary practice, various entirely legitimate measures may be taken to shift a debtor's COMI to another jurisdiction, for instance, to create a jurisdictional nexus for the opening of insolvency proceedings. Such measures may not all be in place by the time of the foreign insolvency application, *ie*, the operative date under the English and European position. It is not objectionable to grant companies the discretion to select the jurisdiction that will offer the best prospects for achieving an effective restructuring solution: see Sundaresh Menon, Chief Justice, Supreme Court of Singapore, "The future of cross-border insolvency: Some thoughts on a framework fit for a flattening world", keynote address at the 18th Annual Conference of the International Insolvency Institute 2018 (25 September 2018) at paras 32–39 <https://www.iiiglobal.org/sites/default/files/media/keynote%20address%20delivered%20by%20Chief%20Justice%20Sundaresh%20Menon.pdf> (accessed 19 November 2018). Indeed, granting debtors the flexibility to make such COMI shifts is a recognition of their autonomy. An applicant company in ordering its affairs is to be given some leeway in choosing an appropriate forum in which to seek reorganisation. The courts should take a neutral stance as to any purported changes in COMI so as to recognise the applicant's autonomy

and to give effect to any preference exercised by the applicant, subject to any public policy concerns.

58 That said, this is not to sanction a free-for-all: limits exist. An applicant company cannot, for instance, seek to evade responsibilities to its employees by seeking reorganisation in a wholly unrelated jurisdiction, and recognition may be denied in such a situation. If, for instance, and subject to considered arguments on this issue, a COMI shift was opportunistically pursued to evade the criminal laws of the recognising court or to cause prejudice to creditors, then the application for recognition of the foreign proceedings may be denied. It may also be that such denial would not turn on whether the conditions for recognition under Art 17(1) of the Model Law were fulfilled, but rather as being contrary to public policy. We will have to see how the arguments are made in such a case. But short of evasion of criminal or similar laws, and generally provided that there are commercial reasons for choosing one jurisdiction over another, I am doubtful that a Singapore court would be overly exercised by the applicant's choice of a particular court to commence insolvency proceedings in.

59 With that consideration in mind, ascertaining the debtor's COMI as at the date of the hearing for recognition facilitates an applicant's ability to seek restructuring in an appropriate forum. Jurisdiction may be assumed by the restructuring court on a number of grounds, not all of which will necessarily establish that the applicant's COMI is in that jurisdiction. That, however, is a separate analysis; what matters for the recognising court is that the requirements of the Model Law are met at the point of the application for recognition.

60 Having preferred the US position to the English position, I now consider the Australian position vis-à-vis the US position. It would seem that the Australian approach is based on the need to give effect to the language of the

Model Law. I am, however, unable to find in the language of the Singapore Model Law anything that distinguishes the date of the *application* from the date of the *hearing* as the relevant date for determining the COMI. I am also of the view that the Australian position leaves the date of the ascertainment of the debtor's COMI uncertain: a bright-line rule would be preferable. Finally, although the Australian position gives the recognising court greater leeway in ascertaining the debtor's COMI, I do not think that in practice there would be much difference in result between the Australian and US positions.

61 All things considered, the ascertainment of COMI as at the date of the application has the advantage of greater certainty, given the possible vagaries of hearing diaries in all jurisdictions. I therefore prefer the US position to the Australian position.

Factors to be considered in determining COMI

62 Having determined the relevant date for the COMI determination, which factors does the court consider in the COMI assessment? A summary of the approaches taken in various jurisdictions follows.

The English and European approach

63 English and European cases, particularly *In re Eurofood IFSC Ltd* (Case C-341/04) [2006] 1 Ch 508 ("*Eurofood*") and *Interedil*, provide useful guidance. They highlight the need for objective criteria that would allow for ascertainment of the COMI by third parties: *Eurofood* at [33], *Interedil* at [49].

64 The English High Court of Justice in *Videology* took the following approach:

(a) English courts are to apply the ECJ's tests in determining a company's COMI: at [28]. *Eurofood* and *Interedil* were applied to determine if the presumption of COMI in the place of the debtor's registered office had been displaced: at [32].

(b) In view of the Recitals and Art 3(1) of the Recast EIR, the factors relied upon to rebut the presumption had to be both objective and ascertainable by third parties. The fact that a parent company in another state controlled the economic choices of a subsidiary was insufficient to rebut the presumption: at [33], citing *Eurofood* at [33]--[37].

(c) On the facts of the case, Mr Justice Snowden concluded that the presumption that the company's COMI was in the place of its registered office had not been displaced. The UK, the place of the debtor company's registered office, was also where the company's trading premises and staff were located; where its customer and creditor relationships were established; where it administered its relations with trade creditors on a day to-day basis; and where its main assets, namely, the receivables and cash at bank, were located. Importantly, representations were made to the company's main finance creditor that the UK was where its COMI was located: at [72]. These were all factors that were visible and immediately ascertainable by customers and trade creditors of the company, and which ultimately displaced the factor that the company's senior management was located in the US: at [73].

65 I note also that Recital (28) of the Preamble to the Recast EIR, which *Videology* considered at [31], states:

> [28] When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their

> perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of [COMI], informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.

66 Although the Recast EIR and its Recitals are not part of Singaporean law, the recognised need for objective criteria ascertainable by third parties and the focus on the debtor company's place of central administration are clearly applicable to the Singaporean context.

The Australian approach

67 In *Legend*, Randall AsJ of the Supreme Court of Victoria considered various factors in this analysis, including the location of the debtor company's assets; the residence of its directors; its principal place of business, the activities of its wholly owned subsidiary; its operations, including its day-to-day activities; and where the auditing of its accounting was attended to. In the circumstances, it was found that the preponderance of the debtor company's activities was conducted in Australia, and Australia was thus the company's COMI. The presumption of COMI in the place of the company's registered office, *ie*, Delaware, was therefore displaced: at [98] [123].

68 The Australian approach also entails consideration of where the debtor conducts the administration of its interests on a regular basis: *Moore* at [19]. The COMI should also be ascertainable by third parties, creditors, and potential creditors; for this to be the case, the court must have regard to the need for an element of permanence: *Moore* at [19], *Kapila, in the matter of Edelsten* [2014] FCA 1112 at [53], *Legend* at [91].

69 I also highlight the broad-ranging approach taken in *Young, Jr, in the matter of Buccaneer Energy Limited v Buccaneer Energy Limited* [2014] FCA 711 at [7]–[14]. Jagot J noted that although the company was registered in Australia, its main activities and that of its subsidiaries were in the US. Its COMI was thus the US; ignoring the company's group structure would be to ignore the commercial realities which the Model Law attempts to address.

The US approach

70 The US courts have adopted the term "nerve centre", focussing on where the debtor company performs its most important and consequential business decision-making functions: *In re Railpower Hybrid Technologies Corp* Case 09-41498-WWB at 8 (Bkrtcy WD Pa, 2009), *Fairfield Sentry (Bankruptcy Court)* at 64 -65. We have not had the occasion to consider the US cases in extensive detail, but I am concerned that the focus on the company's "nerve centre" is perhaps too narrow where the language of the Model Law is concerned, given that the analysis is concerned more broadly with where the company's "centre of main interests" is located.

71 That being said, the US cases do look at a similarly broad range of factors in the COMI determination, as in other jurisdictions, including the location of the debtor's headquarters; the location of its management; the location of its primary assets; the location of the majority of its creditors; and the jurisdiction whose law would apply to most disputes: *Fairfield Sentry (CA)* at 137, *In Re SPhinX, Ltd.* 351 BR 103 at 117 (Bankr SDNY, 2006).

The Singaporean approach

72 We have not had the occasion yet, at least in a written judgment, to consider the interpretation of COMI under the Singapore Model Law. I

previously applied a common law COMI test when deciding recognition issues in *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] 4 SLR 312 ("*Opti-Medix*") and *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] 5 SLR 787. In particular, I was satisfied in *Opti-Medix* that despite the debtor companies' incorporation in the BVI, their common law COMI was in Japan where the companies carried on business. I thus granted full recognition to the relevant Japanese insolvency orders and the Tokyo District Court-appointed bankruptcy trustee: at [24] and [25].

73 Singapore has since adopted the Model Law. It would be preferable if the common law and Model Law conceptions of COMI were aligned as far as possible.

74 Turning to the Guides for reference, the 1997 Guide is quite laconic; para 72 only states that COMI as used in Art 2(*b*) of the Model Law is used also in the EU Convention on Insolvency Proceedings. No commentary is made regarding Art 16(3) of the Model Law. In comparison, the 2013 Guide describes the COMI concept as fundamental to the operation of the Model Law; proceedings commenced in a company's COMI are accorded deference and automatic relief: para 144. The 2013 Guide then states, at para 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 location: (*a*) where the central administration of the debtor takes place, and (*b*) which is readily ascertainable by creditors. ...

This approach echoes the approach taken in the Recast EIR.

75 In addition, the 2013 Guide at para 147 also highlights additional COMI factors which could be considered by the recognising court as applicable:

> ... [T]he 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.

76 I have noted at [30] and [31] that I do not understand the Singapore Model Law to require that the Art 16(3) presumption be rebutted on the balance of probabilities. In determining a debtor's COMI under the Singapore Model Law, the court would first presume that the place of the debtor company's registered office is its COMI. This presumption would be displaced if it is shown that the place of the company's central administration and other factors point the COMI away from the place of registration to some other location. The COMI factors should be those that are objectively ascertainable by third parties generally, with a focus on creditors and potential creditors in particular. This follows the English, European and Australian positions.

77 *Eurofood* at [33] noted that objectivity and the possibility of ascertainment by third parties are necessary to ensure legal certainty and foreseeability concerning the determination of which EU Member State's courts have jurisdiction to open main insolvency proceedings. Although this consideration does not strictly apply in Singapore, there remains a need to ensure that creditors especially can predict when an insolvency proceeding

might subsequently be granted recognition as a "foreign main proceeding", given the automatic reliefs that follow under the Model Law.

78 In this respect, I would also consider it material, in determining which factors to take into consideration for the COMI determination, to consider how likely it is that a creditor would weigh a particular factor in his mind. I would focus on those factors that a creditor would take into account in his deliberations as to whether to afford credit to the applicant company. For instance, where a company is clearly involved in cross-border activities, a creditor may not regard the location of assets as being significant if it is expected that the assets in question, *eg*, vessels or planes, would move around as part of the company's operations. It may be in such a situation that the location of the company's fixed assets plays a greater role.

79 I also accept that there should be an element of settled permanence or intended permanence in the factors considered, which would assist creditors in their weighing of the relevant factors and the risks entailed in granting credit. As such, a change in COMI would be tolerated, even just ahead of an insolvency filing, provided that there is a clear ascertainable intention to make such a COMI change lasting, rather than vacillating.

80 The US approach of identifying the company's "nerve centre" is useful, but I would not regard this factor as determinative. It would be one of several factors that need to be weighed in the round. I would focus on the centre of gravity of the objectively ascertainable factors, if that helps the analysis: balancing all the relevant factors, where does the mass settle in the end? It will be a robust, entirely qualitative analysis especially since the proceedings will not involve a full trial of the facts, but that is, I believe, what is intended under the Model Law.

81 Flowing from that, where there are disputed facts, the court will have to make the best conclusions it can in the circumstances. Where the scale does not clearly tip either way, the location of the registered office will be taken to be the COMI by default. And, as is the case here, if there are background disputes between shareholders affecting questions of management and direction, that again may, on the facts, lead to the conclusion that the presumption or default position should be upheld.

82 As the analysis requires a consideration of factors relevant to the creditor's understanding, the court's focus is on actual facts on the ground rather than on legal structures. The court's inquiry in this regard is broad-ranging, looking at the company's activities in and connections to a particular locale. In some situations, it may be that the actual activities on the ground mean that little distinction is drawn in reality between a company and other members in its group. That should be taken into account in determining the company's COMI. This approach may be contrasted to other situations where the concept of separate corporate identity is maintained: the purpose of those legal doctrines is different. COMI determination is not concerned with corporate identity as such, unlike, say, determinations of corporate liability or attribution.

83 Accordingly, I am of the view that in ascertaining a specific company's COMI, there is no need to maintain strictly the distinction between different entities within a group. It is possible for the analysis to be made of the activities of an entire group of companies, rather than of the specific debtor company in question. In this case, some of the COMI factors relate to the activities of the Zetta Entities and the Zetta Jet Group generally, and not Zetta Jet Singapore itself.

84 In any event, I do not think there is a significant difference in the position of the applicants and the Intervener as to the law on the determination of COMI.

Consideration of factors in the present application

85 I will assess the various factors raised by the parties in the following categories:

(a) the location from which control and direction was administered;

(b) the location of clients;

(c) the location of creditors;

(d) the location of employees;

(e) the location of operations;

(f) dealings with third parties; and

(g) the governing law.

I will also deal briefly with the applicants' argument that the location where the foreign insolvency representative, *ie*, the Trustee, operated from should be considered.

86 The COMI determination takes into account the facts as they were at 13 December 2017, the date of the applicants' recognition application. That said, as noted above at [23], the analysis will be unchanged regardless of the date considered.

Location from which control and direction was administered

87 The applicants contend that control of Zetta Jet Singapore resided in the US, particularly after 17 August 2017 when Geoffrey Owen Cassidy ("Cassidy") and June Tang Kim Choo ("Tang") were removed from their positions in the Zetta Jet Group. Following their removal, the Zetta Entities were managed exclusively from the US;[24] operational decisions were also made in the US.[25] The Intervener relies on the fact that Cassidy was the managing director of Zetta Jet Singapore prior to his "improper removal" before the commencement of the Chapter 11 proceedings.[26]

88 I accept that at least following Cassidy's ouster, control and direction of Zetta Jet Singapore resided in persons located in the US. I note that there was a dispute about whether Cassidy's removal was proper, but this does not affect my finding. In determining COMI, the court only needs to consider the question of actual control of the debtor company, leaving the resolution of any underlying legal dispute to the appropriate forum and process.

Location of clients

89 The applicants argue that the clients were primarily based in the North America and Europe.[27] The Intervener does not refute this.[28]

90 The presence of clients in a given location does not by itself establish the debtor's COMI; the relevance of this factor arises primarily through its

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24 Seagrim's OS 1391 Affidavit at paras 32, 50 and 51.

25 Andrew Payne's ("Payne's") 2nd Affidavit at para 94(b).

26 Cassidy's 1st Affidavit at paras 16 and 20.

27 Seagrim's OS 1391 Affidavit at para 66.

28 Intervener's Submissions dated 12 January 2018 at para 76(f).

connection with other factors such as whether these clients are creditors, and the location of funds, assets and management. I would not in the circumstances of this case attach much weight to this factor.

Location of creditors

91 The Intervener contends in submissions that Zetta Jet Singapore has creditors in Singapore.[29] In contrast, the applicants state that its creditors were largely based in the US; ten of its top 20 unsecured creditors were located in the US as at 15 September 2017, the date of the commencement of the US Chapter 11 proceedings.[30]

92 I accept the evidence of the applicants that at least half of the primary unsecured creditors were located in the US. But that by itself would not be sufficient to lean the conclusion regarding the COMI towards the US, as the position with respect to the creditors would appear, on the applicants' own evidence, to be mixed.

Location of employees

93 The Intervener argues that Zetta Jet Singapore employed 176 employees who were mostly based out of the US.[31] The applicants refute this, saying that there were only 60 employees based in Singapore, with the remaining employees based elsewhere. Those in Singapore played primarily back-end functions, in low-level administrative roles. The applicants' assertion of the limited roles of the employees in Singapore was not backed up by more than an organisation chart[32] and a page in the Zetta Jet Singapore employee handbook,

29 Intervener's Submissions dated 12 January 2018 at para 76(f).

30 Payne's 1st Affidavit at para 43(f).

31 Cassidy's 1st Affidavit at para 12.

which directed employees to direct questions and suggestions to Seagrim or to Eric Rastler, the Zetta Jet Group's Chief Pilot.[33]

94 I find that there is insufficient evidence as to the level or responsibility of the employees stationed in Singapore. In the circumstances, this does not play a material role in the ultimate determination.

Location of operations

95 The applicants rely on the fact that Zetta Jet Singapore's business was conducted primarily in the US: a large majority of the flights that it and Zetta Jet Group chartered occurred within the US. These flights could only be operated with US Federal Aviation Authority certification of the planes, which Zetta Jet USA maintained.[34] The Intervener argues that no maintenance facility or offices were in effect maintained in the US: while a flight operation centre was supposedly maintained in the US, most operations were conducted by the Singapore operation centre, which housed most of the operations staff; all flight scheduling and operations were conducted in Singapore.[35]

96 I am of the view that in this specific case, the locus of operations was of less relevance than perhaps in other cases. Where and how the business activities of the Zetta Entities were conducted would not have been of much relevance and not appreciable to a creditor, especially since the company was concerned with flights, at least some of which presumably would be international in nature. Some dispersal of operations would have been expected. The administration would seem to be split in some way between the US and

32 Payne's 2nd Affidavit at para 94 and Exhibit "AP-23".

33 Seagrim's OS 1391 Affidavit at paras 71 and 80 to 82 and Exhibit "JS-1", Tab 21.

34 Seagrim's OS 1391 Affidavit at paras 42–46.

35 Cassidy's 1st Affidavit at para 12.

Singapore. I cannot conclude that this points clearly in either direction. I also find that the location of assets would not perhaps be readily apparent to a creditor, nor would a creditor likely consider it significant, given the nature of the business of transporting persons. It would have been otherwise had the business been one of largely domestic inland transport. Accordingly, I give this factor less weight in the analysis.

Dealings with third parties

97 The applicants rely on the fact that the Zetta Entities were understood to be US-based by customers and creditors. The Zetta Entities were marketed on their website and social media as operating out of Burbank, California.[36] The applicants refer to communications to key customers, vendors and creditors that their points of contact after 17 August 2017 following the removal of Cassidy and Tang would be Walter, Michael Maher, the newly-appointed Chief Executive Officer of the Zetta Jet Group, and Seagrim, who were all US-based. The applicants also point to the Zetta Jet Group's website which indicated that the US was the location of Zetta Jet Group's business.[37] These factors are significant pointers which were readily perceivable by third parties that indicated that the COMI was in the US.

98 The Intervener alleges that Zetta Jet Singapore conducted sales and marketing for its flights all over the world, implying that it was not US-centred.[38]

99 In so far as dealings with creditors are concerned, I would accept that it is relevant that representations pointed to the Zetta Jet Group as being located

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36 Seagrim's OS 1391 Affidavit at paras 60, 86 and 87.

37 Seagrim's OS 1391 Affidavit at para 35.

38 Cassidy's 1st Affidavit at para 12(e).

in the US, reinforcing the expectations of at least some of the creditors that they were dealing with a company that would have a strong connection to the US.

The governing law

100 Neither side invokes the use of a particular law or choice of jurisdiction. In general, I would think that this is of less relevance in most situations given the demise of the rule in *Gibbs* outside England and its associated jurisdictions.

Location that the foreign representative was operating from

101 The applicants point to the fact that the US-based Trustee undertook efforts to restructure Zetta Jet Singapore from the date of his appointment to the cessation of the business of the Zetta Entities, *ie*, from 5 October 2017 to 30 November 2017.[39]

102 However, I would not take the foreign representative's actions as being relevant in the ascertainment of COMI. The work being done by the foreign representative would flow from the assumption of jurisdiction by the foreign court on whatever basis it considers appropriate.

103 I am mindful that I differ in this regard from the approach of the US courts in cases such as *Fairfield Sentry Ltd (CA)*, which held that "any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis": at 137. I am not, however, convinced that it is proper to consider such activities in determining COMI.

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39 Payne's 4th Affidavit at Exhibit "AP-37", Tab 2.

The final assessment

104 On an overall assessment, the following significant factors displace the presumption that Singapore, the place of Zetta Jet Singapore's registered office, was its COMI:

(a) central management and direction of Zetta Jet Singapore were conducted from the US at all relevant times;

(b) corporate representations indicated it operated from the US; and

(c) a substantial portion of its creditors were located in the US.

105 The fact that Zetta Jet Singapore's administration and operations were carried out at least to some extent in Singapore is outweighed by the abovementioned factors. I am not sure that any distinction can be drawn between administration and operations. For that reason, I am the of the view that in these circumstances, the presence of employees in Singapore will be at best a neutral factor in determining COMI.

106 I am also of the view that the location of Zetta Jet Singapore's assets, namely, the planes, is incidental and not indicative of the location of its COMI. It is to be expected for a business of this nature that its assets may be dispersed in the location most appropriate from time to time. The fact that US air certification was required for Zetta Jet Singapore to operate its flights in the US is also a neutral factor, and ultimately does not assist in the COMI determination.

107 On the facts, the most important factor to my mind is the location of the primary decision-makers. I am therefore satisfied on the evidence that Zetta Jet Singapore's COMI was at the material times located in the US.

Issue 3: Whether the public policy exception applies

108 The Intervener argues that there was continued breach of the Singapore injunction on the applicants' part; this breach was still contempt even if the injunction was subsequently discharged: *Pertamina* at [82]. *Pertamina* is to be preferred to *Nikkomann* at [62], which held that the discharge of an order would not leave the putative contemnor with any liability for penalties.[40]

109 The Intervener had consented to the discharge on the basis that the law was set out in *Pertamina*. King had made implicit concessions that he was aware or wilfully blind that he had breached and continued to breach the Singapore injunction. The application to discharge the injunction was only made after King had failed to obtain full recognition in *Zetta Jet (No 1)* and after the Australian courts observed in parallel proceedings that the Singapore injunction enjoined him.[41] King accepted on 12 July 2018, at the hearing where the injunction was set aside, that in the event the injunction was discharged, any breach or contempt that he committed prior to the discharge would not be excused.[42]

110 The applicants first argue that there is no public policy issue that should lead the court to refuse to recognise the US bankruptcy proceedings and the Trustee. No concessions had been made: King had been advised by US counsel that the injunction "did not bite on him", and thus had not sought to discharge the injunction earlier.[43]

111 Second, the effect of the Intervener's arguments on continued breach would be that the Trustee can never obtain recognition in Singapore. The

40 Intervener's Submissions dated 16 November 2018 at paras 15–16.

41 Intervener's Submissions dated 16 November 2018 at para 17.

42 Intervener's Submissions dated 16 November 2018 at para 22.

43 Applicants' Further Submissions at paras 43–46.

applicants highlight that the US bankruptcy proceedings are still underway and that the Intervener could have entered an appearance or resisted those proceedings. Moreover, the Singapore injunction had been discharged, and the court discharging the injunction had observed that the basis of the injunction was no longer extant.[44]

112 Third, public policy does not call for recognition to be refused. The first and most important public policy consideration is to protect the general body of Zetta Jet Singapore's creditors and to ensure that the Trustee maximises recovery for all of them, giving priority to creditors over shareholders. The Intervener had cynically sought to prioritise the rights of shareholders over the rights of creditors in procuring the Singapore injunction. The Intervener's public policy arguments ought to be disregarded, or weighed against the overwhelming public policy concerns pointing in favour of allowing the application.[45]

113 Fourth, the applicants highlight the overwhelming evidence of Cassidy's wrongdoing and the Intervener's deliberate deception in its *ex parte* application to procure the Singapore injunction. The applicants call the court to make a finding with regard to the Intervener's wrongful procurement of the Singapore injunction.[46]

114 Finally, the applicants argue that the present case is unlike the US decision in *In re Gold & Honey, Ltd.* 410 BR 357 (Bankr ED NY, 2009) ("*Gold & Honey*"), which the Intervener relied upon in *Zetta Jet (No 1)*. *Gold & Honey* involved a situation where the recognition of foreign receivers would directly

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44 Applicants' Further Submissions at paras 47–48; Agreed Bundle of Documents ("ABOD"), Tab 19, Notes of Evidence ("NE") (12 July 2018) p 3 ln 25–31.

45 Applicants' Further Submissions at paras 49–54.

46 Applicants' Further Submissions at para 55.

contradict local proceedings that sought to maximise the recovery for the entire pool of creditors. Recognition would have resulted in an irremediable situation. In comparison, S 864/2017 is a civil suit brought by one shareholder against two other shareholders of Zetta Jet Singapore, and Zetta Jet Singapore itself. The recognition of the US bankruptcy proceedings and the Trustee will not undermine any claim the Intervener may make in the US proceedings or separately against the other shareholders.[47]

115 Having considered these submissions, I set out my decision as follows.

The allegedly continuing breach

116 The fact that the parties had by consent agreed to the discharge of the Singapore injunction would seem to point to the conclusion that there was no continuing breach of the injunction. The Intervener's argument, though, is that the applicants' initial breach of the injunction was not cured by subsequent discharge of the injunction.

117 This is a question that engages domestic public policy considerations. In determining these issues, the court is not primarily concerned with the desires or interests of the body of Zetta Jet Singapore's creditors as a whole or even of those in Singapore, but with the administration of justice in Singapore.

118 Whether or not breach or contempt continues after an order is discharged would be a matter dependent on the facts. I am wary of enunciating a general rule. The Intervener relies on *Pertamina* at [82], which cites Mark S W Hoyle, *Freezing and Search Orders* (Informa, 4th Ed, 2006) ("Hoyle") at paras 9.17:

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47 Applicants' Further Submissions at paras 59–61.

> The following observations in a leading textbook are also apposite (see *Hoyle* ... at para 9.17):
>
> > It is no defence to contempt proceedings to allege that the order should not have been made, or has been discharged. **An order of the court must be obeyed while it stands, and a breach is still contempt even if, at a later stage, the order is in fact discharged.** The same principle applies if the original order was wrongly made; the defendant's remedy is to apply for its immediate discharge while keeping to its terms.
>
> [emphasis added in bold italics]

119 The Intervener contrasts *Pertamina* with *Nikkomann* at [62]:

> ... In *Hallmark Cards Inc v Image Arts Ltd* [1977] FSR 150, however, Buckley LJ said:
>
> > While the order stands, the party who refuses access to his premises is in default of the order. But if the party against whom the order is made were to succeed in getting the order discharged, I cannot conceive that that party would be liable to any penalties for any breach of the order of which he may have been guilty while it subsisted, for if the order is discharged upon the footing that it ought not to have been made, then the contempt is in truth no contempt, although technically no doubt there is contempt.

120 I read the extract from *Pertamina* to mean that an order of the court must be obeyed while it stands; a breach of a court order is still contempt even if, at a later stage, the order is in fact discharged. I do not read *Nikkomann* as taking a different position, as the Intervener suggests. Indeed, opprobrium attaches at the point of breach regardless of what happens after.

121 I would, with respect, prefer to weigh the original injunction order, the breach of the order and the circumstances of any purported rectification to consider the consequences that follow for a putative contemnor. But while the applicants' wrong remains a breach of the Singapore injunction after its discharge and may be pursued as contempt, it does not follow that such failure

to comply remains a ground for refusal of recognition, whether under the Singapore Model Law or the common law. Recognition was refused in *Zetta Jet (No 1)* because the US Trustee had flouted an express order of court; he breached the Singapore injunction by pursuing US bankruptcy proceedings, which undermined the administration of justice in Singapore: at [29]. However, if the order is discharged and the court issuing the order is content to let the order be discharged, recognition no longer undermines the administration of justice in Singapore. It may be that contempt proceedings may be continued for such breaches in some situations, but that is a separate matter.

122 Thus the fact that the Intervener may have consented to discharge on the basis that contempt may still exist does not determine the question of whether recognition should be granted. The Intervener may indeed pursue contempt proceedings against the applicants if it wishes, but the fact that contempt may have been committed does not in itself give rise to grounds for continued non-recognition of the US bankruptcy proceedings.

The general interests of creditors

123 The other point of public policy raised by the applicants is that there is a countervailing public policy consideration of ensuring that the general interests of creditors are protected. I do not accept the applicant's arguments as regards public policy and do not find this consideration material in the application of Art 6 of the Singapore Model Law.

124 Briefly, the public policy concern identified in *Zetta Jet (No 1)* at [29] was simply that recognition of a foreign insolvency proceeding pursued in breach of an injunction issued by a co-ordinate court would undermine the administration of justice in that co-ordinate jurisdiction. That policy

consideration overrides all others, including those raised by the applicants. On the facts, the objectives of facilitating the uniform and orderly distribution of assets cannot override the paramount public policy of upholding the administration of justice in Singapore.

125 Flouting a Singapore order will carry consequences. Those advising in restructuring and insolvency matters abroad would do well to take note of that. Those breaching orders issued by Singaporean courts may not need to come to Singapore and may feel that they can thumb their noses with safety from foreign shores. But should they ever need to look to assets or information in Singapore, they will have to answer for their conduct. In the present case, the consensual discharge resolved the issue for the Trustee. The same result may not arise in other cases.

Orders made

126 Prayer 1 in Originating Summons No 1391 of 2017 ("OS 1391/2017") is for the US bankruptcy proceedings to be recognised as a foreign main proceeding within the meaning of Art 2(*f*) of the Singapore Model Law. For the reasons above, Prayer 1 is accordingly granted.

127 Prayer 2 in OS 1391/2017 is for the Trustee to be recognised as a foreign representative within the meaning of Art 2(*i*) of the Singapore Model Law. No issue arises on that score, and Prayer 2 is also granted.

128 Automatic stay reliefs flow from the recognition of the US bankruptcy proceedings as a foreign main proceeding: Art 20(1) of the Singapore Model Law. Prayer 3 in OS 1391/2017, which covers this, is granted. Prayer 4, which deals with the situation in which the US bankruptcy proceedings are recognised as a foreign non-main proceeding, is not in play.

129 Of the other operative prayers in OS 1391/2017, I grant as follows:

(a) I grant Prayer 5 to allow the Trustee to examine witnesses, take evidence, and obtain delivery of information concerning the Zetta Entities' property. I regard such powers as necessary for the proper conduct of the insolvency proceedings whether here or in the US. If any party takes specific objection to the powers granted to the Trustee in these orders, these objections will be considered separately.

(b) I also grant Prayer 6 to allow the Trustee to be entrusted with the realisation of the Zetta Entities' assets located in Singapore, save that the Trustee should apply to court for leave to repatriate any assets to locations outside of Singapore. I would also limit realisation of the assets to the extent that powers granted under Prayer 6 shall not be exercised within Singapore to prejudice rights granted by Zetta Jet Singapore to any person in respect of any real property located in Singapore.

(c) Prayer 7(a) seeks to allow the Trustee to apply to the court under Art 23(1) of the Singapore Model Law for orders under or in connection with avoidance provisions in the Companies Act and s 73B of the Conveyance and Law of Property Act (Cap 61, 1994 Rev Ed). The applicants highlight the need to be granted standing to protect the integrity of Zetta Jet Singapore's assets, and note that there are at present no other insolvency proceedings against Zetta Jet Singapore.[48] I am satisfied that the Trustee should be able to pursue claims under Art 23(1) of the Singapore Model Law in the circumstances. Any potential prejudice faced by Singapore creditors is addressed by the requirement that the Trustee apply for leave before any assets are repatriated.

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[48] Applicant's Further Submissions at paras 201–202.

(d) Prayer 7(b) seeks relief under Art 21(1)(g) of the Singapore Model Law to grant the Trustee powers available to a liquidator under Singapore insolvency law. I am satisfied that such powers should be granted to the Trustee to allow him to pursue an orderly liquidation.

130 Several of the other Prayers in OS 1391/2017 are in the circumstances not necessary and accordingly no orders are made on these.

131 I will see parties to settle the scope of the orders and determine their precise wording, and will give directions on cost submissions. In the meantime, time for appeal is extended.

Aedit Abdullah
Judge

Tan Mei Yen, Thenuga Vijakumar, and Oh Teng Chew, Dennis (Hu Tingchao) (Oon & Bazul LLP) for the applicants;
Rajaram Muralli Raja, Jerric Tan Qiu Lin and Kyle Gabriel Peters (Straits Law Practice LLC) for the Intervener.

Gunel Bakhshiyeva (in her capacity as the Foreign Representative of The OJSC International Bank of Azerbaijan) v Sberbank of Russia & 6 Ors [2018] EWHC 59 (Ch) (IBA Case)

Neutral Citation Number: [2018] EWCA Civ 2802

Case No: A2/2018/0084

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)
THE HONOURABLE MR JUSTICE HILDYARD
[2018] EWHC 59 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2018

Before:

LORD JUSTICE LEWISON
LORD JUSTICE HENDERSON
and
LORD JUSTICE BAKER

IN THE MATTER OF THE OJSC INTERNATIONAL BANK OF AZERBAIJAN AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

Between:

GUNEL BAKHSHIYEVA (IN HER CAPACITY AS THE FOREIGN REPRESENTATIVE OF THE OJSC INTERNATIONAL BANK OF AZERBAIJAN)	**Appellant**
- and -	
(1) SBERBANK OF RUSSIA **(2) FRANKLIN GLOBAL TRUST – FRANKLIN EMERGING MARKET DEBT OPPORTUNITIES FUND** **(3) FRANKLIN EMERGING MARKET DEBT OPPORTUNITIES FUND PLC** **(4) FRANKLIN TEMPLETON FRONTIER EMERGING MARKETS DEBT FUND** **(5) FRANKLIN TEMPLETON EMERGING MARKET DEBT OPPORTUNITIES (MASTER) FUND, LTD** **(6) FRANKLIN TEMPLETON SERIES II FUNDS** **(7) FRANKLIN EMERGING MARKET DEBT INSTITUTIONAL FUND**	**Respondents**

Mr Daniel Bayfield QC and Mr Ryan Perkins (instructed by **White & Case LLP**) for the **Appellant**
Mr Mark Howard QC and Fred Hobson (instructed by **Fried, Frank, Harris, Shriver & Jacobson (London) LLP**) for the 1st **Respondent**
Mr Gabriel Moss QC and Mr Richard Fisher (instructed by **Dechert LLP**) for the 2nd to 7th **Respondents**

Hearing dates: 24 and 25 October 2018

Approved Judgment

Lord Justice Henderson:

Introduction

1. This appeal raises important questions about the proper scope of the powers conferred on the English court by the Cross-Border Insolvency Regulations 2006, SI 2006 No 1030, (the "CBIR") to order a stay of proceedings in this jurisdiction in support of a foreign insolvency proceeding.

2. The CBIR were made in order to implement and give the force of law in Great Britain to "the UNCITRAL Model Law", that is to say the Model Law on cross-border insolvency as adopted by the United Nations Commission on International Trade Law on 30 May 1997, "with certain modifications to adapt it for application in Great Britain"; see regulations 1 and 2(1). The Model Law, with those modifications, is set out in Schedule 1 to the CBIR. References in this judgment to articles of the Model Law are (unless otherwise stated) to the version of it set out in the schedule.

3. By virtue of regulation 3(1), British insolvency law (as defined in article 2) is to apply with such modifications as the context requires for the purpose of giving effect to the CBIR, while regulation 3(2) provides that in the case of any conflict with British insolvency law, the CBIR shall prevail. The relevant definition of British insolvency law incorporates, in relation to England and Wales, the provisions of the Insolvency Act 1986, or any extension or application thereof by or under any other enactment.

4. The scope of application of the Model Law is laid down by article 1, which states that it applies where:

> "(a) assistance is sought in Great Britain by a foreign court for a foreign representative in connection with a foreign proceeding."

It also applies in the converse situation, immaterial for present purposes, where assistance is sought in a foreign State in connection with a proceeding under British insolvency law, and in certain other specified circumstances. "Foreign proceeding" is widely defined in article 2(i) to mean:

> "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 reorganisation or liquidation."

A "foreign representative", by virtue of article 2(j), means:

> "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

5. Article 9, headed "Right of direct access", entitles a foreign representative "to apply directly to a court in Great Britain". Such an application may be made for recognition of the foreign proceeding in which the foreign representative has been appointed: see article 15, which specifies the formalities which have to be complied with on such an application. Article 17 then provides for the mandatory recognition of a foreign proceeding if the necessary conditions are satisfied. By virtue of article 17, the foreign proceeding must be recognised as "a foreign main proceeding" if it is taking place in the State where the debtor has the centre of its main interests (or "COMI"), or as "a foreign non-main proceeding" if the debtor has an establishment in the foreign State.

6. Article 20 then provides for certain *automatic* effects of recognition of a foreign *main* proceeding:

> "(1) Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this article -
>
> (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."

In the case of a corporate debtor, the stay and suspension are to be the same in scope and effect as if the debtor had been made the subject of a winding-up order under the Insolvency Act 1986, but paragraph (6) also enables the court, either on application or of its own motion, to modify such stay and suspension, or any part of it, "on such terms and conditions as the court thinks fit." In practice, this means that where the foreign proceeding is not a winding-up or akin to a liquidation, but is a process such as an administration or reconstruction from which it is hoped that the company will emerge as a going concern, the English court is likely to adapt the automatic stay under article 20(1) so that it more closely resembles the moratorium which applies when a company goes into administration under Schedule B1 to the Insolvency Act 1986.

7. Article 21 then provides for relief that *may* be granted upon recognition of a foreign proceeding, whether *main or non-main*. Since this is the central provision upon which the present case turns, I will set out the relevant parts of article 21, together with the supplementary provisions in article 22 for the "[p]rotection of creditors and other interested persons":

> **"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;

...

(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.

(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 Great Britain to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in Great Britain are adequately protected.

...

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 or paragraph 6 of article 20, the court must be satisfied that the interests of the creditors... and other interested persons, including if appropriate the debtor, are adequately protected.

(2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate, including the provision by the foreign representative of security or caution for the proper performance of his functions.

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

8. In the light of these provisions of the CBIR, I can now formulate the question which arises in this case with more precision. The relevant circumstances may be summarised in this way:

a) the foreign proceeding is not a liquidation, but a voluntary restructuring entered into between the company and its creditors, with the aim of enabling the company to survive as a going concern;

b) the restructuring plan provides for all the company's existing debts of a specified class to be discharged in full and replaced with various entitlements;

c) under the relevant foreign law (which is the law of the company's place of incorporation and COMI), the restructuring plan becomes binding on all the creditors of the relevant class once it has been approved by a specified majority of them and confirmed by the foreign court;

d) the plan is duly approved by the requisite majority and confirmed by the foreign court;

e) the relevant class of creditors includes some whose claims against the company are governed by English law ("the English creditors"), who do not participate in the restructuring or otherwise submit to the jurisdiction of the foreign court;

f) under English law as it now stands, binding on all courts below the Supreme Court, the claims of the English creditors are not discharged or otherwise affected by the foreign restructuring; and

g) the foreign representative successfully applies to the English court for recognition of the foreign proceeding as a foreign main proceeding, and obtains a suitably modified version of the automatic stay under article 20 which will continue in force until the restructuring has been fully implemented, but will lapse or be liable to termination thereafter.

In those circumstances, does the English court have the power (and, if so, should it exercise the power), on application by the foreign representative under article 21(1)(a) and/or 21(1)(g) of the CBIR, to direct that the claims of the English creditors should continue to be stayed indefinitely, even after the restructuring has come to an end and the company has resumed operation as a going concern?

9. The purpose of the application, as is candidly conceded, is to prevent the English creditors from relying on their rights under English law to seek to enforce their claims against the company's assets in England and Wales, or in any other jurisdiction which does not recognise the discharge of their debts under the foreign law. Thus, although a stay is normally a procedural remedy, of limited duration, the purpose of seeking it in the present case is to achieve what is in effect a substantive remedy, barring the English creditors from relying on their English law rights and thereby, so it is said, obtaining an unfair advantage over the other creditors of the specified class whose original debts have been replaced by the entitlements provided for by the plan. The justification advanced for inviting the English court to act in this way is that to do so would promote the principle of modified universalism in cross-border insolvencies which not only forms part of English common law but also underpins the UNCITRAL Model Law.

10. The applicant in the present case is the foreign representative of the OJSC International Bank of Azerbaijan ("IBA"), which fell into financial difficulties, obliging it to enter into a restructuring proceeding under Azeri law. The plan which IBA put forward to restructure its debts was approved by a large majority at a meeting of creditors in Azerbaijan on 18 July 2017, and was approved by the local court on 17 August 2017. As a matter of Azeri law, the plan is now binding on all affected creditors, including those who did not vote and those who voted against the plan. In this respect, the situation is similar to that brought about by a domestic scheme of arrangement under Part 26 of the Companies Act 2006 once it has been sanctioned by the court.

11. On 24 May 2017, the foreign representative applied to the Business and Property Courts of England and Wales for an order recognising the restructuring proceeding as a foreign main proceeding under the CBIR, and at a hearing on 6 June 2017 Barling J made the order sought. The order included a suitably modified version of the automatic stay under article 20.

12. The respondents are English creditors in the sense in which I have used that term – i.e. their claims against IBA are governed by English law. The first respondent, Sberbank of Russia ("Sberbank"), is the sole lender under a US $20m term facility agreement dated 15 July 2016 ("the Sberbank Facility"). The other respondents (together "Franklin Templeton") are beneficial owners (through Citibank as trustee) of some of the US $500m 5.62% notes issued by IBA under a trust deed dated 11 June 2014 and due to mature in 2019 ("the 2019 Notes"). The respondents did not vote at or participate in any way in the meeting in Azerbaijan to approve the restructuring plan, and it is accepted by the foreign representative for the purpose of these proceedings that they have not acquiesced in the plan or its application to them, nor have they submitted to the jurisdiction of the Azeri court.

13. By a further application issued on 15 November 2017, the foreign representative sought an order against Sberbank continuing the moratorium imposed by the recognition order of 6 June 2017 "until further order… so that no legal process in relation to the Designated Financial Indebtedness may be instituted or continued against the Bank or its property except with the permission of the court". An order was also sought that the moratorium should not be lifted so as to permit Sberbank to enforce its loan facility agreement against IBA. In her affidavit in support of the application, the foreign representative made it clear that similar relief was also sought against Citibank as trustee of the 2019 Notes. This application was then countered by cross-applications from Sberbank and Franklin Templeton asking for the existing moratorium granted by Barling J to be lifted so as to permit the institution and prosecution of proceedings against IBA to enforce their English claims.

14. All three applications came on for hearing before Hildyard J as a matter of considerable urgency, on 14 and 15 December 2017. The urgency was occasioned by the fact that, as matters then stood, the Azeri restructuring proceeding was set to expire on 30 January 2018, with no possibility of further extension. The judge heard submissions from Daniel Bayfield QC leading Ryan Perkins for the applicant, from Barry Isaacs QC leading Alexander Riddiford for Sberbank, and from Gabriel Moss QC leading Richard Fisher for Franklin Templeton. On 21 December 2017, the judge announced that he would dismiss the application for a stay, and gave a brief indication of his reasons for so concluding. His detailed reasons were contained in the reserved

judgment which he handed down on 18 January 2018: [2018] EWHC 59 (Ch), [2018] Bus LR 1270.

15. Although produced under considerable time pressure, the judgment (which runs to 170 paragraphs) contains a full and thoughtful discussion of the arguments presented to the judge in what he described, at [23], as "exemplary skeleton arguments and oral submissions". By this date, however, it had become clear that the immediate urgency had gone, because the Azerbaijan Parliament had approved an amendment to the Law on Banks which would enable the Azeri court to order further extensions of the restructuring proceeding, with no limit on the number or duration of such extensions. Accordingly, orders have now been made by the Azeri court prolonging the restructuring pending the outcome of IBA's appeal to this court, which is brought with permission granted by the judge.

16. We have had the benefit of submissions from the same team of counsel who appeared below, except that Mark Howard QC and Fred Hobson have replaced Mr Isaacs QC and Mr Riddiford as counsel for Sberbank. Like the judge, I would wish to pay tribute to the excellent quality of the written and oral submissions which we have received from all parties.

The facts

17. There is little which needs to be added to the outline of the factual and procedural history which I have already given.

18. The judge received undisputed expert evidence from an expert on Azeri banking and insolvency law, Mr Anar Karimov. As Mr Karimov explained, the basic function of a voluntary restructuring of the present type is to give the relevant bank a breathing space to propose a plan of reorganisation in respect of its debts. It is a "rescue" or "turnaround" process, designed to enable the bank to continue trading while the plan is implemented, the object being to reorganise its liabilities so that it can survive as a going concern. While the restructuring is in progress, the bank will continue to carry on business subject to the supervision of the Azerbaijan Financial Market Supervisory Authority ("the AFMSA") and the Azeri court. As preliminary step, the bank must promulgate an indicative restructuring proposal, which must be approved by the AFMSA. There is a statutory mechanism which permits amendment of the proposal following consultation with creditors, and the proposal must also be extensively advertised. Once the terms of the restructuring plan have been finalised, the affected creditors will attend a meeting to vote on the final form of the plan. If it is approved by the prescribed majority (effectively two-thirds of the relevant creditors by value) and confirmed by the Azeri court, it will then be binding on all affected creditors.

19. In other words, as the judge said at [29], "the process facilitates rehabilitation and the resumption of trading rather than the collection of assets and their fair distribution followed by dissolution."

20. The plan in the present case provided for the restructuring of IBA's "Designated Financial Indebtedness" amounting to approximately $3.34 billion. Both the Sberbank Facility and the 2019 Notes constituted Designated Financial Indebtedness for the purposes of the plan, which provided for the Designated Financial Indebtedness to be discharged in its entirety and exchanged for various "entitlements". Those

entitlements consisted mainly of new debt securities, some of which were sovereign bonds issued by the Government of Azerbaijan and some of which were corporate bonds issued by IBA itself. The plan received overwhelming creditor support, being approved at the creditors' meeting held on 18 July 2017 by 99.7% of those voting at the meeting (in person or by proxy), who held, in aggregate, 93.9% (by value) of the total Designated Financial Indebtedness. Accordingly, the requisite two-thirds majority was achieved by a large margin.

21. Following the approval of the plan, a number of creditors who had voted against it, or who did not vote at all, decided to consent to it and surrender their existing claims. As matters now stand, the only creditors which could seek to enforce their claims contrary to the terms of the plan are (a) Sberbank, in right and respect of the Sberbank Facility, and (b) Citibank, in its capacity as trustee for Franklin Templeton of the 2019 Notes. Holders of about $154.7m of the 2019 Notes either voted against the plan or did not vote, and have not subsequently surrendered their Notes. Approximately $58m of those Notes are beneficially owned by the second to seventh respondents, and most of the remainder are also owned by entities connected to Franklin Templeton Investment Management Limited. They have asked not to be joined as respondents because they prefer to remain anonymous.

22. The dissentient creditors represent only a very small proportion (about 5%) of the total Designated Financial Indebtedness, and it is important to note that the foreign representative does not contend that the plan will fail to achieve its primary objective if the claims of the English creditors do not continue to be stayed. The plan became effective under Azeri law on 1 September 2017, following its approval by the Azeri court at the confirmation hearing on 17 August 2017. As I have already explained, the consequence of the Azeri court order is that the plan is binding on all the creditors in respect of the Designated Financial Indebtedness, whether or not they participated in the creditors' meeting and whether or not they voted for or against the plan.

The rule in *Antony Gibbs*

23. It is common ground that this court is bound, as was the judge, by a rule of English private international law which is often referred to as "the *Gibbs* rule" or "the rule in *Antony Gibbs*". The rule takes its name from the decision of this court (Lord Esher MR, sitting with Lindley and Lopes LJJ) in Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399. The defendant was a French company which entered into contracts with the plaintiffs, who were merchants carrying on business in London, for the purchase of consignments of copper, to be delivered and paid for in England. The contracts were subject to the rules and regulations of the London Metal Exchange. After the contracts were made, but before the due dates for delivery of much of the copper, the defendant went into liquidation in France, and refused to accept delivery of the copper. In its defence to an action brought by the plaintiffs for non-acceptance of the goods, the defendant argued that the French liquidation operated as a discharge from liability on the contracts under French law. This argument was rejected by the trial judge, Stephen J, who gave judgment for the plaintiffs for the loss sustained on resale in respect of all the copper, including that of which delivery was not due until after the liquidation.

24. The defendant's appeal was then rejected by this court, which also held that there was no basis upon which the judge ought to have stayed the proceedings, whether before

or upon giving judgment. The first step in the reasoning of Lord Esher MR was that the contracts were governed by English law, because they were made in England and due to be performed in England. Accordingly, English law would govern the discharge of the contract, in whatever country the action was brought. Conversely, had the governing law of the contract been a foreign law, the English court would recognise a discharge from liability upon bankruptcy in accordance with that law: see his judgment at 405-406.

25. Lord Esher continued (ibid):

> "It is now, however, suggested that, where by the law of the country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound.
>
> ...
>
> Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract."

26. In relation to the question of a stay, Lord Esher said at 409 that he could "see no ground in law on which any such stay ought to be granted." The other two members of the court took the same view, at 410 and 411 respectively.

27. For a modern statement of the *Gibbs* rule, the judge referred at [45] to Fletcher, The Law of Insolvency, fifth edition (2017), at para 30-061:

> "According to English law, a foreign liquidation – or other species of insolvency procedure whose purpose is to bring about the extinction or cancellation of a debtor's obligations – is considered to effect the discharge only of such a company's liabilities as are properly governed by the law of the country in which the liquidation takes place or, alternatively, of such as are governed by some other foreign law under which the liquidation is accorded the same effect. Consequently, whatever may be the purported effect of the liquidation according to the law of the country in which it has been conducted, the position at English law is that a debt owed to or by a dissolved company

> is not considered to be extinguished unless that is the effect according to the law which, in the eyes of English private international law, constitutes the proper law of the debt in question."

28. As the judge went on to note at [46], there is an exception to the rule if the relevant creditor submits to the foreign insolvency proceeding. In that situation, the creditor is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency proceeding. But the application before the judge proceeded on the basis, as it does before us, that this exception is not engaged.

29. The *Gibbs* rule has been criticised by many academics and commentators, including Professor Fletcher, on the basis that it is an outdated relic from an era when international cooperation in insolvency matters was in its infancy, and a parochial outlook tended to prevail. I do not propose to discuss those criticisms in any detail, since it is agreed that we are bound by the rule, although the appellant reserves the right to challenge it in the Supreme Court if the case proceeds that far. For similar reasons, I will not review the subsequent cases in which the rule has been applied by courts at all levels in England and Wales, usually without adverse comment. Most of the significant cases are noted by the judge at [54], to which should be added the recent decision of the Supreme Court in Goldman Sachs International v Novo Banco SA [2018] UKSC 34, [2018] 1 WLR 3683, where Lord Sumption JSC (with whom the other members of the court agreed) said at [12]:

> "The rescue of failing financial institutions commonly involves measures affecting the rights of their creditors and other third parties. Depending on the law under which the rescue is being carried out, these measures may include the suspension of payments, the writing down of liabilities, moratoria on their enforcement, and transfers of assets and liabilities to other institutions. At common law measures of this kind taken under a foreign law have only limited effect on contractual liabilities governed by English law. This is because the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law, such as that of a contracting party's domicile, are normally disregarded: *Adams v National Bank of Greece SA* [1961] AC 255."

30. I would, however, observe that the charge of parochialism seems to me rather unfair, given the acceptance by this court in Gibbs that questions of discharge of a contractual liability are governed by the proper law of the contract, whether or not that law is English law. In the present case, as in Gibbs itself, the relevant contracts were governed by English law; but if they had been governed by Azeri law, the English court would have recognised the effect of the restructuring.

31. The real criticisms which may be levelled against the *Gibbs* rule, I would venture to suggest, are twofold. First, the rule may be thought increasingly anachronistic in a world where the principle of modified universalism has been the inspiration for much

cross-border cooperation in insolvency matters, including the UNCITRAL Model Law, and has also been recognised as forming part of the common law: see Singularis Holdings Limited v Pricewaterhouse Coopers [2014] UKPC 36, [2015] AC 1675, at [19] per Lord Sumption. In particular, there may now be a strong case for saying that, in the absence of a stipulation to the contrary, contracting parties should generally be taken to envisage that, upon the supervening insolvency of one party, a single law closely associated with that party should govern the rights of its creditors, wherever in the world its assets happen to be situated, and regardless of the proper law of the contract. Secondly, the rule may be thought to sit rather uneasily with established principles of English law which expect foreign courts to recognise English insolvency judgments or orders, for example when a scheme of arrangement under Part 26 of the Companies Act 2006 is approved by the court. It is only fair to add, however, that this second objection was decisively rejected by Lord Collins of Mapesbury in Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 AC 236, ("Rubin") at [126].

The UNCITRAL Model Law: principles of construction

32. There is no dispute about the principles which should guide us in construing the Model Law.

33. Regulation 2(2) of the CBIR provides that:

> "Without prejudice to any practice of the courts as to the matters which may be considered apart from this paragraph, the following documents may be considered in ascertaining the meaning or effect of any provision of the UNCITRAL Model Law as set out in Schedule 1 to these Regulations
>
> (a) the UNCITRAL Model Law;
>
> (b) any documents of the United Nations Commission on International Trade Law and its working group relating to the preparation of the UNCITRAL Model Law; and
>
> (c) the Guide to Enactment of the UNCITRAL Model Law... made in May 1997."

34. We were not directly referred to any of the "travaux préparatoires" apart from the Guide to Enactment ("the Guide"). At the beginning of the Guide, the purpose of the Model Law was described in these terms:

> "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, harmonised 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.
>
> ...
>
> 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, 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;
>
> ..."

35. The important point that the Model Law "does not attempt a substantive unification of insolvency law" is reinforced by paragraph 21 of the Guide, which describes its scope as "limited to some procedural aspects of cross-border insolvency cases", and says that "the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State". It also deserves emphasis that the Model Law does not depend in any way on reciprocity. Once a State has decided to adopt the Model Law, the local version of it adopted by that State will apply to all cross-border insolvencies which fall within its scope, whether or not the foreign representative comes from another enacting State. Thus, at the present time, the Model Law has been adopted and given effect in Great Britain and some 40 other countries, but not in Azerbaijan. In this respect, there is a significant contrast both with the EC Insolvency Regulation (Council Regulation (EC) 1346/2000 on Insolvency Proceedings), which applies to insolvency proceedings within the EU, and with international conventions on the recognition and enforcement of judgments, which as Lord Collins said in Rubin at [128] typically depend on a degree of reciprocity.

36. Under the heading "Relief", the Guide says:

> "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…
>
> …
>
> 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 reorganisation or liquidation of the assets of the debtor… The mandatory moratorium triggered by the recognition of the foreign main proceedings 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."

37. In the commentary on article 21, the Guide notes at paragraph 189 that the grant of post-recognition relief under that article is discretionary, and that the types of relief listed in article 21(1) "are typical of the relief most frequently granted in insolvency proceedings". However, "the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case." Paragraph 191 adds that "[i]t is in the nature of discretionary relief that the court may tailor it to the case at hand."

38. Apart from the Guide, we were also referred to the explanatory memorandum to the CBIR, which was prepared by the Department of Trade and Industry and laid before Parliament. Under the heading "Description", paragraph 2.1 recorded that a project to produce a model law on cross-border insolvency was initiated by UNCITRAL, and two international colloquiums were held in the early 1990's "to discuss whether that body should facilitate the development of a legal instrument providing a framework, which would encompass judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings." A working group was then established in 1995, whose work led to the adoption by UNCITRAL of a model law in 1997 "designed to assist States to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency."

39. Under the heading "Policy background", the memorandum began with an introduction from which I will quote the following extracts:

"7.1... The UNCITRAL Model Law on cross-border insolvency is that body's attempt to promote modern and fair legislation for cases where the insolvent debtor has assets in more than one State. The Model Law is, however, designed to respect the differences amongst national procedural laws and does not attempt a substantive unification of insolvency laws.

7.2 The British Government has a commitment to the promotion of a rescue culture and supports the Model Law as an appropriate legislative tool to support this objective on the wider international stage. In addition, implementation of the Model Law will be beneficial in serving the cause of fairness towards creditors who may be located anywhere in the world. We hope that it may also provide an example to other countries of our readiness to engage in a genuine process of co-operation in international insolvency matters and that our actions will encourage other countries to implement the Model Law. In this way, insolvency officeholders in Great Britain should be able to enjoy, progressively, the same benefits abroad as their international counterparts, and be able to reduce administrative costs incurred in recovering assets from overseas. As a result funds available for distribution to creditors, wherever they are located, should increase.

7.3. Limitations on cooperation and coordination between different national jurisdictions can be the result of lack of a legislative framework or from uncertainty regarding the scope of the existing legislative authority, for pursuing cooperation with foreign courts... 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.

7.4. In May 2002, the European Union adopted its own Regulation on insolvency proceedings. There is a significant element of overlap between the UNCITRAL Model Law and the EC Insolvency Regulation and although the latter governs only the coordination of insolvency proceedings within the European Union, its underlying principles and approaches have been extremely influential in the international community. However the Regulation does not deal with cross-border insolvency matters extending beyond member States of the European Union. Thus, the Model Law will provide a complementary regime of considerable practical value that will be capable of addressing instances of cross-border insolvency and cooperation outside the European Union. This will place Great Britain, by virtue of the operation of s426 of the Insolvency Act 1986, in the unique position of having a suite of statutory procedures available in cross-border insolvency cases, as well as the flexibility of common law."

40. Paragraph 7.19 of the memorandum noted that the language of the Model Law is similar to that used in international treaties and conventions, and "will almost certainly… be interpreted purposively. Accordingly the UNCITRAL Guide to Enactment will be a useful tool in interpreting the text."

41. Finally, it is relevant to note article 8 of the Model Law itself, headed "Interpretation", which states that:

> "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."

42. As counsel for Sberbank correctly point out in their written submissions, the Model Law deliberately does not incorporate a choice of law framework, nor is it predicated on reciprocity. That this was a deliberate choice is apparent from the reports of the working group discussed by Morgan J in Fibria Celulose S/A v Pan Ocean Co Limited [2014] EWHC 2124 (Ch), [2014] Bus LR 1041, ("Pan Ocean") at [82] to [87]. As appears from that discussion, an initial draft of what is now article 21(1)(g) included a power for the recognising court to apply the law of the foreign proceeding, but this was thought to be unrealistic and the wording was accordingly not included in the final version. Morgan J commented at [87]:

> "My reaction to the discussions of the working group is that it seems improbable that the working group, having deleted (from what is now article 21(1)(g)) a power for the recognising court to apply the law of the foreign proceeding, intended to bring back in such a power under the general wording which refers to "any appropriate relief"."

I respectfully agree, while noting that the submission of IBA (to which I will now turn) do not seek to go that far.

IBA's submissions

43. At an early stage of his oral argument, Mr Bayfield submitted that the principle of modified universalism does not entail the application of a single insolvency law to a cross-border insolvency. That would be a characteristic of what one might call full or unmodified universalism (see Rubin at [16]), but in the modified form which forms part of the English common law, and which underpins the UNCITRAL Model Law, it only requires, as Lord Hoffmann put it in In re HIH Casualty and General Insurance Ltd [2008] UKHL 21, [2008] 1 WLR 852, ("HIH") at [30]:

> "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."

See too Rubin at [17] to [20], where Lord Collins pointed out that a similar approach is adopted by the United States courts.

44. This submission is undoubtedly true as far as it goes, and it is well recognised that "at common law the court has power to recognise and grant assistance to foreign insolvency proceedings" as Lord Collins went on to explain in Rubin at [29] to [33]. Nevertheless, it is also important to note the qualifications expressed by Lord Sumption, speaking for the Privy Council, in Singularis at [19], where he said:

> "In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law."

45. Next, Mr Bayfield submitted that, as an international instrument, the Model Law "should be construed on broad principles of general acceptation", and its "interpretation should not be rigidly controlled by domestic precedents of antecedent date": see Stag Line v Foscolo Mango & Co Limited [1932] AC 328 ("Stag Line") at 350, per Lord Macmillan, and the observations to similar effect of Lord Wilberforce in James Buchanan & Co Limited v Babco Forwarding & Shipping (UK) Limited [1978] AC 141 at 152. Again, I would readily accept that such an approach to the interpretation of the Model Law is appropriate. Indeed, it chimes with the principles of construction applicable to the Model Law which I have already discussed, including in particular paragraph 7.19 of the explanatory memorandum to the CIBR.

46. Mr Bayfield then submitted that, if the foreign proceeding in the present case were a liquidation instead of a reconstruction, the English creditors would have been unable to enforce their claims in England. The reasons he advanced for reaching this conclusion are:

> a) the Azeri liquidation would have been recognised as a foreign main proceeding under the CIBR, with the consequence that upon recognition an automatic stay would have come into effect under article 20(1), and would have remained in place throughout the liquidation until IBA was dissolved;
>
> b) the foreign representative would have been able to apply for any assets situated in England to be remitted to the Azeri liquidation under articles 21(1)(e) and 21(2), which would enable the assets to be distributed in accordance with Azeri law;
>
> c) before granting remission, the court would have to be satisfied that the interests of the creditors in Great Britain were adequately protected, but there is no reason to doubt that this requirement would be satisfied, because Mr Karimov's unchallenged evidence is that Azeri law treats foreign and local creditors equally, and has all the procedural safeguards that the English court would expect; and

d) it follows that all monetary claims against IBA, including claims governed by English law, would have to be proved in the Azeri liquidation, and could not instead be enforced against IBA's assets in England.

I should add that neither article 21(2), nor article 21(1)(c) which is in similar terms, uses the language of "remission", but rather says that the court may "entrust" the distribution, administration or realisation of the debtor's assets located in Great Britain to the foreign representative. I would accept, however, that this language is wide enough to include the remission of assets located in Great Britain, or their proceeds of sale, to a foreign liquidator in an appropriate case, especially as such a power exists at common law: see Rubin at [31] and [34].

47. Against this background, counsel for IBA in their written submissions pose what they call the critical question: namely, "whether the CBIR requires a foreign reorganisation to be treated less favourably (from the perspective of the company and its general body of creditors) than a foreign liquidation." They submit that this would be a surprising result, because the CBIR were expressly enacted to promote the "rescue culture" (see the explanatory memorandum at paragraph 7.2). Accordingly, just as article 21(1)(c) empowers the court to remit assets to a foreign liquidation, so as to prevent creditors from enforcing their claims against assets in England, so too article 21(1)(a) enables the court to stay the enforcement of claims subject to a foreign restructuring, so as to achieve the same objective. They go on to submit that the judge's reasoning is flawed because "he failed to explain why foreign reorganisations should be treated less favourably that foreign liquidations."

48. On the question whether there is jurisdiction to make such an order under article 21(1)(a) and (b), IBA submits that the language of those provisions is clearly wide enough to confer the necessary power on the court. The wording of article 21(1)(a) must be intended to go further than the automatic stay under article 20(1)(a), because it authorises the stay of proceedings "to the extent that they have not been stayed" under the latter provision. So too, the power to grant a stay of execution under article 21(1)(b) only applies "to the extent it has not been stayed under paragraph 1(b) of article 20". Furthermore, the need to give article 21 a wide construction was endorsed by Lord Collins in Rubin at [143], where he said:

> "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..."

49. Counsel for IBA then go on to deal with four alleged jurisdictional bars which are said to limit the apparently broad scope of article 21(1)(a) and (b):

a) there is no jurisdiction to grant relief inconsistent with *Gibbs*;

b) there is no jurisdiction to grant relief against persons who are not bound by the reconstruction plan;

c) there is no jurisdiction to interfere with substantive rights; and

d) there is no jurisdiction to grant relief continuing beyond termination of the plan.

(a) No jurisdiction to grant relief inconsistent with Gibbs

50. IBA submits that this objection misunderstands the proper approach to construction of the CBIR. The existence of jurisdiction under these paragraphs of article 21 is essentially a question of statutory construction. Precisely because the CBIR give effect to an international instrument, which has been implemented in a large number of jurisdictions, the common law is irrelevant to its interpretation. This is reinforced by article 8, which requires regard to be had to the international origin of the Model Law and to the need to promote uniformity in its application. It is therefore wrong in principle to ask whether the CBIR were intended to abrogate the *Gibbs* rule. That rule is a classic example of a "domestic precedent of antecedent date", which in accordance with Stag Line should be ignored when construing an international instrument.

(b) No jurisdiction to grant relief against persons not bound by the reconstruction

51. According to IBA, this objection again takes matters nowhere. At common law, the English creditors can rely on the rule in *Antony Gibbs* to argue that they are not bound by the reconstruction plan, because they have not submitted to the jurisdiction of the Azeri court. But the present case is not concerned with the common law, and the relevant question is whether the English creditors' claims are capable of being stayed under the CBIR. As a matter of construction, it is clear that they are. There is no relevant restriction on the types of "obligations" or "liabilities" which can be stayed under article 21(1)(a); nor is there any suggestion in the CBIR or the Model Law (or in any of the *travaux préparatoires*) that the governing law of a liability is relevant to determining whether it can be stayed. As a matter of Azeri law, the plan is binding on all creditors who hold Designated Financial Indebtedness, including the English creditors, all of whom were entitled to vote at the creditors' meeting. There is nothing voluntary about the automatic stay under article 20(1), and there is equally no reason why a stay under article 21 should not be imposed contrary to the wishes of the English creditors.

(c) No jurisdiction to interfere with substantive rights

52. It is accepted (as I have already said) that the relief sought by IBA is intended to prevent the English creditors from exercising their contractual rights against IBA indefinitely. However, there is nothing in the CBIR which precludes the court from granting such relief. On the contrary, there are many forms of relief under the Model Law which prevent or interfere with the exercise of substantive rights, including rights governed by English Law. The most obvious example of this is the court's power to remit English assets belonging to the debtor in a foreign liquidation under articles 21(1)(c) and 21(2): see above. Where the court makes such an order, it operates to prevent creditors, including those whose claims are governed by English law, from enforcing their claims in England. The stay sought in the present case is simply the equivalent, in the context of a foreign reorganisation, of an order for remission in the context of a foreign liquidation. Further, although the judge drew a distinction between foreign liquidation proceedings and foreign reorganisation proceedings, there is no relevant difference between (a) remitting a company's assets

to a foreign liquidation so as to prevent a creditor from taking enforcement action in England, and (b) staying the enforcement of the creditor's claim in England so as to achieve the same result. Both forms of relief prevent the exercise of substantive contractual rights, and both are permitted under the Model Law.

53. Other examples of relief under the Model Law which prevent or interfere with the exercise of substantive contractual rights include:

> a) the power under article 21(1)(c) to grant an order "suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor";
>
> b) the power under article 23 for the foreign representative to bring avoidance proceedings under various sections of the Insolvency Act 1986, including section 238 (transactions at an undervalue), section 239 (unlawful preferences) and section 423 (transactions in fraud of creditors); and
>
> c) the power under article 21(1)(g) to grant "any additional relief that may be available to a British insolvency officeholder under the law of Great Britain". Thus, for example, in Re Atlas Bulk Shipping AS [2011] EWHC 878 (Ch), [2012] Bus LR 1124, Norris J made an order under this paragraph restraining the respondent from relying on a contractual right of set-off governed by English law.

54. In reaching the contrary conclusion, the judge sought to derive support from the decision of the Supreme Court in Rubin and the decision of Morgan J in Pan Ocean, but neither case justifies the reliance which the judge placed upon it.

55. In Rubin, the receivers of a trust established under English law, with trustees resident in England, to carry on a sales promotions scheme in the USA and Canada, filed for protection under Chapter 11 of the US Bankruptcy Code, having obtained authority to do so from the English court. The Chapter 11 proceeding was recognised in England as a foreign main proceeding under the CBIR, on the application of the receivers who had been appointed as "foreign representatives" of the debtor trust by the US Bankruptcy Court. The receivers then commenced "adversary proceedings" under the US bankruptcy legislation against various defendants, with the object of clawing back funds for distribution in the bankruptcy. The defendants were not present in New York when the proceedings were begun, nor did they submit to the jurisdiction of the New York court. As a result, default and summary judgments were entered against them in New York. The receivers, as foreign representatives, then sought to enforce the judgments in England.

56. The main question considered by the Supreme Court was whether the New York judgments could be enforced at common law, by application of the principles developed by Lord Hoffmann in Hill and Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings PLC ("Cambridge Gas") [2006] UKPC 26, [2007] 1 AC 508. Reversing the decision of this court, the Supreme Court held by a majority that the judgments could not be enforced in England at common law, and that the reasoning of Lord Hoffmann in Cambridge Gas should not be followed. For present purposes, nothing turns directly on that part of the Supreme Court's judgment. However, the receivers also argued in the alternative that the judgments should be enforced under article 21 of the CBIR. This argument was in

turn rejected by the Supreme Court, for the reasons given by Lord Collins at [141] to [144]. After pointing out that the CBIR and the Model Law "say nothing about the enforcement of foreign judgments against third parties", Lord Collins said at [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."

57. IBA submits, and I would agree, that this paragraph contains the ratio of the Supreme Court's decision on the receivers' alternative argument. It must therefore be accepted that the court does not have jurisdiction under article 21 to recognise or enforce a foreign judgment against a third party. But, says IBA, that proposition has no bearing on the present case, where the foreign representative is not seeking to recognise or enforce any judgment of the Azeri court, but merely seeks to extend the existing moratorium (to the extent that it applies to IBA's Designated Financial Indebtedness) beyond the termination of the restructuring proceeding. Furthermore, although the Model Law contains no specific provision relating to the recognition of foreign judgments against a third party, there are specific provisions in article 21 which empower the court to grant the relief sought.

58. In Pan Ocean, the point in issue is helpfully summarised as follows by IBA:

> "a Korean company was party to a long-term contract of affreightment governed by English law with the respondent (Fibria). The company entered into an insolvency proceeding under Korean law, which was recognised as a foreign main proceeding in England under the Model Law. Under Korean insolvency law, a contractual term which purports to empower one of the parties to terminate the contract in the event of the other party's insolvency (an "*ipso facto* clause") is unenforceable. In those circumstances, the foreign representative sought an order under Article 21(1) of the Model Law preventing Fibria from serving a notice of termination under the contract. It was argued that Article 21(1) empowered the English Court to apply the Korean prohibition against *ipso facto* clauses."

59. The application was dismissed by Morgan J. He began by rejecting the foreign representative's argument that the court could "stay" Fibria's right to serve a termination notice under article 21(1)(a) of the Model Law, on the ground that a termination notice is not an "action" or "proceeding" within the meaning of that provision: see the judgment at [63] to [76]. No challenge is made by IBA to that part of the decision, which it accepts as being "plainly correct". In the alternative, the

foreign representative argued that the court had a general discretion to apply the law of the foreign proceeding as "appropriate relief" under article 21(1), but this argument was also rejected. Morgan J held that the court did not have jurisdiction under article 21(1) to grant "relief which would not be available to the court when dealing with a domestic insolvency": see [108]. Since *ipso facto* clauses are valid and enforceable under English law, the relief sought went beyond that which the court was able to grant in a domestic insolvency, and the court therefore lacked jurisdiction to grant it.

60. I have already referred to some of the reasoning which led Morgan J to this conclusion: see [42] above. I will also quote what he said at [80], in the context of his preliminary consideration of possible literal readings of article 21:

> "The administrator's argument that the scope of "any appropriate relief" is not cut down by the terms of sub-paragraphs (a) to (g) which are matters "included" in the appropriate relief but not exhaustive of the appropriate relief does reflect the ordinary meaning of the language of article 21. None the less, I consider it somewhat surprising that sub-paragraph (g) is expressed in the way which it is if it had really been intended that the phrase "any appropriate relief" permitted the recognising court to grant relief which it would not be able to grant in an insolvency conducted in accordance with the laws of the recognising court. A power for the recognising court to grant relief in that way would be a very significant power. It is odd to think that such a power was intended without there being any specific reference to the recognising court's ability to apply the law of a foreign state, or even to do something which no system of law anywhere would allow. This is particularly so in view of the terms of sub-paragraph (g) which deliberately limit relief under that sub-paragraph to relief which would be available to a British insolvency office holder under the law of Great Britain."

61. IBA submits that Pan Ocean presents no obstacle to its application in the present case, because the grant of a stay falls squarely within the language of article 21(1)(a) and (b), and is plainly "appropriate relief" in all the circumstances. If it were necessary to go further, and establish that the relief sought by IBA would be available to the court when dealing with a domestic English insolvency, that test is satisfied because the relief is substantially equivalent to a permanent anti-suit injunction in support of a creditors' voluntary arrangement or scheme of arrangement, those being the nearest domestic equivalents to the Azeri restructuring proceeding. IBA goes on to submit that, in any event, Morgan J was wrong to conclude that the relief available under article 21(1) is confined to relief which would be available in the context of a domestic insolvency. The words "any appropriate relief" mean what they say, and should not be glossed. If it were always necessary, as a matter of jurisdiction, to establish that the relief sought under article 21(1) is of a kind that would be available in an English insolvency, then the whole of article 21(1) apart from paragraph (g) would be redundant.

62. In oral argument, Mr Bayfield submitted that we should not be deterred by the relatively brief comments made by Lord Collins in Rubin about the scope and purpose of article 21. Lord Collins expressly recognised that article 21 should be "widely construed in the light of the objects of the Model Law", and at [28] he had referred to a passage in the Guide emphasising "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". The grant of a stay or moratorium is of the same broad "type" as the relief available in a domestic insolvency, and although of a largely procedural nature, there is no reason why it should not be deployed so as to achieve a substantive result which fully accords with the principle of modified universalism.

(d) No jurisdiction to grant relief continuing beyond termination

63. The judge did not reach any final decision on the question whether, as a matter of jurisdiction, it is open to the court to grant relief which would continue beyond the termination of the foreign proceeding, although he expressed sympathy for the argument advanced by Mr Moss on behalf of Franklin Templeton that such a limitation is implicit in the scheme of the CBIR. As the judge said, at [154]:

> "If the administration type proceeding terminates with a rescue based on a plan of reorganisation, then there seems to me to be, at least in general terms, sound sense in the proposition that the CBIR relief (i) cannot last beyond the duration of the foreign proceeding being assisted and (ii) cannot or should not affect creditors who are not bound by the plan which the foreign proceeding has enabled. I also consider it to be a useful test of the nature of the relief sought, and its proper characterisation as substantive or procedural in nature, whether it is to extend in time beyond the pendency of the foreign proceeding."

Franklin Templeton renew the contention in this court by means of a respondent's notice.

64. IBA's position in relation to the contention may be summarised as follows:

> a) There is nothing in the CBIR, the Model Law or the Guide which expressly confines the grant of relief under article 21 to the duration of the foreign proceeding itself. On the contrary, where the foreign proceeding terminates, article 18 merely requires the foreign representative to inform the court of any "substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment". The court can then decide what steps should be taken to modify or terminate the effects of recognition: see the Guide at paragraph 168.
>
> b) Upon termination of the foreign proceeding, there is admittedly no longer any "foreign representative" who has standing to apply for relief under the CBIR: see Sanko Holdings Co Limited v Glencore Limited [2015] EWHC 1031 (Ch) at [38] to [50]. However, it does not follow from this that the court lacks jurisdiction to grant relief continuing beyond the date of termination. Provided the application is made and determined before the date of

termination, there is no reason why the relief granted should not continue beyond that date.

c) Although the automatic stay under article 20(1) may well be a temporary measure designed to provide breathing space, the relief available under the Model Law does not end there, and the courts of the enacting State must then determine what coordination among the jurisdictions or other relief is best calculated to achieve the optimal disposition of the insolvency. Such relief may include, where appropriate, the grant of an indefinite stay under article 21.

d) Where a stay extends beyond the duration of the foreign proceeding, it is possible that a creditor might apply to lift the stay. Since the foreign representative would no longer be in office, the debtor company (here IBA) would have standing to oppose the application; and, in any event, the court would only lift the stay if it was appropriate to do so, even if the application were unopposed.

e) Various provisions in schedule 2 to the CBIR deal with procedural matters and envisage that the foreign representative will be a respondent to the relevant application, but these provisions do not form part of the Model Law itself and cannot be used as an aid to its interpretation. Their purpose is merely to bring the Model Law within the framework of English civil procedure.

Discretion

65. On the assumption that the court has jurisdiction to grant the relief sought, IBA submits that the court should exercise its discretion to do so. Since, however, the question only arises if IBA succeeds on the issue of jurisdiction, I will not at this stage set out IBA's detailed submissions on it.

The submissions of Sberbank

66. Mr Howard opened his oral submissions on behalf of Sberbank by emphasising that the Azeri restructuring proceedings are now for all practical purposes at an end. The plan has been approved by the Azeri court, its provisions have been implemented, and IBA has been restored to financial health and is now trading. Against that background, he submits, the substantive nature of IBA's application for an indefinite stay is readily apparent. By the use of a procedural device, IBA hopes to achieve the result that Sberbank's English law rights are abrogated and effectively transformed into rights under Azeri law. This would be an abuse of article 21, which was designed with the limited object of enabling modest assistance of a procedural nature to be given in the case of a foreign restructuring. The limited nature of the article's scope is reinforced by the complete absence of any provision which might enable creditors' rights to be subjected to the law applicable to the foreign proceedings.

67. Building on those opening points, Mr Howard submits that, as a substantive rule of English private international law, the rule in *Gibbs* applies, Sberbank's rights under the Sberbank Facility remain unaffected by their discharge under Azeri law, and it would be wrong in principle to use the procedural mechanisms of the CBIR so as to effect a substantive discharge of those rights. In order for Sberbank's English law rights to be affected, it would be necessary either for *Gibbs* to be overruled (which

should be done, if at all, by Parliament) or for a "gateway" to variation of those rights to be found under existing English law, for example in an English liquidation, administration or scheme of arrangement. In a case of the present type, the appropriate remedy for a foreign office holder to adopt would be to apply for a parallel scheme of arrangement in this jurisdiction; but, for whatever reason, the foreign representative has chosen not to go down that route.

68. As an example of this conventional way of proceeding, Mr Howard referred us to the decision of Lawrence Collins J (as he then was) in In re Drax Holdings Limited [2003] EWHC 2743 (Ch), [2004] 1 WLR 1049. The scheme of arrangement in that case related to funding liabilities incurred on the acquisition of the Drax power station in Yorkshire, carried out by a series of transactions involving a group of subsidiaries of a Delaware corporation. The relevant contractual obligations were governed by English law, but the claimant companies were incorporated in the Cayman Islands and Jersey respectively. As Lawrence Collins J noted, at [30]:

> "In the case of a creditors' scheme, an important aspect of the international effectiveness of a scheme involving the alteration of contractual rights may be that it should be made, not only by the court in the country of incorporation, but also (as here) by the courts of the country whose law governs the contractual obligations. Otherwise dissentient creditors may disregard the scheme and enforce their claims against assets (including security for the debt) in countries outside the country of incorporation."

69. Lawrence Collins J added, at [34]:

> "Of fundamental significance in the present case is the fact that simultaneous orders would be made (if the schemes are sanctioned) in the courts of the place of incorporation, Cayman Islands and Jersey. The English schemes will make those schemes effective by binding the creditors who are subject to the English jurisdiction. I was also informed (although I was not given details) that Drax Holdings will, for a similar purpose, apply for injunctions under the United States Bankruptcy Law (11 United States Code section 304) granting relief, in aid of the schemes of arrangement in England, the Cayman Islands and Jersey, with the object of preventing United States creditors from taking action to frustrate the schemes."

70. Given the existence of this recognised procedure for binding English creditors to a foreign scheme of arrangement, it would be wholly wrong, submits Mr Howard, to seek to achieve the same result indirectly under the CBIR, thus circumventing the substantive and procedural conditions which have to be satisfied before an English scheme of arrangement can be sanctioned by the court.

71. More generally, Sberbank submits that an indefinite stay is no longer required for the purposes of the Azeri reconstruction plan, which has run its course. The "breathing space" envisaged by the Model Law has served its purpose, and all the creditors who participated in the plan have received their entitlements. As I have already pointed out, there is no suggestion that the success of the plan is jeopardised by the non-participation of the dissentient English creditors, and the entitlements of those who participated were calculated on the assumption that all the holders of Designated Financial Indebtedness would be treated alike. If the English creditors choose not to participate in the scheme, and are instead able to enforce their debt claims under English law, the other creditors have no legitimate grounds for complaint. They have received everything to which they were entitled under Azeri law.

72. As to the construction of the Model Law, Sberbank submits that its provisions should be interpreted widely and purposively, so far as procedural matters are concerned, but narrowly, in relation to substantive matters. While it may be difficult in some cases to draw the line between procedural and substantive matters, there is no such difficulty in the present case. Indeed, IBA now concedes that the indefinite moratorium which it seeks would have a substantive effect. In support of this approach to the construction of the Model Law, Sberbank relies on the Guide and other admissible aids to construction to which I have already referred, the guidance by Lord Collins given in Rubin, and the discussion by Morgan J of the *travaux préparatoires* in Pan Ocean. It is notable, says Mr Howard, that there is nothing in the *travaux* specific to article 21, which one would have expected if its provisions were intended to have substantive effects and to go beyond the provision of supplementary procedural assistance.

73. As an instructive example of how the Model Law operates in practice, Mr Howard took us to an appellate decision in the Federal Court of Australia on which Mr Bayfield also places reliance for IBA, Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 ("Akers"). The foreign main proceeding in that case was the liquidation in the Cayman Islands of a Cayman-registered company, Saad. The appellants were the joint foreign representatives of the Cayman liquidators, and upon recognition of the liquidation in Australia under the Australian version of the Model Law, they asked the court to order remission of Saad's remaining funds in Australia to the Cayman Islands. This was opposed by the Deputy Commissioner of Taxation, on the basis that Saad was liable to Australian tax and penalties for which the Commissioner would have been unable to prove in the Cayman liquidation, because under Cayman law that would amount to enforcement of a foreign revenue law. This objection was upheld by the federal court, both at first instance and on appeal, but it should be noted that the Commissioner's claims to pursue relief against the company within Australia "were limited to recovery of an amount of money up to, but no more than, a sum that would be received by the DCT on a *pari passu* basis if he or she were entitled to prove the taxation debts as an unsecured creditor in the foreign main proceeding": see the judgment of Allsop CJ at [26]. In other words, the effect of the order was to place the Commissioner in the same position as the other creditors, but freed from the rule against enforcement of foreign revenue debts which still formed part of Cayman law, but not the law of Australia.

74. For present purposes, submits Mr Howard, the main interest of Akers lies in the explanation given by Allsop CJ of how the Model Law works: see in particular paragraphs [58], [68] to [69], [98] and [115] to [143]. These passages are too long to

quote in full, but one of the matters upon which the court placed repeated emphasis was the need to provide proper protection for the interests of local creditors under articles 21(2) and 22(1) of the Model Law. I will also quote Allsop CJ's conclusion at [120]:

> "Whilst the Model Law reflects universalism, there is nothing in the Model Law or the UNCITRAL Working Papers prior to its formulation, or in the CBI Act, which would justify the stripping of rights of a local creditor by reason of recognition. The universalism that underpins the Model Law and CBI Act is one for the benefit of all creditors, and the protection of local creditors is expressly recognised. It is not inappropriate to call it "modified universalism" for what such an appellation is worth."

75. Sberbank goes on to submit that, where the Model Law does potentially have a substantive effect on creditors' rights, this is made explicit. Apart from articles 21(1)(e) and 21(2), which (as I have explained) make express provision for the remission of assets located in Great Britain to the foreign representative for distribution under the relevant foreign proceeding, provided that the interests of creditors in Great Britain are adequately protected, Mr Howard also referred to article 13(3), where Parliament made express provision relating to claims by a foreign tax or social security authority, thereby reversing the common law rule in Government of India v Taylor [1955] AC 491. By contrast, the effect of granting the indefinite stay sought by IBA would be to force the English creditors to accept the terms of the Azeri reorganisation and the effective abrogation of their English law rights, despite the absence of any express provision to that effect in the Model Law. There is simply no equivalent to the clear and unambiguous provisions which permit the remission of assets to a foreign liquidator in a case like Akers.

76. Sberbank also made submissions on the issue of discretion, but as I have already noted this issue only arises if IBA succeeds on jurisdiction. In this context, Mr Howard reiterated that the Azeri reconstruction plan had been drawn up on the footing that all the relevant creditors would participate, and the terms on offer were not "discounted" to reflect the probable non-participation of the English creditors. The plan was therefore premised on all the creditors being offered the same treatment. None of the other creditors' entitlements are affected if the English creditors succeed in obtaining a better outcome through enforcement of their English law rights. Mr Howard likened any resentment which the other creditors might feel in those circumstances to that of a passenger on an aeroplane who discovers that the person sitting next to him paid less for their ticket. It is undeniably irritating, but the passenger who paid more cannot claim to have been deprived of anything, or of having been treated unfairly.

The submissions of Franklin Templeton

77. Franklin Templeton adopted the written and oral submissions of Sberbank in their entirety. Near the start of his oral argument, Mr Moss emphasised the contrast between the Model Law, which contains no choice of law provisions, and the EU

Regulation on Insolvency Proceedings, which both in its original form (available to those who drafted the Model Law) and in the recast version which has applied since 2015 contains a general choice of law provision (subject to specific exceptions), and also provides expressly for the recognition and enforceability with no further formalities of judgments of the courts of the Member State in which the debtor's COMI is situated, including compositions and schemes of arrangements: see articles 19 and 32 of the recast Regulation (EU) 2015/848 of 20 May 2015. Against that background, submits Mr Moss, it is very significant that the framers of the Model Law did not adopt similar provisions.

78. In so far as this omission may be thought to leave a gap in the Model Law, Mr Moss points out that UNCITRAL is currently working on a further model law about the recognition and enforcement of insolvency-related judgments ("the Insolvency Judgments Model Law"). Indeed, matters have progressed to the stage where the Insolvency Judgments Model Law was adopted by a decision of UNCITRAL on 2 July 2018, and it will now be disseminated to governments and other interested bodies with a recommendation that all States give favourable consideration to its implementation. The accompanying Guide to Enactment includes in its non-exhaustive list of the types of judgment that might be considered insolvency-related judgments, at paragraph 59(e):

> "A judgment (i) confirming or varying a plan of reorganisation or liquidation, (ii) granting a discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement."

79. It is provisions of this kind, submits Mr Moss, which if implemented in the United Kingdom would provide the appropriate machinery to deal with the present type of case. As matters stand, however, there is a confusion at the heart of IBA's case between two different aspects of international insolvency restructurings. One aspect is the stay or moratorium that debtors seek in order to obtain a breathing space while they formulate a restructuring; the other is the question of how the debtor can bind dissenting parties to the proposed restructuring. Only the former aspect falls within the scope of the existing Model Law. The latter issue depends on jurisdiction over the dissenting creditors and/or the law which governs their debts. In many cases, of which this is one, it may not be possible to enforce the compromise against all creditors, but the reorganisation may nevertheless be worthwhile and save a viable business. If it is desired to go further, and bind foreign creditors who would not otherwise be bound, the long-standing practice in international restructurings of the present type has been to apply for parallel schemes of arrangement in other jurisdictions. IBA's failure to follow this course "should not be cured", as counsel for Franklin Templeton put it in their written submissions, "by granting unprecedented and unjustifiable relief under the CBIR".

80. In this connection, Mr Moss also submits that there are fundamental differences between liquidations (and equivalent procedures) on the one hand, and company reorganisations (in a broad sense) on the other hand. When a company goes into liquidation, the governing principle is that the pre-existing rights of the creditors should be enforced collectively. As Lord Hoffmann said in Cambridge Gas at [15], "bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them". By contrast, the purpose of a corporate

reorganisation will generally be to change the substance of the creditors' existing rights, with a view to the company emerging from the reconstruction as a going concern. It is therefore not surprising if these two very different types of proceeding are treated differently under the Model Law. Moreover, even in the case of a foreign liquidation, it is by no means clear that the English court would remit assets to a foreign liquidator if to do so would be unfair to creditors whose rights are governed by English law: compare In re Bank of Credit and Commerce International SA (No.10) [1997] Ch 213, discussed by Lord Hoffmann, and regarded by him as correctly decided on its facts, in HIH at [15] to [17].

81. The remainder of Mr Moss's oral submissions were principally directed to the temporal issue, that is to say the question whether (as Franklin Templeton put it in their respondent's notice) it is possible as a matter of jurisdiction to grant relief under article 21 which extends in duration beyond the termination of the foreign proceedings. The arguments relied on by Mr Moss in the court below in support of this proposition were summarised by the judge at [149] (1) to (7) and [150], which I will not repeat. In summary, the main points which Mr Moss emphasised before us were as follows:

a) Numerous provisions of the Model Law, including in particular articles 1, 2, 9-12 and 15-31, are all drafted on the assumption that the relevant foreign proceeding is still in existence and there is a validly appointed foreign representative still in office.

b) The notion of "appropriate relief" in article 21(1) must be confined to relief which is available under domestic law (see in particular the Guide at [189]), and as a matter of English law it would not be possible for a stay or moratorium to continue beyond the termination of a liquidation or administration.

c) Regardless of the position under domestic law, the temporal limitation is anyway inherent in the scope of relief potentially available under article 21, and the judge was right to conclude as he did at [154], quoted at [63] above.

d) Support by way of analogy for what is basically a proposition of common sense may be found in Re Kingscroft Insurance Co Limited [1994] BCC 343, where Harman J held that an order for the production of books and documents and for private examination obtained by provisional liquidators under section 236 of the Insolvency Act 1986 was spent once the winding-up petition had been dismissed and the provisional liquidators ceased to hold office: see his judgment at 346-347. As Harman J said at 347, "when there is no office, there cannot be a purpose of assisting the holder of that non-existent office."

e) Further support may also be found in the recent decision of Rares J, sitting in the Federal Court of Australia, in Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA [2018] FCA 153 ("Rizzo"). That case had a complex procedural background, summarised by Rares J at [3] to [11]. For present purposes, it is enough to say that an Italian form of reconstruction proceedings (known as a *concordato preventivo*) had been superseded in Italy by a liquidation ordered by the Italian court, and one issue which then arose was whether, and if so when, orders

which the Australian court had previously made in support of the *concordato* should be terminated and replaced with interim relief in support of the liquidation. The judge dealt with these matters at [26] to [34], concluding that the purpose of the earlier orders had come to an end when the Italian court dismissed the *concordato*, with the result that those orders should be vacated or set aside with effect from that date. As the judge put it, at [33]:

> "As a matter of principle, orders made under the Model Law should also cease to operate once the reason for having originally granted a stay and any other orders under the Model Law to recognise, aid or facilitate the conduct of the foreign proceeding also has ceased to exist. There is then no need to protect the debtor's assets here under the Model Law, because the foreign proceeding (in aid of which the local stay, recognition and any other orders were made) has ceased to exist, or otherwise no longer provides a justification to prevent creditors from exercising their rights in Australia against the debtor or the debtor's assets."

82. In the present case, submits Mr Moss, the Azeri reconstruction has for all practical purposes come to an end, and it is only being kept alive artificially for the purposes of this appeal. In substance, it terminated on 30 January 2018, and it would be wrong in principle for this court to grant any relief extending beyond that date.

The jurisdiction issue: discussion and conclusions

83. The first question to consider, in my judgment, is in what sense it may be said that the English court lacks jurisdiction to grant the indefinite stay requested by the foreign representative. As Pickford LJ usefully clarified in Guaranty Trust Company of New York v Hannay & Company [1915] 2 KB 536 at 563:

> "The word "jurisdiction" and the expression "the Court has no jurisdiction" are used in two different senses which I think often leads to confusion. The first and, in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."

84. It is clear, to my mind, that the present case does not involve an issue of jurisdiction in the former, or what one might call the "strict", sense. The application was made by a foreign representative of a foreign proceeding, duly recognised as such in this jurisdiction under the CBIR. Furthermore, the foreign proceeding was still in progress both when the application was made and when it was determined by the High Court.

As Mr Bayfield made clear, the application is made under article 21(1)(a) and (b), which expressly empower the court, "where it is necessary to protect… the interests of the creditors", to "grant any appropriate relief" at the request of the foreign representative, including a stay of the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities, or a stay of execution against the debtor's assets to the extent that there has not already been an automatic stay under article 20(1)(a) and (b). As a matter of jurisdiction in the strict sense, the application seems to me to fall squarely within the clear wording of article 21. In particular, I would reject a submission made by Mr Moss that the only purpose of article 21(1)(a) and (b) is to enable the court, upon reorganisation of a foreign *non-main* proceeding, to grant equivalent relief to that automatically conferred by the corresponding paragraphs of article 20(1) in the case of a foreign *main* proceeding. That is no doubt an important function of article 21(1)(a) and (b), but I can see no warrant in the wide language of the paragraphs for confining their scope so narrowly.

85. Accordingly, the real issue in the present case, as I see it, is one of jurisdiction in Pickford LJ's second sense, that is to say whether as a matter of settled practice the court should not exercise its power to grant a stay under those paragraphs, going beyond the automatic stay under article 20, where to do so:

> a) would in substance prevent the English creditors from enforcing their English law rights in accordance with the *Gibbs* rule; and/or
>
> b) would prolong the stay after the Azeri reconstruction has come to an end.

Despite Mr Bayfield's skilful and well-sustained submissions, I would answer both those questions in favour of the respondents. I must now explain my reasons for reaching that conclusion.

(a) Is it appropriate to grant an indefinite stay so as to defeat the rights of the English creditors?

86. An English court could only properly grant the stay sought by IBA, which is avowedly intended to prevent the English creditors from enforcing their English law rights indefinitely, if it were satisfied of two things. First, the stay would have to be *necessary* to protect the interests of IBA's creditors. Secondly, the stay would have to be an *appropriate* way of achieving such protection. In my view, neither of those conditions is satisfied.

87. As to the interests of IBA's creditors, viewed collectively, the relevant class which needs to be considered is the creditors whose debts formed part of IBA's Designated Financial Indebtedness. But they have now obtained everything to which they were entitled under the Azeri reconstruction plan, unless they deliberately chose not to participate in it. There is no evidence to suggest that the benefits on offer under the plan were discounted to reflect the probable non-participation of the English creditors, and the plan was duly approved by the Azeri court. IBA is now trading again, and the reconstruction is at an end. There is no further protection which the creditors need in order for the foreign proceeding to achieve its purpose. The highest that Mr Bayfield was able to put it was to argue that the creditors who participated in the plan could conceivably be prejudiced if the ability of IBA to repay its new corporate bonds,

which formed part of the new entitlements provided under the plan, were jeopardised in the future by successful enforcement by the English creditors of their stayed claims. There is no evidence, however, to suggest that this possibility is of more than theoretical significance; and, even if there were, I would regard it as far too indirect and imponderable a consideration to satisfy the test of necessity in article 21(1).

88. It is also material in this context that IBA could in principle have promoted a parallel scheme of arrangement in this jurisdiction, but chose not to do so. Mr Bayfield says that this objection misses the point, because one of the objects of the Model Law is to avoid duplication of proceedings with all the additional expense and inconvenience which they entail. I acknowledge the force of that argument, and would accept that the Model Law is designed to increase cooperation and reduce the need for separate proceedings in relation to matters falling within its scope. But that goes only some of the way towards answering the question whether protection of the interests of IBA's creditors really requires an indefinite stay of the English creditors' claims, when the alternative of a separate English scheme of arrangement was always available. One may surmise that IBA's real reasons for not promulgating a separate English scheme of arrangement probably had more to do with the need which would then have arisen to treat the English creditors as a separate class, and to offer them terms which they would be prepared to accept. That is another way of saying that the English creditors' strongest bargaining position would have been their English law rights, protected by the *Gibbs* rule; and this brings one back to the question whether anything in the Model Law, properly construed, should be permitted to override those rights. If not, it seems to me that it could seldom, if ever, be appropriate to grant relief under the Model Law which would have the substantive effect of doing just that.

89. Here, the starting point must in my opinion be the clear recognition in the Guide that the scope of the Model Law is "limited to some procedural aspects of cross-border insolvency" and that it "does not attempt a substantive unification of insolvency law". I would accept the respondents' submissions that the absence of any choice of law provisions in the Model Law is highly significant in this context, as is the absence of any requirement of reciprocity and the contrast which may be drawn with other international instruments such as the EU Insolvency Regulation or conventions for the mutual recognition of judgments. Furthermore, if the power to grant a stay under article 21 had been intended to override the substantive rights of creditors under the proper law governing their debts, one would expect this to have been made explicit, or at the very least to have been the subject of discussion and a positive recommendation at the preparatory stage. In the absence of any such material, I can find no warrant for treating the relevant article 21 powers as other than procedural in nature, with the main object of providing a temporary "breathing space" of the kind envisaged in the Guide.

90. Strong support for this approach may also be found in the existing case law. The decision of the Supreme Court in Rubin is particularly instructive, in my view, because the court there firmly rejected the approach taken by this court (of which I was a member) which sought to build on the principles stated with typical brilliance by Lord Hoffmann in HIH and Cambridge Gas so as to develop the common law on recognition of foreign judgments in line with the principle of modified universalism in insolvency proceedings. In essence, as it seems to me, IBA is trying to achieve a similar sort of result in the present case, by asking us to sideline or circumvent the

established common law rights of the English creditors by an appeal to the principle of modified universalism.

91. In any event, whatever the force of that comparison may be, Rubin is also directly in point, and binding on us, because, having declined to extend the common law, the Supreme Court went on to reject the receivers' alternative argument based on the CBIR and the Model Law. It was in this connection that Lord Collins expressly said, at [143], that article 21 is "concerned with procedural matters", and although it should be given a purposive interpretation and widely construed, there is nothing to suggest that it applies to the recognition and enforcement of foreign judgments against third parties: see [56] above. In a similar way, I can find nothing in article 21 to suggest that the procedural power to grant a stay could properly be used to circumvent the *Gibbs* rule.

92. Nor, in my view, does IBA gain any assistance from the Australian case of Akers. The issue was a very different one, concerning the terms on which it would be appropriate for the Australian court to order the remission of assets to a foreign liquidator, in circumstances where the Commissioner of Taxation would be unable to prove in the foreign liquidation because of the rule in Government of India v Taylor, but was subject to no such disqualification in Australia. The solution adopted was, in effect, to put the Commissioner on the same footing as the other creditors, but freed from the disability which would have prevented him from recovering anything in the foreign liquidation. Thus, the decision fully respected the domestic rights of the Commissioner as an Australian creditor, and far from circumventing them, the whole purpose of the order was to protect these rights, although not to the extent of affording him a preference over the other creditors. The fundamental principle of *pari passu* distribution on a liquidation was thus also protected. Nothing in Akers appears to me to be inconsistent with the position of the respondents in the present case. The difference is that the substantive rights which they are asking the court to respect gives them a potential advantage over the other creditors, but since the Model Law is essentially procedural in nature, it would in my view be wrong to use it to deprive the English creditors of that substantive advantage.

93. I also agree with Mr Moss's submission that there is an important distinction to be drawn between a liquidation and schemes of reconstruction. In a liquidation, the substantive rights of creditors are generally unaffected, and the primary focus is on achieving a fair distribution of the company's assets between all the creditors, normally on a *pari passu* basis. Save in exceptional cases, the liquidation will end with the dissolution of the company. In a reconstruction, on the other hand, the object is usually that the company will continue as a going concern, and the terms will typically involve significant changes to the creditors' substantive rights. This distinction was in my view rightly recognised by the judge, albeit in his discussion of discretion, at [158(3)], where he expressed his agreement with Morgan J in Pan Ocean at [112], helpfully adapting that paragraph to the present case as follows:

> "In some cases, it can be argued that anyone who does business with a foreign company which might thereafter enter a process of insolvency, governed by the law of its country of registration, should expect that the insolvency will be governed by that law. Indeed, statements to that effect have been made in [Atlas Bulk] para 26 and AWB (Geneva) SA v North America

> Steamships Limited [2007] 1 CLC 749, para 31. However, in the present case, the parties had deliberately chosen English law as the law of the contract. Whereas the parties might have expected that an [Azeri] court would apply [Azeri] insolvency law to the insolvency of the company, they might have been very surprised to find that an English court would [in effect] apply [Azeri] insolvency law to the substantive rights of the parties under a contract which they had agreed should be governed by English law."

94. More generally, I also agree with the main thrust of the conclusion reached by the judge at [146] after his careful consideration of essentially the same arguments as have been addressed to us:

> "In conclusion, in my judgment, the *Pan Ocean* case, following *Rubin*, and consistently with the *Antony Gibbs* case, affirms that the Model Law and the CBIR do not empower the English court, in purported appliance of English law, to vary or discharge substantive rights conferred under English law by the expedient of procedural relief which as a practical matter has the same effect, and has been fashioned with the intention, of conforming the rights of English creditors with the rights which they would have under the relevant foreign law."

95. The judge went on to say, at [147], that he would regard this conclusion "as a jurisdictional bar in the strict sense", but that it would in any event amount to a jurisdictional fetter in the wider sense explained in the Guaranty Trust case, with the result "that any such power could never appropriately be exercised so as to achieve the application of foreign law to the discharge or variation of an English law right." While I agree with the judge's conclusion at [146] in its application to the facts of the present case, however, I think that in [147] he went rather further than is either necessary or appropriate for resolution of the present case. In the first place, as I have already explained, I do not regard the issue as one of jurisdiction in the strict sense. Secondly, viewing the matter as one of jurisdiction in the wider or "soft" sense, I feel a lawyer's instinctive reluctance to use the word "never". I think there could be circumstances where, to a limited extent, it might be appropriate to exercise powers under the Model Law so as to achieve the discharge or variation of an English law right in a way that is tantamount to the application of a foreign law, for example when exercising the powers to remit assets to a foreign liquidator: compare HHH at [18] to [21]. In the context of the present case, however, I am satisfied that it would be wrong in principle to use the powers in article 21(1)(a) and (b), or any other provisions of the Model Law as incorporated in the CBIR, so as to circumvent the English law rights of the English creditors under the *Gibbs* rule.

(b) Can a stay properly be granted beyond the end of the Azeri reconstruction plan?

96. Since the conclusion which I have already reached is sufficient to dispose of the appeal, I will deal with this alternative ground more shortly.

97. In my view the arguments advanced by Mr Moss provide a compelling case for concluding that relief under the Model Law should not be granted so as to continue

beyond the date of termination of the relevant foreign proceeding. Such a limitation would be consistent with the procedural and supportive role of the Model Law. Once the foreign proceeding has terminated, there will no longer be a foreign representative who can apply to the English court for assistance, nor will there be a foreign proceeding for which such assistance could be sought. Consistently with this, article 18 requires the foreign representative to inform the court promptly of any substantial change in the status of the recognised foreign proceeding, or the status of the foreign representative's own appointment. This duty can only be performed while the foreign proceeding is still in existence, and the foreign representative is still in office. The strong implication is that, once the foreign proceeding has come to an end, and the foreign representative no longer holds office, there is no scope for further orders in support of the foreign proceeding to be made, and any relief previously granted under the Model Law should terminate.

98. Against that background, it would in my judgment be anomalous if a stay granted before the termination of the foreign proceeding were permitted to remain in force indefinitely. Furthermore, in the absence of a foreign representative, it would no longer be possible for IBA to institute proceedings under the Model Law in which the continuing validity or function of the stay could be tested. I do not think it is a sufficient answer to this point to say that the debtor company could always oppose an application to lift or vary the stay. No doubt that is true, in the sense that an English court would presumably allow submissions to be made on the company's behalf upon any such application; but that does not meet the objection that, had the Model Law ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would surely have addressed the question explicitly and provided appropriate machinery for that purpose.

99. There is little in the way of existing authority on this issue, but I agree with Mr Moss that the decision in Rizzo accords with common sense, and provides a helpful illustration of some of the practical problems likely to arise if relief continues beyond the duration of the relevant foreign proceeding, even if some of the reasoning of Rares J may arguably be open to criticism. On this last point, Mr Bayfield submitted that the decision of Allsop CJ in Yakushiji v Daiichi Chuo Kisen Kaisha (No. 2) [2016] FCA 1277 was in places difficult to follow, even though Rares J had found that the latter case "cogently explained" why recognition can be terminated, if the grounds on which it was granted "have ceased to exist": see Rizzo at [32]. Mr Moss was, I think, disposed to accept that there may be some difficulties with the reasoning of the court in Yakushiji, but he submitted that this did not deprive the decision in Rizzo of its value. I respectfully agree, while emphasising that I express no views on either the decision or the reasoning in Yakushiji.

100. Mr Bayfield also pointed out that a rather different approach has been adopted in the United States, where the courts have on occasion shown themselves willing to grant relief which is capable of continuing after the end of the foreign proceeding. In this regard, he referred us to In re Ho Seok Lee [2006] 348 B.R. 799 and In re Daewoo Logistics Corporation [2011] 461 B.R. 175. I do not consider it necessary to explore this point any further, however, because the background to the incorporation of the Model Law in the United States differs significantly from that in Great Britain or Australia, as Morgan J explained in Pan Ocean at [94] to [104] and [106] to [107]. It need not therefore occasion any surprise if the approach taken by US courts to the

interpretation and application of the Model Law is not always the same as that adopted in Great Britain or Australia.

101. If my analysis is right thus far, the only remaining question is whether it makes any difference that the Azeri reconstruction has been prolonged after its original termination date on 30 January 2018 by the change in the law enacted by the Azeri legislature and the orders made under it prolonging the life of the foreign proceeding pending the outcome of the present litigation. In my view, for the purposes of construing the Model Law and its temporal scope, the position cannot be altered by a legislative change made with specific reference (as I understand it) to the present proceedings. As a matter of substance, the original purpose of the Azeri reconstruction had been achieved before the termination date in January 2018, and IBA is now trading normally. The reconstruction plan is being kept alive artificially, but as an insolvency proceeding it has served its purpose and run its course.

Conclusion on the jurisdictional issue

102. For all these reasons, therefore, I am satisfied that the jurisdiction issue should be decided in the respondents' favour, as it was by the judge, provided that "jurisdiction" in this context is understood in the wider or "soft" sense.

Discretion

103. In view of the conclusions I have reached, the question of discretion does not arise and I prefer to say nothing about it. I will merely note that by the end of the hearing it had become common ground that, had we been in favour of IBA on the jurisdiction issue, it would then have been necessary for this court to exercise its discretion afresh, because the judge, although he discussed the issue at some length, ultimately left the question open.

Disposal

104. I would dismiss the appeal.

Baker LJ:

105. I agree

Lewison LJ:

106. I also agree.

Re : Pacific Andes Resources Development Ltd [2016] SGHC 210

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 210

Originating Summons No 668 of 2016

In the matter of Section 210(10) of the Companies Act (Cap 50, 2006 Rev Ed)

PACIFIC ANDES RESOURCES DEVELOPMENT LIMITED

... *Applicant(s)*

Originating Summons No 812 of 2016

In the matter of Section 210(10) of the Companies Act (Cap 50, 2006 Rev Ed)

PARKMOND GROUP LIMITED

... *Applicant(s)*

Originating Summons No 813 of 2016

In the matter of Section 210(10) of the Companies Act (Cap 50, 2006 Rev Ed)

PACIFIC ANDES ENTERPRISES (BVI) LIMITED

... *Applicant(s)*

Originating Summons No 814 of 2016

In the matter of Section 210(10) of the Companies Act (Cap 50, 2006 Rev Ed)

PACIFIC ANDES FOOD (HONG KONG) COMPANY LIMITED

... Applicant(s)

ORAL JUDGMENT

[Companies] — [Foreign Companies]
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Pacific Andes Resources Development Ltd and other matters

[2016] SGHC 210

High Court —Originating Summons Nos 668 and 812–814 of 2016
Kannan Ramesh JC
1 July; 8 August, 15 August, 29 August; 13 and 26 September 2016

27 September 2016 Judgment reserved.

Kannan Ramesh JC:

Introduction

1 Pacific Andes Resources Development Ltd ("PARD"), Parkmond Group Limited ("PGL"), Pacific Andes Enterprises (BVI) Limited ("PAE") and Pacific Andes Food (Hong Kong) Limited ("PAF") (collectively "the Applicants") each filed applications under s 210(10) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") by way of Originating Summons Nos 668, 812, 813 and 814 of 2016 respectively (collectively "the Applications") for moratoria against proceedings brought or to be brought against them by their creditors in Singapore and elsewhere. The Applications were allowed, in the case of PARD on the terms set out in the Order of Court dated 1 July 2016 as varied by the Order of Court dated 8 August 2016 ("the PARD Orders"), and in the case of PGL, PAE and PAF (collectively, "the Subsidiaries") on the terms set out in the Orders of Court dated 15 August 2016 ("the Obligor

Orders"). The moratorium in each instance was granted until 5 September 2016.

2 The Applicants have each filed applications to extend the moratoria until 13 January 2017. In turn, certain of their creditors, all financial institutions, have filed applications to set aside the PARD Orders and the Obligor Orders save that no application has been made as regards PAF. A tabulation of the applications filed by the Applicants and the creditors is set out in Annex 1 hereto.

3 The applications came before me for hearing on 13 September 2016. After hearing arguments, I reserved judgment and extended the moratoria under the PARD Orders and the Obligor Orders on an interim basis until the conclusion of the hearing on 26 September 2016. On 26 September 2016, I gave brief grounds and my decision, and indicated that fuller grounds would be made available on 27 September 2016 at 5pm. I will proceed to deliver those grounds today. Full written grounds of decision shall be furnished if necessary.

The background

4 The Applicants are part of a cluster of companies which describes itself as the Pacific Andes Group ("the Group"). The companies in the Group are incorporated in various jurisdictions including the British Virgin Islands (the "BVI"), Bermuda, Peru, Hong Kong, the United Kingdom, Cyprus and Spain, just to name a few. Notably, none of the Applicants are incorporated in Singapore though it is pertinent that PARD is listed on the Singapore Exchange, and carries out business activity in Singapore. The Subsidiaries on

the other hand do not appear to have any business activity or assets, or at least assets of any significance, in Singapore. These are matters of importance for reasons which will become apparent later.

5 At the risk of over simplification, the economic activity of the Group might be spliced into three broad divisions of which only two appear to be of any commercial significance: the production of fishmeal and fish oil ("the Peruvian Business") and the supply of frozen fish and related products ("the Frozen Fish Business"). The Frozen Fish Business is controlled and managed by the Applicants with the Subsidiaries appearing to be the operating units. It is common ground that as between the two businesses, it is the Peruvian Business that is far more lucrative and valuable. It is the Group's most substantial asset, being described as its "crown jewel". Various values have been attributed to the Peruvian Business, ranging from US$1 to US$1.6 billion, and it seems quite evident that these values are not broadly speaking inaccurate. In contrast, the Frozen Fish Business, though not insignificant, pales in comparison in terms of turnover, profit (in the past at least) and most importantly, value. Given the financial malaise of the Group, the Frozen Fish Business has in fact ground to a halt, with efforts being made as part of the restructuring initiative to restart it. Nonetheless, it is evident to me that the principal discord between the Group and its creditors is over control of the Peruvian Business. Given its value, this should come as no surprise.

6 As the name would suggest, the economic activity of the Peruvian Business takes place in Peru through various operating entities there. These entities in turn are controlled by the China Fishery Group Limited ("CFGL"), a company incorporated in the Cayman Islands, through indirect equity

interest held through various other entities. PARD's most valuable asset is its indirect shareholding in CFGL, held through various entities of which Richtown Development Ltd ("Richtown"), a company incorporated in the BVI, is the immediate subsidiary. Richtown has been placed in provisional liquidation in the BVI on the application of a creditor, Sahara Investment Group Pte Ltd ("Sahara"). PARD, through its holding in Richtown, also has an indirect interest in the Subsidiaries. A simplified diagrammatic representation of the group structure of the Group with the Peruvian Business and the Frozen Fish Business delineated may be found in Annex 2 hereto.

7 The Subsidiaries owe liabilities to various creditors, in particular, the financial institutions which have filed applications to set aside the PARD Orders and the Obligor Orders. These liabilities have been guaranteed by PARD as the Subsidiaries' parent. It would appear that none of these debts, both primary and contingent, are subject to Singapore law. They are, it would seem, subject to Hong Kong law with the loans being structured in Hong Kong and disbursed by the branches of the financial institutions situated there. However, it is pertinent that PARD has also undertaken fund raising in Singapore, having issued some $200m in Singapore denominated bonds governed by English law ("the SGD Bonds"). These bonds are traded on the Singapore Exchange. PARD's total indebtedness, both contingent and primary, is approximately US$280 million. The bondholders therefore make up the single largest creditor polity of PARD.

8 It is clear that the Group in general, and the Peruvian Business and the Frozen Fish Business specifically, are in financial straits. Various reasons have been alleged and attributed by the debtor and the creditors as causative of that

situation. Needless to say, the reasons are quite polarised. For present purposes, these reasons are not germane.

9 In an effort to extricate itself from its financial woes, the Group initially engaged in discussions with principally its financial institution creditors. However, for reasons which are again not of relevance to the applications, the discussions broke down, resulting in increased polarisation of the debtor-creditor positions. Things appear to have come to a head in late June 2016 when in an attempt to secure breathing space and formulate a rescue plan, insolvency proceedings were commenced almost simultaneously in various jurisdictions. The Peruvian units under the control of CFGL commenced restructuring proceedings in Peru on 30 June 2016 ("the Peruvian Proceedings") simultaneously with CFGL filing Chapter 11 proceedings in the United States Bankruptcy Court, Southern District of New York ("the US Proceedings"). In addition, as noted earlier, Sahara applied for and obtained the appointment of a provisional liquidator on 30 June 2016 over Richtown.

10 Further, on 1 July 2016, the PARD filed Originating Summons 668 of 2016 seeking a moratorium as regards the Applicants. I heard that application on the same day on an urgent basis and granted it. When granting the application, I expressed reservations as to whether I had jurisdiction to make the order as regards PGL, PAE and PAF in the absence of an application by each of them. However, given the urgency of the situation, I granted the order on an interim basis until 12 August 2016 ("the 1 July 2016 Order") and directed PARD's counsel to address me on this issue if an application was made to extend the moratorium. Thereafter, PARD filed an application to extend the moratorium which came on for hearing before me on 8 August

2016. After hearing arguments, I varied the 1 July 2016 Order to exclude the Subsidiaries as I was the view that I did not have jurisdiction, in an application by PARD, to grant moratoria under s 210(10) to cover the Subsidiaries where they were not applicants in their own right. I extended the moratorium as regards PARD only until 5 September 2016 ("the 8 August 2016 Order"). However, I suspended the lifting of the moratoria as regards the Subsidiaries until 15 August 2016 to allow them time to file applications in their own stead, if they so desired. This they did on 12 August 2016 in Originating Summons Nos 812, 813 and 814 of 2016 respectively. Those applications came before me for hearing on an opposed *ex parte* basis on 15 August 2016. The principal arguments made in opposition were by Bank of America ("BoA"). After hearing arguments, I expressed reservations on whether the Subsidiaries had *locus standi* to make an application under s 210 of the Act. I therefore granted the moratoria in each instance on an interim basis until 5 September 2016 – the Obligor Orders – pending an *inter partes* hearing on whether the orders ought to be sustained. Malayan Banking Berhad ("Maybank") subsequently filed applications to set aside the Obligor Orders save as regards PAF, and the PARD Orders. The Applicants in turn filed applications to extend the moratoria until 13 January 2017.

11 Maybank's applications were supported by BoA, Cooperatieve Rabobank, UA, Hong Kong Branch ("Rabobank") and Standard Chartered Bank (Hong Kong) Limited ("SCB") as well a group of bondholders represented by Cavenagh Law LLP. Broadly speaking, these creditors collectively hold more than 25% of the debt of the Applicants on an individual basis.

12 On the other hand, two financial institutions namely, Taipei Fubon Commercial Bank Co Limited and China CITIC Bank International Limited were supportive of the Applicants' applications. United Overseas Bank Limited ("UOB") and DBS Bank Limited maintained neutrality. In addition, Sahara, and a group of bondholders which describes itself as the Informal Steering Committee were supportive of the Applicants' applications. Collectively, these creditors make up a substantial portion of the debts owed by the Applicants, though this proportion is insufficient to cross the statutory threshold for value for a successful scheme vote under s 210.

13 It appears that no restructuring plan has as yet been proposed in the Peruvian Proceedings and the US Proceedings. A broad outline of a restructuring plan has been placed before the Court in the Applications ("the Plan"). The Plan is, however, somewhat thin on details. This is perhaps unsurprising given that a successful restructuring of the Group generally and PARD in particular is very much contingent on the restructuring of the Peruvian Business. This in turn is dependent on the outcome of the US Proceedings and the Peruvian Proceedings to a large extent.

The Issues

14 A multitude of issues was canvassed before me. However, they may be conveniently condensed into three core issues:

(a) Does the Court have powers under s 210(10) of the Act or as a matter of inherent jurisdiction to restrain the commencement or continuation of proceedings elsewhere by creditors within and subject to the jurisdiction of the Court ("the Jurisdiction Issue").

(b) Do the Applicants have *locus standi* to make applications under s 210 of the Act? ("the *Locus Standi* Issue").

(c) Aside from *locus standi*, what are the pre-requisites for an order under s 210(10) of the Act ("the s 210(10) Issue").

The Jurisdiction Issue

15 This issue arose principally because the moratoria under the PARD Orders and the Obligors Orders were not limited to the commencement and continuation of proceedings *in Singapore only*. The orders provided that the moratoria were as regards "actions or proceedings in Singapore or *elsewhere*". The orders therefore sought to restrain proceedings from being brought not just in Singapore but elsewhere by creditors subject to the jurisdiction of the Court. This raised the question of whether the Court could restrain the commencement or continuation of proceedings elsewhere by creditors subject to its jurisdiction. The Applicants argued that the Court had the jurisdiction. They had two strings to their bow in support of their argument – the Court had jurisdiction under s 210(10) of the Act, and as a matter of inherent jurisdiction to make the order. I consider the points in turn.

Section 210(10) of the Act

16 The key question is whether s 210(10) can be construed as conferring extra-territorial jurisdiction? Having considered the arguments and authorities, the position seems fairly clear that it cannot be read in such a manner.

17 This seems to be a settled proposition here as noted by the reports of the Insolvency Law Review Committee (at para 92) and the Committee to

Strengthen Singapore as an International Centre for Debt Restructuring (at para 3.12). This is also the view in the academic literature. For example, in *Woon's Corporation Law* (LexisNexis, 2016), the following was said (at para 152.1):

> Generally, schemes of arrangement are territorial in nature and s 210(10) would therefore have no application to actions or proceedings in foreign courts akin to anti-suit injunctions restraining foreign proceedings from being started or proceeded with.

I endorse this view.

To construe otherwise would be to create dissonance between the moratorium provisions as regards liquidation and judicial management, which have been recognised by the Court of Appeal in *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 ("*Beluga Chartering*") (at [90]) as being territorial. A similar approach has also been taken in the United Kingdom as regards administration (see, *eg*, *Bloom and others v Harms Offshore AHT "Taurus" GmbH & Co KG and another* [2010] 2 WLR 349 (at [16]) ("*Bloom*"), which in turn, drew on cases such as *In re Oriental Inland Steam Co, ex parte Scinde Railway Co* (1874) LR 9 Ch App 557 (which was in the context of winding up). I see no principled basis for concluding that the approach under s 210(10) should be any different.

18 The Applicants made several arguments in counter. First, that there is nothing in the text of s 210(10) that constrains the Court to read its powers as being territorial. They argued that that the term "proceedings" as it appears in s 210(10) ought to be given its natural meaning and read without any territorial limitation to include proceedings outside jurisdiction. I do not find

this argument persuasive as it ignores the similarity of language between s 210(10) and similar statutory provisions for judicial management and liquidation in the Act. It also ignores the presumption that statutes are intended to operate territorially in the absence of language that suggests otherwise. It must be remembered that a scheme of arrangement is territorial in nature and therefore the protective relief that s 210(10) offers to facilitate a scheme ought to also be territorial. In the main, it is difficult to understand what policy imperative would require a departure in the approach taken for schemes of arrangements as compared to judicial management and liquidation.

19 Secondly, it was argued that the moratoria, while expressed as restraining proceedings elsewhere, would only apply to creditors within jurisdiction. It was pointed out that the PARD Orders and the Obligors Orders had specific carve outs to exclude creditors who were out of jurisdiction. The argument appeared to be that the moratoria would only enjoin the creditors who were within jurisdiction and participating in the Applications from commencing proceedings outside Singapore. In substance, the argument was that the Court was in substance exercising *in personam* jurisdiction and not any extra-territorial jurisdiction over these creditors. I have difficulty with this argument. The Court has subject matter jurisdiction by reason of s 210 so long as the applicant is a "company" within the definition provided in s 210(11). In exercising subject matter jurisdiction over the scheme, creditors who are within the jurisdiction or participating in the scheme and whose debts are legitimately subject to the scheme would be subject to the *in personam* jurisdiction of the Court. The Court, having subject matter jurisdiction over the scheme and *in personam* jurisdiction over these creditors, is then able to exercise its powers to restrain such creditors only within the limits of s

210(10). And, for the reasons expressed earlier, s 210(10) does not have the reach that the Applicants contend for.

20 Further, the Applicants' suggested approach creates a dichotomy between creditors who chose to participate in the Applications and those who did not. The latter may actually do better simply by staying away. Ultimately, the question of whether a stay of proceedings *elsewhere* ought to be granted to facilitate a restructuring under a scheme of arrangement here is a matter for consideration by the Court where those proceedings are being brought. It will depend in such a situation on the domestic laws of that jurisdiction, and principles of comity and modified universalism. It may very well be that recognition of the proceedings here may have to be sought there or parallel proceedings opened there, in order to secure the required stay.

21 Third, the Applicant argued that such orders have been made by the High Court in various earlier matters. However, I note that those were instances where there did not appear to be any contest either at the stage where the order was obtained or subsequently. The specific issue of extra-territoriality of the powers under s 210(10) was not canvassed. I am therefore unable to attribute much precedential value to those cases.

Common law

22 The second string to the Applicants' bow is that the Court has inherent jurisdiction to restrain creditors over whom it has *in personam* jurisdiction from unsettling efforts to restructure under s 210 by commencing proceedings elsewhere. It was argued, drawing an analogy from authorities that recognised such jurisdiction as regards a creditor's oppressive, vexatious, or otherwise

unfair or improper conduct in the context of administration or liquidation, that a similar approach ought to be taken as regards schemes of arrangement. I am not persuaded.

23 The argument in my view ignores the jurisprudential basis upon which the Courts have recognised the jurisdiction in liquidation or administration. The jurisdiction is recognised, notwithstanding the existence of statutory provisions for moratorium within jurisdiction, to assist the discharge of statutory obligations of an officer, being a liquidator or an administrator, appointed by the Court, including the recovery and protection of the assets of the company. The Court is compelled to assist its officer in the discharge of his statutory obligations, and therefore exercises its inherent jurisdiction to restrain creditors: see *Bloom* at ([22] and [24]). The Court is in effect seeking to protect the integrity of its insolvency jurisdiction over the company and its assets with a view to ensuring that the statutory scheme is complied with: see *Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] AC 871 (at 892H). In *Stichting Shell Pensioenfonds v Krys and another* [2015] AC 616 (at [24]) ("*Stichting*"), the Privy Council observed (at [24]):

> ... Where a company is being wound up in the jurisdiction of its incorporation, other interests are engaged. The court acts not in interest of any particular creditor or member, but in that of the general body of creditors and members. Moreover, as the Board has recently observed in *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2015] 2 WLR 971, para 23, there is a broader public interest in the ability of a court exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of its jurisdiction. *In protecting its insolvency jurisdiction, to adopt Lord Goff's phrase, the court is not standing on its dignity. It intervenes because the proper distribution of the company's assets depends on its ability to get in those assets so that comparable claims to them may be dealt with fairly in*

> *accordance with a common set of rules applying equally to all of them. ...*
>
> [emphasis added]

24 This key element is missing in the scheme of arrangement which is essentially a debtor-in-possession regime. There is no officer of the Court appointed nor is there a statutory scheme governing the insolvency. Indeed, a scheme under s 210 of the Act is not predicated on insolvency unlike judicial management and most instances of liquidation.

25 I should also add that while there are statements in the authorities to the effect that such inherent jurisdiction ought to be exercised only when the conduct of the creditor is oppressive, vexatious, or otherwise unfair or improper, I am not persuaded that this is a necessary ingredient. If the *raison d'etre* of the jurisdiction is to assist its officer and preserve its insolvency jurisdiction in order to ensure that the statutory scheme is observed, I do not see why the conduct of the creditor needs to be so tainted before the jurisdiction is exercised. I find support for my view in the Privy Council's judgment in *Stichting* (see [18] and [23]), where it was stated as follows:

> 18 ... In *Carron Iron Co Proprietors v Maclaren* (1855) 5 HL Cas 416, Lord Cranworth LC (at pp 437-439) identified three categories of case which, without necessarily being comprehensive or mutually exclusive, have served generations of judges as tools of analysis. ... Third, there are cases which do not turn on the vexatious character of the foreign litigant's conduct, nor on the relative convenience of litigation in two alternative jurisdictions, in which foreign proceedings are restrained because they are "contrary to equity and good conscience". ... the court has an equitable jurisdiction to restrain the acts of persons amenable to the court's jurisdiction which was calculated to violate the statutory scheme of distribution.
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> ...

> 23 ... The leading modern case on the jurisdiction to restrain foreign proceedings is *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871. ... Lord Goff of Chieveley, delivering the advice of the Board, pointed out that *the insolvency cases proceeded on a different principle, which was based not on protecting litigants against vexation or oppression, but on the protection of the court's jurisdiction to do equity between claimants to an insolvent estate.* ... It is clear from Lord Goff's formulation that he was making the same distinction as Lord Cranworth made in the Carron Iron case between cases such as the insolvency cases, in which there is an equitable jurisdiction to enforce the statutory scheme of distribution according to its terms, and cases in which the court intervenes on the ground of vexation or oppression.
>
> [emphasis added]

The Privy Council was of the view that there was an equitable jurisdiction to restrain interference by persons amenable to the jurisdiction of the Court who threatened to violate or interfere with the statutory scheme. I find this to be correct as a matter of principle and suggest that a similar position would apply in Singapore.

26 For completeness, Maybank argued that the Court should not find that it had inherent jurisdiction in the case of a scheme of arrangement because that would make s 210(10) irrelevant or otiose. I do not accept that in and of itself, the existence of a statutory provision imposing or enabling the grant of a moratorium is conclusive as to whether the Court ought to exercise inherent jurisdiction. That such jurisdiction has been recognised in the context of judicial management and liquidation, notwithstanding the existence of moratorium provisions that echo the language of s 210(10), undermines the argument (see, *eg*, *Bloom at* [21]–[22]). The issue instead is whether the Court ought to safeguard its jurisdiction by restraining a creditor over which it has jurisdiction from interfering with a statutory scheme administered by its

officer in the discharge of statutory obligations. Such a statutory scheme does not exist in the context of s 210.

27 In the final analysis, I am therefore unable to accept the view that the Court's inherent jurisdiction ought generally to be exercised to restrain proceedings elsewhere where the Court is faced with an application under s 210. To do so would be to interfere with the jurisdiction of another court and not recognise the principle of comity, assuming the creditor can legitimately bring such proceedings. There is, however, perhaps a caveat which I shall discuss briefly.

28 Maybank made the argument, without conceding the point, that such jurisdiction may perhaps exist where the Court has sanctioned the scheme. I agree with that submission. In such an instance, the Court is effectively giving effect to a scheme which has statutorily compromised an applicant's debts. However, I would venture to say that the point may go even further. Where the scheme is presented for sanction following a successful vote at a scheme meeting, an argument is certainly there for the exercise of equitable jurisdiction to restrain proceedings elsewhere so as to ensure observance with the scheme that has been presented for sanction. At that stage, a statutory compromise has been reached by the creditors, subject to court sanction, using statutory cram down powers. In such a scenario, I do not see why the Court should not protect the integrity of the vote so as not to undermine the application for sanction before it. However, I offer this only as a preliminary view as I have not heard full arguments on this issue.

Conclusion on the Jurisdiction Issue

29 I accordingly conclude that the Court has no jurisdiction under s 210(10) and under its inherent jurisdiction, certainly not at this stage, to restrain creditors subject to its jurisdiction from commencing or continuing proceedings elsewhere.

The *Locus Standi* Issue

30 The principal argument by Maybank and the creditors that support its applications is that Applicants have no *locus standi* to file applications under s 210.

31 Section 210 applies to a "company", the definition of which has been expanded under s 210(11) to "mean any corporation liable to be wound up under this Act". Section 351 stipulates that an "unregistered company" may be liable to be wound up under the Act and in turn, s 350 defines such a company as including a "foreign company". To complete the analysis, s 4 of the Act defines a "foreign company" as "a company or corporation incorporated outside Singapore". As the Applicants are incorporated in the Bermuda (PARD), the BVI (PGI and PAE) and Hong Kong (PAF), they would be foreign companies for the purpose of the Act. Notwithstanding this, the Court has jurisdiction under s 210.

Is sufficient nexus a matter of jurisdiction or discretion?

32 Maybank argued that notwithstanding the language of s 210(11) read with ss 350, 351 and 4, the Court has no jurisdiction under s 210 where there does not exist sufficient nexus between the company and Singapore. Reliance

was placed on the Singapore authorities of *Re Griffin Securities Corporation* [1999] 1 SLR(R) 219 ("*Re Griffin*"), *Re Projector SA* [2009] 2 SLR(R) 151 ("*Re Projector*") *and Re TPC Korea Co Ltd* [2010] 2 SLR 617 ("*Re TPC Korea*"). It was submitted that, insofar as the English position as set out in *Re Drax Holdings Ltd* [2004] 1 WLR 1049 ("*Re Drax*"), *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch) ("*Re Rodenstock*") and *Re Indah Kiat International Finance Company BV* [2016] EWHC 246 ("*Indah Kiat*") was that "sufficient nexus" did not go to jurisdiction but the exercise of discretion, I should decline to follow that position on the basis that it was at odds with the Singapore authorities. I should add that BoA took a very similar stance at the hearings on 15 August 2016 and 13 September 2016. On the other hand, the Applicants submitted that it was matter of discretion and not jurisdiction.

33 I am unable to agree with the submission of Maybank and BoA in this regard. A careful review of the Singapore authorities suggests to me that the Courts there were in substance approaching the issue as a matter of discretion and not of jurisdiction. In *Re Griffin* (at [17]), the Court spoke in terms of when the Courts would "exercise this discretion". *Re Projector*, which followed *Re Griffin*, cited this very paragraph with approval when it said (at [26]) that the Court had jurisdiction to wind up a foreign company where it had assets or there was sufficient nexus with Singapore. The Court, while using the term "jurisdiction", seemingly had "discretion" in mind. Similarly, in *Re TPC Korea,* the Court cited (at [12]) with approval both *Re Griffin* and *Re Projector*, when it articulated the circumstances where the Court would have "jurisdiction" under s 210. It seems evident that the concepts of jurisdiction and discretion were conflated simply because the dichotomy

between jurisdiction and discretion was not a point of focus. However, it seems equally evident that the Courts in fact had in mind discretion.

34 Accordingly, I do not believe that there is discord between the English and Singapore positions. In any event, if indeed there is a difference, I would prefer the English position for the reasons articulated in *Re Drax*. It was stated in *Re Drax* (at [24]–[26]) as follows:

> 24 In most cases the distinction will not matter. The English court will not wind up a foreign company where it has no legitimate interest to do so, for that would be to exercise an exorbitant jurisdiction contrary to international comity, and for that purpose it does not matter whether the preconditions are couched in terms of the existence of jurisdiction or the exercise of jurisdiction.
>
> 25 But in the present case it may make a difference, because the question is one of the jurisdiction to approve a scheme of arrangement, and the second and third conditions may not be relevant because they were formulated in the context of winding up. If they go to the jurisdiction to order a winding up, the words "any company liable to be wound up" in section 425(6) may require those conditions to be fulfilled even in the case of schemes of arrangement. If they go to the discretion to wind up, then they do not have to be fulfilled in the case of a scheme of arrangement, although the first condition would plainly be relevant in any event.
>
> 26 The question therefore is whether (as was assumed in the present matter by the companies) the combined effect of section 425(6) of the 1985 Act and of section 221(1) of the Insolvency Act 1986, and the cases on the winding up of foreign companies, is that the three conditions must be satisfied before the court can exercise its powers under section 425. In my judgment the three conditions go to the discretion of the court, and not to the existence of its jurisdiction. If that it is right, then the conditions do not have to be satisfied for the purposes of section 425, because they do not go to the question whether a company is "liable" to be wound up under the Insolvency Act 1986. So also it is not necessary for the purposes of section 425 that the grounds for winding up in section 221(5) exist.

For completeness, I note that this is also the position in Hong Kong: see *Re LDK Solar Co Ltd (In Provisional Liquidation)* [2014] HKCU 2855 ("*LDK*") (at [35]).

35 However, Maybank and BoA submitted that there would be no difference in the outcome regardless of my conclusion on this issue. I agree. Ultimately, if the Applicants did not have assets within or sufficient nexus to jurisdiction, there would be no *locus standi* under s 210.

Is there sufficient nexus?

36 Mr Lee in response to a question from me candidly conceded that his strongest argument would not be that PARD did not have sufficient nexus to Singapore. This concession was rightly made. PARD, while incorporated in Bermuda, is listed and conducts economic activity here. Indeed, it does seem that it would not be inaccurate to conclude that PARD's COMI or Centre of Main Interest is in Singapore. I am therefore of the view that the Court has jurisdiction to hear an application by PARD under s 210.

37 The position, however, as regards the Subsidiaries is quite different. Despite posing the question several times, the Applicants were unable to point me to any assets within jurisdiction or any nexus that these entities might have with Singapore. Maybank submits and I agree that these entities do not have any tangible nexus to Singapore; they have failed to produce any evidence in this regard.

38 The Applicants rely on a variety of factors in support of the argument that there is in fact nexus.

39 First, the Applicants argue that the Subsidiaries are wholly owned by PARD, and integral to the Frozen Fish Business which has contributed significantly to PARD's revenue. With respect, none of these are relevant factors for the purpose of nexus. Nexus in this context is that which enables a court to wind up a foreign company. The fact that the Subsidiaries are wholly owned by PARD does not afford a basis. Neither does the fact that they are part of PARD's business offer any foothold. The Subsidiaries are independent legal entities and the fact that they intend to present a group restructuring with a composite, inter-dependent and inter-connected restructuring plan does not have the effect of or warrant the piercing or lifting of the corporate veil such that they may be regarded as one composite entity. This, I would venture to say, is settled law. While it would be possible to file for a scheme of arrangement that proposes a composite inter-dependent plan involving the Applicants, *all* the Applicants in such a situation must establish *locus standi* through the existence of assets within or sufficient nexus to jurisdiction. In addition, even if jurisdiction here is established, given that the Applicants are incorporated and carry on economic activity elsewhere, it may be necessary to present the restructuring plan for recognition and endorsement in other jurisdictions, in particular, the place of their incorporation.

40 Second, the argument is that PARD is a guarantor of the liabilities of the Subsidiaries, and therefore their largest contingent creditor. Other reasons were offered in support. For example, that PARD is listed in Singapore, has issued the SGD bonds on the Singapore Exchange, that PARD has an office in Singapore and has its annual general meetings in Singapore, that PARD has a bank account in Singapore, and that PARD has four subsidiaries incorporated in Singapore which own real properties as assets. While all of these factors

fortify my earlier conclusion that PARD has sufficient nexus to Singapore, they do not assist the Subsidiaries at all. They show no nexus between Singapore and the Subsidiaries.

41 Third, much store was placed on the argument that the Applicants have creditors within jurisdiction. In particular, emphasis was placed on the fact that the financial institutions which lent to the Subsidiaries through their Hong Kong branches had branches or were incorporated in Singapore and were therefore subject to the *in personam* jurisdiction of the Court. Reliance was placed on the English decision in *Re Magyar Telecom BV* [2015] 1 BCLC 418 (Ch) ("*Re Magyar*") and *Re Drax*. I do not believe that these authorities assist.

42 In *Re Magyar*, the remarks (at [22]) on the relevance of the presence of creditors within jurisdiction were made in the context of several other important considerations:

(a) Whether the debts were governed by English law and subject to jurisdictional clauses involving the English courts (at [15]);

(b) Whether there were assets within jurisdiction such that a scheme if sanctioned would have the effect of preventing execution against those assets (at [22]); and

(c) Whether the company had moved its COMI to England (as the company in the case had done before the application), such that any insolvency process would be undertaken under English law in England, providing a solid basis and background for a scheme under English law which altered contractual rights governed by a foreign law (at [23]).

43 On the facts of *Re Magyar*, the move of the COMI to England was clearly a factor that weighed heavily on the judge's mind. In *Re Drax*, the Court found that there were "many factors" which pointed to the exercise of the jurisdiction as being legitimate and appropriate (at [31]). The agreements were subject to English law and English jurisdiction clauses, the collateral taken for the debts were property and securities in England. Also, the financial institutions that were subject to the jurisdiction of the Court had undertaken the lending to the applicant in England. These factors were considered relevant. For completeness, a similar approach was taken in *Re Rodenstock*.

44 It seems evident therefore that the mere presence of creditors within jurisdiction *per se* is not necessarily a sufficient factor. If the debt owed to the creditor has a connection to the jurisdiction, then the presence of that creditor within jurisdiction may be regarded as a relevant factor in an overall assessment of sufficient nexus. This is significant in the context of banks that have undertaken lending through branches in various parts of the world. As Maybank correctly pointed out, these branches are quite often set up to comply with regulatory requirements in order for the relevant authority to exercise supervisory control over their business activities within jurisdiction. The regulator does not intend to control, through such branches, the business activities of the banks carried out in other jurisdiction unless of course that is of relevance to their activities within jurisdiction.

45 Accordingly, while it is correct to say that the banks are subject to the *in personam* jurisdiction of the Court by reason of being creditors within jurisdiction, it would be incorrect to assert that jurisdiction as regards their business activity elsewhere. That would be to conflate the Court's *in personam*

jurisdiction over the bank by reason of the presence of the branch within jurisdiction with the Court's subject matter jurisdiction over the conduct in question, *ie*, the lending that has taken place elsewhere by another branch of the bank. This was a point made by Hoffman J (as he then was) in *MacKinnon v Donaldson Lufkin and Jenrette Securities Corporation* [1986] 1 Ch 482 ("*MacKinnon*"), where he observed at (493) as follows:

> I think this argument confuses personal jurisdiction, i.e., who can be brought before the court, with subject matter jurisdiction, i.e., to what extent the court can claim to regulate the conduct of those persons. It does not follow from the fact that a person is within the jurisdiction and liable to be served with process that there is no territorial limit to the matter upon which the court may properly apply its own rules or the things which it can order such a person to do. ...
>
> The content of the subpoena and order is to require the production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction. In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement upon a foreigner, in particular, upon a foreign bank. The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction.
>
> ... If every country where a bank happened to carry on business asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in the unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure.

This is a correct statement of principle in my view. To exercise jurisdiction in such a situation could be regarded as exorbitant. I am therefore not persuaded that the presence of the creditors within jurisdiction, particularly the branches of banks, *per se* provides sufficient nexus.

46 There is however, one caveat. It seems to me that the fact that the debt that is sought to be compromised is not subject to Singapore law or the jurisdiction of Singapore courts is not in and of itself a bar to the Court exercising jurisdiction if the applicant can otherwise show sufficient nexus to or assets within jurisdiction. This point assumed relevance as BoA, and notably not Maybank, argued that the Court should not assume jurisdiction over the Applications because the debts owed to the banks by the Applicants were subject to Hong Kong law. By reason of this, it was argued that any discharge of the debts would not be recognised in Hong Kong on the basis of the principle in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399 ("*Gibbs*") which was followed in Hong Kong in *Hong Kong Institute of Education v Aoki* [2004] 2 HKLRD 760 ("*Aoki*") and *LDK*. The principle in *Gibbs* is that a discharge of a debt is not effective unless it is in accordance with the law governing the debt. It was also pointed out that the bonds that PARD issued were subject to English law, presumably in support of the same point.

47 I am not convinced this is a compelling argument. It should be noted that the principle in *Gibbs* has received academic criticism – see *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 15th Ed, 2012) at para 31-097, Philip St J Smart's *Cross-Border Insolvency* (Butterworths, 2nd Ed, 1998) (at pp 259–60) and Professor Ian Fletcher in *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at para 2.127. Look Chan Ho, in *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016), also offers a compelling critique of the principle in *Gibbs* from the perspectives of the common law, policy and Model Law. Among other points, Look Chan Ho questions if the common law refusal to recognise

foreign bankruptcy discharge still makes sense today for several reasons, including (see paras 4-096–4-107):

> First, the common law rule hinges on characterising bankruptcy discharge solely as a contractual matter which is thus logically within the scope of the governing law. ... Upon closer inspection, the contractual characterisation of bankruptcy discharge is highly suspect. ...
>
> The common law chose contract on the premise that the parties only intended the governing law of the contract to determine its discharge and did not assent to the use of any other system of law, including the bankruptcy law of the country in which the defendant was domiciled.
>
> The emphasis on party autonomy in general contractual matters is entirely understandable ... But bankruptcy discharge is not quite a consensual matter.
>
> ...
>
> Bankruptcy discharge is about the post-insolvency treatment of the claimants' pre-insolvency entitlements. This is because the recognition of bankruptcy discharge fundamentally concerns whether the contractual counter-party may seek to enforce his debt against the bankrupt's assets to the detriment of other creditors. The real contest is between the contractual counter-party and the bankrupt's other creditors who were not parties to the contract. ...
>
> ...
>
> Therefore, as bankruptcy law is not and cannot be a consensual matter, the fact that the parties to a contract did not choose the bankruptcy law of a country to discharge contractual obligations is neither here nor there.
>
> Second, ... [t]reating bankruptcy discharge as an *in rem* matter would also be consistent with the orthodox English classification of bankruptcy proceeding as an *in rem* proceeding.
>
> Third, the common law rule that the discharge of an obligation is governed by its proper law seems to be premised on the contractual parties' expectation. But is the notion that people expect their contractual bargain to always trump bankruptcy law realistic? ...

> ... to say that "[o]rdinarily, looking to the proper law on questions of discharge would give effect to the expectations of the parties" is simply incorrect when the Insolvency Regulation is involved, and also unrealistic "in an age where the rules of private international law are evolving to accommodate the increasingly transnational nature of commerce" and to accommodate transnational insolvencies.
>
> ...
>
> Fifth, it would be wrong to think that enforcing a foreign bankruptcy discharge is something radical. For instance, the US courts have always been willing to give effect to a foreign bankruptcy discharge even where it compromises rights granted under US statutes. ...
>
> ...
>
> Sixth, the failure to recognise foreign bankruptcy discharge is tantamount to refusing to recognise foreign insolvency proceedings. Recognition of international bankruptcy orders and judgments is particularly needed because the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding and therefore deference to a foreign court of proper jurisdiction is appropriate so long as the foreign proceedings are procedurally fair and do not violate public policy ...
>
> ...
>
> It is therefore submitted that the English common law refusal to recognise foreign bankruptcy discharge is now utterly out of date. The right approach forward is to discard the traditional position and develop proper choice of law rules that could allow the English court to recognise and enforce a foreign bankruptcy discharge. ...

Elsewhere, Look Chan Ho makes the point that insolvency policy necessarily overrides contracts because insolvency law is not about a "bilateral bargain" (at para 6-039) and that the principle in *Gibbs* is "philosophically incompatible and practically irreconcilable" with the British Model Law – the former is predicated on territorialism while the latter is steeped in modified universalism (at para 4-028).

48 Professor Fletcher offered a reformulation of the principle in *Gibbs* at para 2.129 which he argued is a better reflection of the needs of current global economic paradigm. He expressed the following view:

> In the case of a contractual obligation which happens to be governed by English law, a further rule should be developed whereby, if one of the parties to the contract is the subject of insolvency proceedings in a jurisdiction with which he has an established connection based on residence or ties of business, it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law.

There is much to commend to this view. I note that this passage was quoted with approval by the Court in *Global Distressed Alpha Fund I Limited Partnership v PT Bakrie Investindo* [2011] 1 WLR 2038 (at [14]) ("*Bakrie*"). It should also be noted that the Court in *Bakrie* would have followed Professor Fletcher's recommendation but for the fact that it felt bound by *Gibbs*, it being a decision of the Court of Appeal. For completeness, I should add that in *Bakrie*, the Court also took the view that creditors who participated in the foreign composition proceedings would be estopped from asserting subsequently that the composition does not bind on the basis of the principle in *Gibbs* (at [31]). A very similar point was made in *AWB Geneva SA v North America Steamships Ltd* [2007] EWHC 1167 (Comm). There is merit in this position as well.

49 While the Court in *Bakrie* might have felt itself bound by the weight of precedent, we, on the other hand, are not similarly constrained. Indeed, it would seem that the applicability of the *Gibbs* principle has not been considered by our courts. I am inclined to the view that the reformulation

offered by Professor Fletcher presents a principled basis to approach the discharge of a debt not under its governing law. I am fortified in my view by three further points:

(a) The approach in Australia which does not see the principle in *Gibbs* as an obstacle to asserting jurisdiction in Australia (see *Bulong Nickel Pty Ltd* [2002] WASC 226);

(b) In *Aoki*, where, while the principle in *Gibbs* was recognised, reservation was expressed by the Court; and

(c) The English courts have, notwithstanding the principle in *Gibbs*, recognised or will recognise the discharge of a foreign debt under English law in certain circumstances: see *Re Magyar, Sea Assets Limited v Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [2001] EWCA Civ 1696 ("*Garuda*") and *Indah Kiat*.

50 The principle in *Gibbs* may only create an issue of recognition in jurisdictions that recognise the principle. It should be noted that the principle does not present a problem in the United States which is a pertinent jurisdiction insofar as the US Proceedings are relevant to the restructuring of the debts of PARD. Ultimately, the failure to recognise is an issue for the debtor and perhaps not the creditor. In this regard, if the Applicants are comfortable restructuring debts governed by Hong Kong law and English law under a Singapore scheme, I see no reason why the Court should be slow to assume jurisdiction provided it had subject matter jurisdiction and there exists sufficient nexus to exercise that jurisdiction.

51 The reformulation of the principle in *Gibbs* is an important and timely step in the global insolvency landscape as it may otherwise prove to be an impediment to *"good forum shopping"*. The English courts in *Garuda, In the matter of Codere Finance (UK) Limited* [2015] EWHC 3778 ("*Re Codere*") and *Re Metinvest BV* [2016] EWHC 79 (Ch) have recognised that forum shopping in a *bona fide* attempt to restructure and so as to take advantage of a juridical advantage was permissible. In *Re Codere*, the Court said (at [17]–[18]) as follows:

> 17 ... the authorities show that over recent years the English courts have become comfortable with exercising the scheme jurisdiction in relation to companies which have not had longstanding connections with this jurisdiction. Mr. Allison has reviewed the authorities in detail in his skeleton argument, referring me, for example, to cases dealing with companies which have shifted their centres of main interest; a relatively recent authority in which there was a change of governing law; and, by way of perhaps particular analogy to the present case, a line of authorities including the decision of Mr. Justice Norris this year in *Re A I Scheme Ltd.* reported at the convening stage at [2015] EWHC 1233 (Ch) and, at the sanction stage, at [2015] EWHC 2038 (Ch). In that case, a company had voluntarily assumed liabilities with a view to the scheme jurisdiction being exercised. Mr. Justice Norris did not consider that that fact prevented the English court from sanctioning the proposed scheme.
>
> 18 In a sense, of course, what was done in the A I Scheme case, and what is sought to be achieved in the present case, is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely available, if available at all, elsewhere. Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is

> appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.

52 This appears to be a sound proposition. I am therefore of the view that the principle in *Gibbs* does not create an obstacle to the exercise of jurisdiction. Accordingly, if the Court has subject matter jurisdiction and there exists assets in or sufficient nexus to jurisdiction that warrants the exercise of jurisdiction, debts which are not governed by Singapore law may be legitimately compromised by a scheme proposed under s 210. This would not be a situation akin to *MacKinnon* as there is subject matter jurisdiction and a legitimate basis for exercising it. I am cognisant that this could potentially cover loans extended or debts incurred offshore or elsewhere, and to the extent the lenders or creditors are within jurisdiction, the Court could exercise *in personam* jurisdiction to restrain them from commencing or continuing proceedings against the applicant debtor. However, such restraint would be limited to proceedings *within* jurisdiction for the reasons noted earlier in relation to the Jurisdiction Issue. Also, as noted earlier, it may very well be the case that given that the moratorium is territorial, there may be a need to seek recognition of the scheme sanctioned here or propose a parallel scheme in the relevant jurisdiction as was done in *Re Codere*. Alternatively, it may be, as suggested in *Indah Kiat* and *Re Codere*, that sanction of the scheme ought to be given subject to a non-waivable condition precedent that the scheme to be recognised in the relevant jurisdiction. Appropriate solutions can no doubt be found by creative practitioners.

Conclusion on the Locus Standi Issue

53 I therefore find that save for PARD, the Subsidiaries do not have *locus standi* to present applications under 210. As such, the Court ought not to grant them relief under s 210(10).

The s 210(10) Issue

54 Essentially two sub-issues arise for consideration. They are:

(a) Whether the Plan had sufficient particularity for the purpose of an application under s 210(10) ("the Particularity Issue"); and

(b) Whether the Court should decline to make an order under s 210(10) where a corpus of creditors constituting in value and/or number at least equal to the statutory threshold for a successful scheme vote has indicated that it will resist any scheme that is presented ("Threshold Issues").

I consider each issue in turn.

The Particularity Issue

55 I had observed earlier that the Plan was short on details. It should be noted that the Plan was only placed before the Court on my direction. I had also observed that the thinness of details is not surprising given that the restructuring of PARD and perhaps even the Subsidiaries is very much contingent on a successful restructuring in the Peruvian Proceedings and the US Proceedings. PARD as one of the holding companies of CFGL would benefit from the flow through of the restructuring efforts in those proceedings.

However, as no plan has been presented and approved in those proceedings as yet, a plan with great particularity has not surfaced in the Applications.

56 The Plan may be summarised as follows:

(a) Creditors to exchange their debt on a dollar-for-dollar basis into new debt instruments issued by PARD.

(b) The principal under the new debt instruments will be payable in full, *ie*, no haircut.

(c) The maturity of the new debt instruments is targeted to be five years, subject to negotiation.

(d) The new debt instruments will be guaranteed by each of PAF, PGL and PAE.

(e) The new debt instruments will be secured against the bank accounts of the PARD Group and against inter-company loans amongst the PARD Group.

(f) Most of the other terms and conditions of the new debt instruments will, in form and substance, be substantially similar to those governing creditors' existing claims.

(g) Creditors may also receive warrants that are convertible into PARD's shares.

(h) In terms of feasibility:

(i) The cashflow for the repayment of the new debt instruments is likely to come from one or more of the following sources, being: partial/entire sale of the Peruvian Business; declared dividends by CFGL; revenue from the revitalised Frozen Fish Business; and new equity capital.

(ii) There is the possibility of early repayment for creditors if suitable refinancing opportunities are identified, in which case PARD may exercise its call option under the new debt instruments to make early repayment.

(iii) Creditors will have some control over the feasibility of the scheme through their rights in relation to the operation of PARD Group's bank accounts and the approving of its yearly budget.

57 It was argued by many of the creditors led by BoA, Rabobank and SCB that the Plan was so shorn of detail that it was nothing more than an attempt to game the system in an effort to procure a moratorium under s 210(10). Heavy reliance was placed on the decision in *Re Conchubar Aromatics Ltd and other matters* [2015] SGHC 322 ("*Conchubar*"). It was also argued that the Plan was only filed to satisfy my direction that a plan be presented to the Court.

58 *Conchubar* has recognised, following the Malaysian decision of *Re Kuala Lumpur Industries Bhd* [1990] 2 MLJ 180, that an order under s 210(10) may be ordered notwithstanding that an application for a scheme meeting to be called under s 210(1) has not been made. I endorse that view.

59 Where an application is made under s 210(10) only, *Conchubar* suggests that two factors are of importance:

(a) Is the application made *bona fide* and not in an an attempt to game the system by procuring orders under s 210(10) without any real intention of putting forward a serious proposal; and

(b) Whether the proposal contained sufficient particularity for the Court to make a broad assessment that there is a reasonable prospect of the scheme working and being acceptable to the general run of creditors.

The creditors argued that the lack of particularity in the Plan indicated that the Applicants were attempting to game the system, and that they did not have any intention to present a serious restructuring plan. This they say demonstrated a lack of *bona fides*.

60 It is correct to say that the lack of particularity could indicate a lack of *bona fides*. Equally, seeking a long moratorium under s 210(10) without a conjoined application under s 210(1) could also suggest that. However, there is a limit to how far the argument can be taken. To accept the argument in the present context without qualification is to ignore the fact that the Applicants and the other entities of the Group have resorted to court-based restructuring regimes which involve close court scrutiny. It is axiomatic that Chapter 11 proceedings, such as the US Proceedings, entail close court and creditor supervision principally because it is a debtor-in-possession regime. I am informed that Peruvian restructuring laws are modelled on the structure in

Chapter 11, and will therefore assume that debtors operate under similar strictures.

61 A similar level of scrutiny can and does exist in relation to proceedings under s 210. It is important to note that there is nothing in the language of s 210(10) that restricts the court's power to grant the moratorium subject to such terms as it deems fit. This is a necessary adjunct of the power under s 210(10) as s 210 is a debtor-in-possession regime. The Court is able to ensure that the debtor is making a *bona fide* effort at restructuring by making such orders as it thinks appropriate to ensure close scrutiny of such effort. These could include – as a condition to the grant of a moratorium – directing an application under 210(1) to be filed by a certain date, requiring regular disclosure of information to the court and creditors, providing regular updates to the Court on the status of the restructuring plan and of satellite proceedings in other jurisdictions, and where relevant, the formation of creditor committees, and the appointment of a court representative (at the applicant's cost) to oversee and report to the Court and the creditors on the restructuring efforts. In addition, case management techniques such as cases docketed to judges and case managing the proceedings through regular and frequent case management conferences increase the depth of scrutiny. The debtor is kept on a fairly tight leash, particularly where there is a s 210(10) application without a s 210(1) application.

62 Section 210 is a malleable tool that allows the Court to exercise close control over the restructuring process thereby assuaging the concerns of creditors that the debtor, notwithstanding that it is insolvent, remains in possession and is managing the restructuring efforts. The Court in my view is

able to build in sufficient safeguards, through control mechanisms, into its orders. This as well as the case management techniques referred to earlier enables the Court to strike a balance between the competing interests of the debtor and its creditors.

63 The creditor's argument makes the sufficiency of particulars a cornerstone for the making of the order under s 210(10). They say that is what *Conchubar* says or requires. I think the argument misreads *Conchubar* and does not consider why particularisation was considered as important in the first place. The argument also ignores the reason why the Plan is short of details.

64 In my view, particularisation serves two important functions at the stage of a s210(10) application. First, the insufficiency of particulars could be an indicium of an absence of *bona* fides. However, that has to be seen against a milieu of other relevant considerations. The present case is clearly illustrative of that. The thinness of details in the Plan is principally down to it being contingent on the Peruvian Proceedings and the US Proceedings which concern the most valuable asset – the "crown jewel" – of the Group, namely the Peruvian Business. There therefore exists a cogent and reasonable explanation for the paucity of details, which the Court must take into account in the assessment of *bona fides*. *Conchubar* in fact makes the same point (at [11] and [16]) where is stated as follows:

> 11 ... What was required, following *Re GAE Pty Ltd* [1962] VR 252 ("*Re GAE*"), was that the particulars of the scheme gave more than a general layout, so that the court would be able to determine if the scheme was feasible, *and that the intention to invoke the section was bona fide.*
>
> ...

> 16 In the present case, there was nothing that would indicate that the proposal was not *bona fide*. The particularisation has been examined above. *Sufficient particularisation is relevant to the assessment of bona fides, as it shows that there is serious intent and thought.* There was nothing either that indicated that the proposal was so bad that it would likely be rejected outright.
>
> [emphasis added]

65 The second function that particularisation serves is to enable the Court, *not the creditors*, to make a broad assessment that there is a reasonable prospect that the scheme will work and be acceptable to the *general run* of creditors: see *Conchubar* (at [12]). As *Conchubar* correctly noted (at [12]), the task is not to undertake a close scrutiny of the merits of the proposal or its viability and likely acceptance by the creditors. Nor should the Court attempt to place itself in the shoes of different creditors with different exposures, commercial motivations and appetite for risk. That would be an impossible task for the Court. Accordingly, the Court, *as opposed to the creditors*, has to be satisfied on a broad assessment that there is a plan that has a reasonable prospect of working and being acceptable to the general run of creditors. Sufficiency of particulars is an aid in this regard. In undertaking this assessment, the Court should not carry out a vote count for the sound reason that the plan is still being discussed, negotiated and developed between the debtor and its creditors before it is ready to be placed at a scheme meeting for a vote. Creditor opposition is obviously relevant but in the face of significant creditor support for the plan, the Court should not engage in a vote count. Such support could be taken as an indicator that there is a reasonable prospect of the plan being acceptable to the general run of creditors: (see *Conchubar* at [12]).

66 In this regard, I note that in *Re Gae Pte Ltd* [1962] VR 252, the Court, when considering the *in pari materia* provision in Australia, expressed the following view (at 256):

> There must, however, be at least a scheme the general principles of which have been defined, and which, though it may need completion by the addition of details such as schedules of creditors and their debts, is nevertheless at a stage at which the Court would be justified in ordering a meeting of creditors. ...

I am unable to accept this view insofar as it suggests that it the plan at the stage of a s 210(10) application must have reached a level of maturity that warrants the Court calling for a scheme meeting at a convening hearing under s 210(1). I do believe that such an approach is not only inconsistent with *Conchubar*, but is also not warranted by the language of s 210(10). Once it is accepted that an application under s 210(10) may be delinked from an application under s 210(1), in a situation where they are, it is not inconceivable and perhaps even likely that the plan that is placed before the Court in a s 210(10) application may differ from that which is placed before the Court in a convening hearing. It seems more than possible that the terms and details of the compromise may change by the time the convening hearing takes place. The plan in a s 210(10) application may very well be nascent as time may be required to discuss and negotiate a more detailed plan before it is presented at a convening hearing. As such, I do not see why the plan at the point of a 210(10) application must have the attributes suggested in *Re Gae*.

67 The argument was made that the words "any such" in s 210(10) indicates that the view is *Re Gae* is correct. While that is a possible reading, I would prefer to read the words as a reference to the *fact* that a plan has been proposed in a s 210(10) application that will be followed by a plan presented

to the Court at the convening hearing. It *does not* in my view mean that both plans are the same but for some difference in detail. The words "any such" is a reference to the fact that a plan that has been proposed in each instance as opposed to those plans being the same or similar. To construe otherwise would be to not recognise the fact that the plan will evolve between the applications under ss 210(10) and 210(1). In my view, what is required is that the debtor has proposed a plan in a *bona fide* application under s 210(10) with the intention of following through with a convening hearing thereafter under s 210(1) which may or may not involve a plan on exactly the same terms. The assessment that the Court makes as to the feasibility and acceptability of the plan to the general run of creditors at the stage of an application under s 210(10) is limited to that plan only. Any shortcoming in the particulars of the plan will have to be explained away by cogent, credible and reasonable reasons. I hasten to add that my remarks should not be in any way be read as an invitation to file an application under s 210(10) without a plan – s 210(10) does not allow for that. It should also not be read as a licence to file plans without adequate particulars. The Court will scrupulously scrutinise the reasons offered if that were to happen.

68 Ultimately, the key consideration appears to me to be the question of *bona fides* – is there a *bona fide* intention to invoke s 210(10)? In this regard, the further question is whether there is a sound reason why the Plan is short of particulars? I am persuaded, at least for now, that having examined the Plan *and the circumstances*, there is a *bona fide* attempt *in the circumstances* to propose a compromise or arrangement between the Applicants and their creditors. It seems clear that the shortness of details in the Plan is readily explained by the absence of an outcome in the Peruvian Proceedings and the

US Proceedings. I am also satisfied, on a broad assessment, that there is a reasonable prospect that the Plan is acceptable to the general run of creditors. In this regard, I have placed some reliance on the significant support from some creditors for the Applicants' applications. I am cognisant that support for these applications does not necessarily mean that there is also support for the Plan. However, as I have not heard otherwise, I conclude as I have done.

The Threshold Issue

69 The creditors who seek to set aside the PARD Orders and the Obligors Orders argue that as they collectively hold more than 25% of the debt owed by the Applicants, the scheme will never receive the approval of the requisite majority of creditors at a scheme meeting. As such, it would be futile to grant or extend a moratorium under s 210(10). The creditors' argument is premised on an extension of *Re Ng Huat Foundations Pte Ltd* [2006] SGHC 112 *("Re Ng Huat")* to a s 210(10) application. *Re Ng Huat* held that a court in a convening hearing should consider whether there is a realistic prospect of approval of the requisite majority of creditors under the Act, both in terms of value and numbers. If the prospect is not realistic, a scheme meeting ought not to be ordered. *Re Ng Huat* was cited with approval by the Court of Appeal in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213 and this court in *Re Punj Lloyd Pte Ltd and another matter* [2015] SGHC 321.

70 It would be apparent from my remarks on the Particularity Issue that I do not believe that it would be appropriate or indeed correct to apply *Re Ng Huat* to a s 210(10) application. It seems self-evident that if the plan that is before the Court for the purpose of a s 210(10) application is liable to or

capable of evolution and change because it is nascent and subject to discussion and negotiation, taking a straw poll of creditors at that stage would not be justified. *Conchubar* (at [12]) has warned against this, suggesting that a close scrutiny of the likely acceptance of the plan by creditors ought to be avoided when the Court makes the broad assessment. It is a matter of common logic that as the plan evolves, creditors are prone to change their position based on their commercial motivations. Indeed, I note that one creditor, UOB, has changed its position from unequivocal opposition to neutrality. Accordingly, to make an assessment of creditor support at the stage of a s 210(10) application is premature.

Conclusion on the s 210(10) Issue

71 I therefore find that the Plan satisfies s 210(10). In addition, I am of the view that the fact that more than 25% of the creditors will presumably oppose any scheme that the Applicants put on the table is no reason to set aside the PARD Orders and the Obligors Orders.

Some observations

72 In the final analysis, the approach that I have taken to the construction of s 210(10) is not only justified as a matter of principle but warranted in present day circumstances where cross-border restructurings are increasingly becoming common, given the proliferation of cross-border investments and trade. Where businesses entities are interconnected and cross-border in nature, it is only to be expected that restructuring of such business entities is undertaken on a composite, interconnected and inter-related basis. The formulation of such a composite plan is a long, involved and complicated

exercise simply by reason of the involvement of multiple jurisdictions with different restructuring regimes and the interweaving of multifarious business and creditor interests. The individual plans for the units that collectively make up the composite plan will therefore take time to formulate and finesse. The Courts must recognise and not turn a blind eye to this reality.

73 The present case is illustrative of this reality. PARD, having listed and borrowed in Singapore (in the case of the SGD Bonds) and having operations here seeks to restructure its debts in Singapore. Its principal asset is its equity in the Peruvian Business through its indirect holding in CFGL. This makes PARD's restructuring plan here heavily contingent on the plan for the Peruvian Business and the restructuring of CFGL. It therefore seems to me incorrect to assert that PARD has not satisfied s 210(10) and *Conchubar* because it has not offered a fleshed out plan. This ignores the fact that PARD cannot restructure in isolation as it is effectively a holding company and its restructuring will depend on the value maximisation of its operating units. The creditors in extending credit to PARD must have reasonably anticipated this paradigm. They should not be so willing to argue without reference to this.

74 I should point out that in the course of arguments, I raised the question that if the creditors' argument were accepted on the Particularity Issue, a company in a situation such as PARD's would face significant difficulty in restructuring under s 210. The response which I received, which implicitly acknowledged the point I made, offered the solution that PARD could apply for a provisional liquidator in Bermuda as it was incorporated there. I found this response to be not very satisfactory. First, it is axiomatic that the provisional liquidator will then take charge of the restructuring as it is settled

law that the appointment of a provisional liquidator effectively displaces management save for some residuary responsibilities (see *Re Union Accident Insurance Co Ltd* [1972] 1 WLR 640 and *Walter Woon on Company Law* (Sweet & Maxwell Asia, 3rd Ed, 2009) at para 17.98). This was acknowledged in the response. This seems to go against the grain of, and indeed is anathema to, a debtor-in-possession regime under s 210. Second, the suggestion in the response only has the potential to work where the company is incorporated elsewhere. If the company is incorporated here, it will have to resort to an application for judicial management to secure the benefit of a moratorium thereby displacing management once again. There would therefore be no scope for the application of a debtor-in-possession regime under s 210. It seemed to me that the solution to the problem did not lie in the response I had received but instead in the interpretation of the statutory language of s 210 that I have arrived at.

75 I make an additional point. This case is also illustrative of the need for communication and cooperation between courts and the insolvency administrators of the respective insolvency proceedings in the formulation of what is effectively a group restructuring plan. It seems axiomatic that such communication and cooperation will not only facilitate the formulation of the plan but also foster better understanding and resolution of issues involving and between the respective proceedings, and strengthen comity in the process. I had strongly encouraged the Applicants in the earlier hearings to come together with the insolvency representatives in the respective proceedings to formulate protocols for such communication and cooperation, subject to approval by the relevant courts. The Applicants unfortunately did not take my suggestion forward citing their battles with the creditors here and elsewhere as

a primary reason. I do not think that this is at all a satisfactory or persuasive reason. I reiterate my call for such a protocol to be formulated and implemented, at the very least with the US Proceedings. I hope that at least this time, my encouragement is pursued with vigour.

76 The importance of having a channel for communication and recognising comity became readily apparent to me when it was brought to my attention in the course of argument that one of the main reasons for wanting to restrict the moratorium to territorial limits was so that a provisional liquidator could be appointed at PARD's place of incorporation, Bermuda, on application by certain creditors. This was with a view to taking control of the US Proceedings and thereby the Peruvian Proceedings. The intention, it would seem, was to stop both proceedings in order to effect a sale of the Peruvian Business. This troubled me.

77 Apart from the small matter of the appointment of a provisional liquidator being antithetical to a debtor-in-possession restructuring of PARD in Singapore, it seemed apparent that the intentions of the creditors, or at least some of them, could very well render the restructuring effort here nugatory, given the importance of the Peruvian Business to PARD's efforts in this regard. This was difficult to accept given that the bondholders of the SGD bonds only had recourse to PARD, and had subscribed to the bonds on the basis of, *inter alia*, the value of PARD's interest in the Peruvian Business. It would seem that the creditors who were intent of proceeding in this manner might not be in the same boat. It may very well be that the composite restructuring plan approved by the creditors will eventually involve a managed sale of the Peruvian Business as an important integer of such a plan. However,

that is not the same as a sale by a provisional liquidator as an essential step in the process of liquidation. It is also not inconceivable that such a plan will not necessarily involve the sale of all or any part of the Peruvian Business. Therefore, the steps envisaged by the creditors did cast a potential pall on the proceedings under s 210 which this Court has exercised subject matter jurisdiction over, at least insofar as PARD. It would therefore seem that any application envisaged by the creditor ought to have the benefit of communication between this court and the relevant court in Bermuda, and perhaps even the Court having charge of the US Proceedings. I will take this opportunity to encourage the parties to enter into a protocol that permits communication between the Courts in Bermuda and Singapore on that issue.

78 In this regard, I draw reference to the judgment of the Supreme Court of Bermuda in *Re Contel Corporation Ltd* [2011] SC (Bda) 14 Com ("*Contel*") (at [11]). There, a Bermuda incorporated company applied for recognition of scheme sanctioned in Singapore. It should be noted that PARD is also Bermuda-incorporated. The company had brought no parallel scheme in Bermuda. Kawaley J (as he then was) in the Supreme Court of Bermuda recognised the order of Quentin Loh J in Singapore sanctioning a scheme. In a judgment which I shall describe as progressive, Kawaley J, who has since assumed the position of Chief Justice, applied the principle in *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 in granting recognition to Loh J's order. This case illustrates the importance of comity and the need to grant recognition where it is appropriate to do so in the particular circumstances of the case. This is entirely in step with the views expressed by the Court of Appeal in *Beluga Chartering* and this Court in *Re Opti-Medix Ltd (in*

liquidation) and another matter [2016] 4 SLR 312. There could therefore be value in allowing the restructuring efforts of PARD in Singapore to run their course insofar as they are allied to the outcome of the efforts in the US Proceedings and Peruvian Proceedings, subject to adequate supervision by the Court in all three proceedings. To this end therefore, I would invite parties to bring these grounds and the notes of arguments in these proceedings to the attention of the Honourable Court in Bermuda that may hear any application for the appointing of a provisional liquidator over PARD, and encourage parties to enter into a protocol for communication between the Courts in Bermuda and Singapore on that issue.

Conclusion

79 In conclusion, I set aside the Obligors Orders, save as regards PAF, and vary the PARD Orders by limiting the moratorium thereunder to proceedings in Singapore. As no application has been filed as regards PAF, I am unable to address the setting aside of the Obligors Orders insofar as they relate to PAF. However, in the light of my views, I declined to grant the application for extension of the moratorium as regards PAF. That moratorium expired on 26 September 2016.

80 In addition, I am minded to allow PARD's application to extend the moratorium under the PARD Orders, subject to the variation in [80] above, and would like to hear parties on the period and the terms upon which such extension ought to be granted, and on costs. I note that in the light of my conclusion that the PARD Orders do not operate extraterritorially, Maybank has informed me that it is not pursuing that part of its application in Summons 4008 of 2016 for orders that PARD and its directors undertake to all creditors

that PARD will be subject to Singapore law as regards unfair preference and transactions at undervalue. For the same reason, BoA has also indicated, subject to instructions, that it is likely to not pursue that part of its application in Summons 3857 of 2016 seeking leave to commence winding up proceedings against PARD, whether here, in Bermuda or elsewhere.

81 Finally, I would like to record my appreciation to counsel for all parties for their assistance to the Court on the challenging issues that have been canvassed in this case. Their assistance was articulate, thorough and invaluable, and was of immense use to me in coming to the conclusions that I have.

Kannan Ramesh
Judicial Commissioner

Cavinder Bull, *SC*, Blossom Hing, Mohan Gopalan, Teri Cheng and ChanWei Meng (Drew & Napier LLC) for the applicant;
Thio Shen Yi, *SC*, Alexander Pang, Evan Ng and Pamela Chan (TSMP Law Corporation) for Bank of America, N.A.;
Chelva Rajah, *SC*, Zara Chan and Megan Chia (Tan Rajah & Cheah) for Sahara Investment Group Pte Ltd;
Andre Maniam, *SC*, Tan Mei Yen, Yu Kanghao, Vithiya Rajendra and Avinash Selvarajah (WongPartnership LLP) for Cooperatieve Rabobank U.A., Standard Chartered Bank (Hong Kong) Limited and DBS Bank Ltd;
Lee Eng Beng, *SC*, Mark Cheng, Matthew Teo and Zhao Jiawei (Rajah & Tann Singapore LLP) for Malayan Banking Berhad;
Suresh Nair and Nicole Foo (Advocatus Law LLP) for Informal Steering Committee;
Nish Shetty and Keith Han (Cavenagh Law LLP) for Steering Committee of Bondholders;
Kwek Fei Joseph, Bondholder, in person; and
Wang Chan Tak, Bondholder, in person.

Annex 1

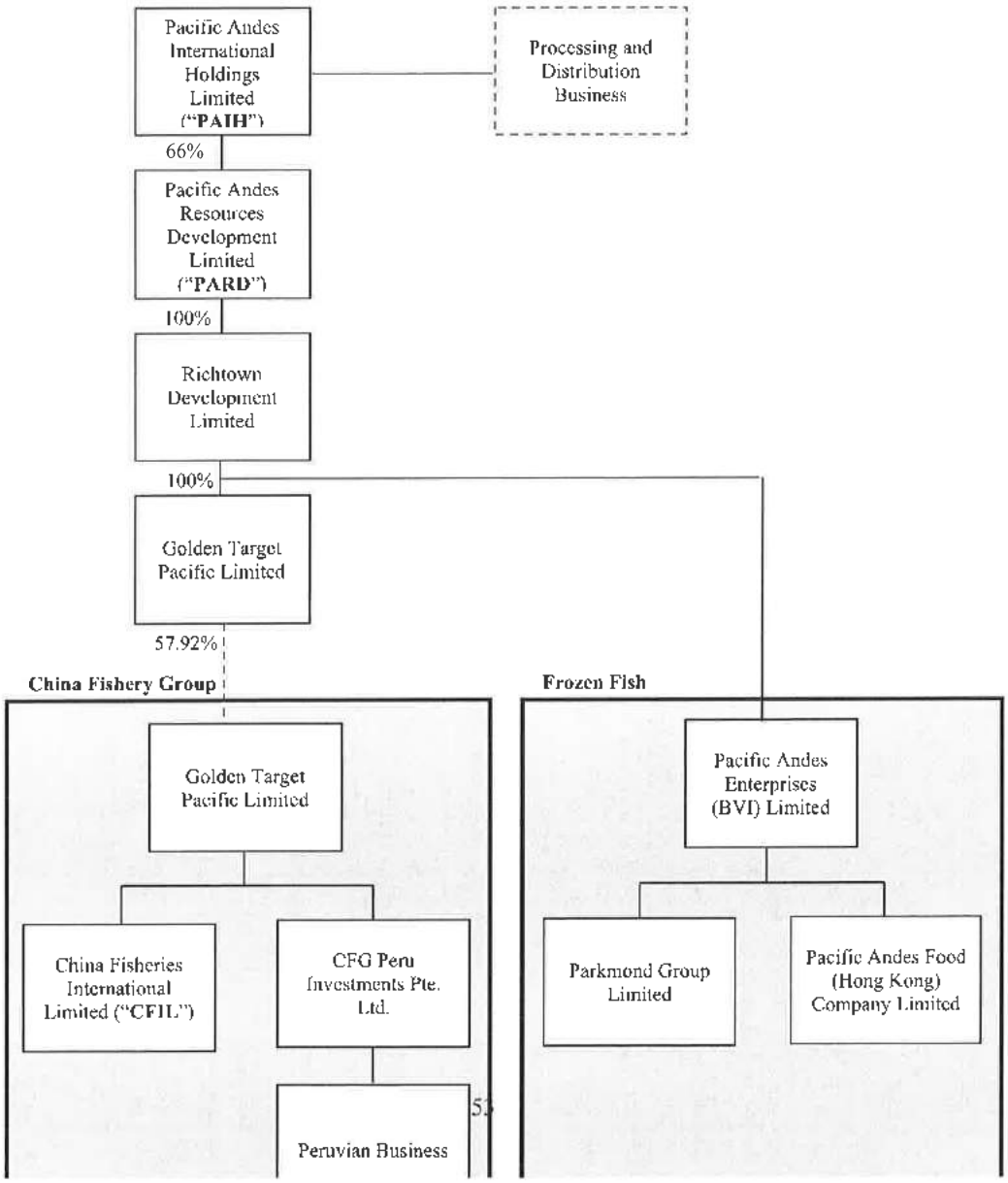
Date	Application	Filed by	Purpose
1 July 2016	OS 668/2016	PARD	For moratoria under s 210(1) for PARD, PAE, PGL and PAF until 31 January 2017
4 August 2016	OS 668/2016 (SUM 3813)	PARD	To extend the 1 July 2016 Order till 12 February 2017
8 August 2016	OS 668/2016 (SUM 3857)	BOA	To, *inter alia*, limit the 1 July 2016 Order to PARD
12 August 2016	OS 812/2016	PGL	For moratorium under s 210(10) until 15 February 2017
12 August 2016	OS 813/2016	PAE	For moratorium under s 210(10) until 15 February 2017
12 August 2016	OS 814/2016	PAF	For moratorium under s 210(10) until 15 February 2017

17 August 2016	OS 668/2016 (SUM 4008)	Maybank	To set aside the PARD Orders and in the event that the PARD Orders are maintained or varied, for an undertaking that PARD will be subject to Singapore law of unfair preferences and undervalue transactions
19 August 2016	OS 813/2016 (SUM 4030)	Maybank	To set aside the 15 August 2016 Order (part of the Obligor Orders) and in the event that the order is maintained or varied, for an undertaking that PAE will be subject to Singapore law of unfair preferences and undervalue transactions
19 August 2016	OS 812/2016 (SUM 4031)	Maybank	To set aside the 15 August 2016 Order (part of the Obligor Orders) and in the event that the order is maintained or varied, for

			an undertaking that PGL will be subject to Singapore law of unfair preferences and undervalue transactions
6 September 2016	OS 668/2016 (SUM 4325)	PARD	To extend the PARD Orders (*ie*, the 1 July 2016 Order as varied by the 8 August 2016 Order) until 13 January 2017
6 September 2016	OS 812/2016 (SUM 4326)	PGL	To extend the 15 August 2016 Order (part of the Obligor Orders) until 13 January 2017
6 September 2016	OS 813/2016 (SUM 4327)	PAE	To extend the 15 August 2016 Order (part of the Obligor Orders) until 13 January 2017
6 September 2016	OS 814/2016 (SUM 4328)	PAF	To extend the 15 August 2016 Order (part of the Obligor Orders) until 13 January 2017

9 September 2016	OS 668/2016 (SUM 4439)	Steering Committee of Bondholders	For, *inter alia*, leave to file an affidavit in the proceedings

Annex 2


Pacific Andes International Holdings Limited ("PAIH")
Processing and Distribution Business
66%
Pacific Andes Resources Development Limited ("PARD")
100%
Richtown Development Limited
100%
Golden Target Pacific Limited
57.92%
China Fishery Group
Frozen Fish
Golden Target Pacific Limited
Pacific Andes Enterprises (BVI) Limited
China Fisheries International Limited ("CFIL")
CFG Peru Investments Pte. Ltd.
Parkmond Group Limited
Pacific Andes Food (Hong Kong) Company Limited
53
Peruvian Business

Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux
(1890) 25 QBD 399 (Gibbs)

COURT OF APPEAL

ANTONY GIBBS SONS v. LA SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX

25 Q.B.D. 399

DATE: 1890 June 26.

COUNSEL: R. T. Reid, Q.C., and R. S. Wright, for the plaintiffs.
Kennedy, Q.C., and H. Tindal Atkinson, for the defendants.

SOLICITORS: For plaintiffs: Johnson, Budd, Johnson.
For defendants: Murray, Hutchins, Stirling.

JUDGES: Lord Esher, M.R., Lindley and Lopes, L.JJ.

HEADNOTE: *Contract – Conflict of Laws – Foreign Bankruptcy or Liquidation, Discharge by – Lex Loci Contractus – Law of Domicil – Stay of Proceedings – Judicature Act, 1873 (36 37 Vict. c. 66), s. 24, sub-s. 5, s. 39.*

A party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled.

APPEAL from the judgment of Stephen, J., at the trial. The action was for non-acceptance of certain quantities of copper purchased by the defendants, a French company, from the plaintiffs, who were merchants carrying on business in London.

The facts, so far as material, were as follows:–

Contracts for the purchase of copper by the defendants from the plaintiffs had been effected through a broker on the London [*400] Metal Exchange, who in each case drew up and sent to the parties bought and sold notes in the usual way, which were retained by such parties. By these notes the contract was expressed to be subject to the rules and regulations of the London Metal Exchange indorsed thereon; the copper was to be delivered at Liverpool; and payment was to be made in cash in London against warrants.(1) The defendants were a trading company created under and by virtue of certain statutes and articles of association according to the law of France and which carried on business in Paris. It appeared that such company had, since the making of the contracts and before the action, gone into liquidation in France, a judgment of judicial liquidation having been pronounced against it by the Tribunal of Commerce of the Seine. The failure to accept a portion of the copper contracted to be purchased by the defendants had taken place before the judgment of liquidation; but the deliveries of the remainder of the copper did not become due until after such judgment. The defendants gave notice to the plaintiffs that they should not accept such copper, which was therefore not tendered. Notice having been given to the plaintiffs by the liquidator in France that they must come in and prove any claim they had against the defendants or such claim would be barred, and they would be excluded from any share in the distribution of the assets, the plaintiffs thereupon sent in a claim in the liquidation for damages in respect of the loss sustained on resale of the copper. Such claim however contained a reservation of all rights in regard to the action in England which was then pending. The liquidator rejected so much of the claim as concerned the portion of the copper delivery of which was not due until after the judgment of liquidation, on the ground

> (1) It has been thought sufficient for the purposes of this report to summarize the effect of the facts with regard to the making of the contracts as above. A question was raised in argument whether they ought to be considered as made in England, and therefore English contracts, or not; but the Court, as will be seen, were clearly of opinion on the facts that the contracts were English contracts. This question turned on the detailed facts of the transactions, which were somewhat more complicated

than as above; but it has not been thought that this point involved any question of law such as called for a report.

[*401] that no such claim was admissible according to French law. The plaintiffs thereupon commenced proceedings in the French Court to establish their right to claim in the liquidation for the full amount claimed, which proceedings were still pending. Evidence was given by French experts as to the effect of the liquidation proceedings in France according to the French law. It was contended for the defendants, in substance, that the evidence shewed that such proceedings had the effect of dissolving the company for all purposes but liquidation, vesting the entire administration of its assets and affairs for the purposes of the liquidation in the liquidator, and preventing any action from being maintainable against the company; and further, that with regard to the copper of which delivery did not become due until after the judgment of liquidation, the French law was that the vendors might deliver the copper to the liquidator and prove for the price; but as they had not done so, and the copper was not delivered, the contract was cancelled and no claim for damages for non-acceptance was admissible.(1) It was, therefore, contended that either the liquidation proceedings were a defence to the action, or that they formed a ground on which the judge ought to order a stay of proceedings. The learned judge gave judgment for the plaintiffs for the loss sustained on resale in respect of all the copper, including that of which delivery was not due until after the liquidation.

Kennedy, Q.C., and H. Tindal Atkinson, for the defendants. It may be that there was no discharge of the defendants from liability in the technical sense in which the term is used in English bankruptcy law; but the effect of the French law of liquidation is that the company is dissolved for all purposes but liquidation, and no action will lie against it, the administration of all its assets and affairs being vested in the liquidator; and therefore the same question arises substantially as in the case of a discharge of the

(1) The evidence given with regard to the French law of liquidation was lengthy, and its effect not altogether clear; but it has not been thought necessary to go into it in detail, because, as will be seen, the judgment of the Court proceeded on the footing that, even if there were in French law what amounted to a discharge of the defendants from liability, it would not be a defence to the action.

[*402] defendant by the bankruptcy law of a foreign country. This company was domiciled in France, and only existed by French law, and after the judgment of liquidation the company was in French law non-existent for the purpose of being sued. With regard to the breaches of contract subsequent to the liquidation, by the French law the contracts were cancelled and no claim could be made for damages for non-acceptance. Therefore, with respect to those breaches there was what was equivalent to a discharge of liability. The result of the authorities is that, where a debtor is domiciled in a foreign country, and by the bankruptcy or liquidation law of such country the administration of the assets of such debtor is vested in a trustee in bankruptcy or liquidator, and an action against the debtor is rendered not maintainable, the law of England, in accordance with the principles of international law on the subject, recognises and gives effect to the foreign bankruptcy or liquidation; and therefore that the effect of the liquidation in this case is to operate as a bar to the action in England. The English law recognises the title of the trustee or liquidator in the foreign bankruptcy or liquidation, and therefore the creditor is not to have a right to the assets in this country, which ought to go to such trustee in bankruptcy or liquidator abroad, to be administered in the bankruptcy or liquidation there. The plaintiffs here have proved in the French liquidation, and therefore have assented to the jurisdiction of the French court and are bound by the French law. If the liquidation in France is not technically an actual defence to the action, it is submitted that the pendency of that liquidation and of the claim of the plaintiffs under it, affords, at any rate, a ground for staying proceedings in the action under s. 24, sub-s. 5, of the Judicature Act, 1873. Under that section and s. 39, the learned judge at the trial had power to grant, and ought to have granted, a stay of proceedings on that ground before judgment, or at any rate it ought to be granted after judgment, and this Court can grant it now. [They cited *Ellis v. McHenry* (1); Story, Conflict of Laws, ss. 340, 342; *Phillips v. Allan* (2); *Ex parte Robertson* (3);

(1) Law Rep. 6 C. P. 228. (3) Law Rep. 20 Eq. 733.

[*403] *Bartley v. Hodges* (1); *Solomons v. Ross* (2); *Sill v. Worswick* (3); *In re Davidson's Settlement Trusts* (4); *Phosphate Sewage Co. v. Lawson Sons' Trustee* (5); Westlake, Private

International Law, ss. 125, 226; *In re Artola Hermanos* (6); *Baldwin v. Hale* (7); *Quelin v. Moisson* (8); *Quin v. Keefe* (9); *Smith v. Buchanan* (10); *Lewis v. Owen* (11); *Ogden v. Saunders* (12); *Edwards v. Ronald.* (13)]

R. T. Reid, Q.C., and R. S. Wright, for the plaintiffs. The evidence does not shew that the defendants were discharged by the French law. But, if they were, it would be no defence to the action or ground for staying proceedings. These contracts were English contracts, made and to be performed in England. There is no authority to shew that a party to such a contract in England can be discharged by the law of a foreign country, whether the country of his domicil or not. The plaintiffs are not bound by the law of France, and cannot be taken to have contracted with reference to it. The consequences of the proposition for which the defendants contend would be most startling. It would mean that, whenever an Englishman makes a contract in England with a subject of some foreign country, he is liable to have such contract cancelled by the law of such foreign country however unjust or unreasonable, though he could have enforced it in his own country. *Smith v. Buchanan* (10) is an authority which is directly to the contrary. The proof sent in by the plaintiffs in the liquidation was conditional only, and reserved all rights in the action. It did not involve any assent to the French law. [They cited Foote, Private International Jurisprudence, p. 381.] Kennedy, Q.C., in reply.

LORD ESHER, M.R. In this case the defendants, a French company, entered into negotiations for the purchase of copper

(1) 1 B. S. 375.
(2) 1 H. Bl. 131.
(3) 1 H. Bl. 665.
(4) Law Rep. 15 Eq. 383.
(5) 5 Court Sess. Cas. 4th Series, 1125, 1138.
(6) 24 Q. B. D. 640.
(7) 1 Wallace, 223.
(8) 1 Knapp, P. C. C. 266.
(9) 2 H. Bl. 553.
(10) 1 East, 6.
(11) 4 B. A. 654.
(12) 12 Wheaton, 213, 366.
(13) 1 Knapp, P. C. C. 259.

[*404] through a London metal-broker, who effected contracts between them and the plaintiffs in England in the ordinary way. He drew up bought and sold notes, by which the contract was expressed to be according to the rules of the London Metal Exchange. One of these notes he sent to the plaintiffs, and the other he sent to the defendants; and both parties retained the notes so sent to them. The contracts were for the purchase of copper to be delivered in England. It appears to me impossible to deny that these were English contracts. The contracts being so made, the defendants became bound to accept the copper contracted to be sold. The plaintiffs were always ready and willing to deliver the copper; but the defendants were not ready to accept, and absolved the plaintiffs from tendering it. Consequently, according to English law, the plaintiffs are entitled to sue the defendants for non-acceptance of the copper, the measure of damages being the difference between the contract and market price at the time of the breaches of contract. But the defendants are a French company domiciled in and governed by the law of France. They have been, by a judgment of the Tribunal of Commerce of the Seine, pronounced to be in judicial liquidation. It was asserted by the defendants by way of defence to the action that the pronouncing of that judgment by the French tribunal by the law of France operated as a discharge of the defendants from liability to an action on the contracts; and it was asserted that it so discharged them in more than one way. It was said that such a judgment dissolved the French company, so that it no longer existed, and so dissolved their liability to be sued on the contracts. It was further said, that the fact of the plaintiffs having by their agents offered proof of their claims before the French tribunal operated as a discharge of the defendants' liability to this action. It was further said, as to part of the claim, that by the law of France, where a company is in liquidation as in the present case, and there is a contract for the acceptance of goods by such company at a date subsequent to the judgment of liquidation, the vendors cannot prove for damages for the non-acceptance; they can elect to deliver the goods to the liquidator and prove for the price; but, if they do not so elect and the goods are not delivered, the effect is that the contract is cancelled and the [*405] purchasers discharged. Such are the contentions set up by

the defendants by way of defence. Then they raise a further point. They say that the judgment against the defendants ought not to have been pronounced, but the judge ought to have stayed the proceedings before judgment, or that, on giving judgment, he ought to have stayed further proceedings generally. The plaintiffs contend, that there was no discharge of the defendants from their obligations under the contract, according to the law of France; but they go further, and contend that, assuming that there was such a discharge by reason of the liquidation proceedings, and that such discharge was for this purpose equivalent in France to a discharge in bankruptcy according to English law, yet such discharge would be no answer to an action in England upon an English contract. We have to decide the questions so raised, or such of them as it may be necessary to decide for the purposes of this case. The question really is, whether anything has been proved which is an answer to the plaintiffs' action in this country according to the law of England. It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract; not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. I say "applicable to it as a contract" to exclude mere matters of procedure, which do not affect the contract as such, but relate merely to the procedure of the court in which litigation may take place upon the contract. The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought.

[*406] That, at any rate, is the law of England on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound. As Lord Kenyon said, in *Smith v. Buchanan* (1), it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied. The proposition contended for seems to me to contravene the general principle to which I have alluded as governing these matters, and to suggest a principle for which there is no foundation in law or reason. Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound? Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract. I should say, too, that, if the contract had been made in any foreign country other than France, the plaintiffs could sue upon it in this country, and their action would not be affected by the law of France. In that case the law of

(1) 1 East, 6.

[*407] such other foreign country would govern the contract. That would be the conclusion I should come to, even supposing that the propositions stated by the defendants as to the law of France were in fact made out. It is not necessary, in the view I take, to determine whether they were or not. I must say that I do not think it was clearly made out that, in any of the modes suggested, the defendants were by the law of France discharged from liability. I wish to base my judgment, however, on the assumption that they were so discharged. I say that, assuming that to be so, the suggestion that the defendants would be discharged in this country by a law of the

country of their domicil is altogether outside the general principle that governs such matters, and cannot be supported. Is there any authority to that effect? I think that the point has been decided by what Lord Kenyon said in *Smith v. Buchanan*. (1) I agree with the observation of Mr. Westlake, who says that Lord Kenyon's view was that the defendant's domicil was immaterial, and I think that he put the case upon the principle that the law of the country of the contract was the law that governed not only the interpretation of the contract, but also all the subsequent conditions by which it was affected as a contract. It has been suggested that, in the case of *Bartley v. Hodges* (2), Lord Blackburn has doubted the correctness of this view, and has used expressions indicating that a discharge in the country of the defendant's domicil would be recognised in an English court, although the contract was not made in that country. I do not give much weight to what he said merely during the argument. I agree with the suggestion of the plaintiffs' counsel as to this, viz., that he was criticising the language of the plea which said that the defendant was resident, not that he was domiciled in Victoria. But, when I come to the judgment which he ultimately gave, my view of it is that he meant to accept the view taken by Lord Kenyon, and since adopted by several text-writers on the subject. He said, in giving judgment: "The law on this subject is laid down in Story, Conflict of Laws, s. 342, 5th ed. Having stated in previous sections that the discharge of a contract by the law of the place where it was made or to be performed will be a discharge everywhere,

(1) 1 East, 6.
(2) 1 B. S. 375.

[*408] he goes on to say: 'The converse doctrine is equally well established, namely, that a discharge of a contract by the law of a place where the contract was not made or to be performed will not be a discharge of it in any other country. Thus it has been held in England that a discharge of a contract made there under an insolvent Act of the State of Maryland is no bar to suit upon a contract in the Courts of England.' For this he cites *Smith v. Buchanan* (1), and proceeds: 'In America the same doctrine has obtained the fullest sanction.' In addition to that, we have the same doctrine pretty distinctly laid down and acted on in *Phillips v. Allan*." (2) It seems to me clear that the meaning of what Lord Blackburn so said is, that he accepted the law as laid down by Story, for which the decision of Lord Kenyon in *Smith v. Buchanan* (1) was an authority so far as regards this country. With regard to the case of Edwards v. Ronald (3), the ground of the decision there was, in my opinion, that the Act of Parliament relied upon, being an Act of the English Imperial Parliament, was binding in Calcutta, and, that being so, it was for this purpose the law of the country in which the contract was made and was being sued on. That ground of decision does not apply here. The case of *Quelin v. Moisson* (4) was a somewhat peculiar case, and has not much bearing, in my opinion, upon the present case. There the bankrupt had made a promissory note in favour of a French woman in Nantes. He became bankrupt in France, and the payee of the note proved under the bankruptcy. Then, under circumstances which are not clearly stated – but one is inclined to suspect not very honestly on the part of the payee – the note was indorsed over, and immediately indorsed by the indorsee to a person in Jersey. Negotiable instruments, such as notes and bills of exchange, are peculiar instruments, and give rise to several contracts. There is the original contract by the maker of a note or acceptor of a bill with the payee or drawer, as the case may be. Then, if there is an indorsement over, that gives rise to a contract between the maker or acceptor and the indorsee, as well as to a distinct contract between the indorser and indorsee. When the indorsee is

(1) 1 East, 6.
(2) 8 B. C. 477.
(3) 1 Knapp, P. C. C. 259.
(4) 1 Knapp, P. C. C. 265.

[*409] suing the maker of the note or acceptor of the bill, he is suing on the contract made by such maker or acceptor, which will be governed, I should say, by the law of the country to which such contract belongs. Difficulties may, no doubt, arise with regard to cases on negotiable instruments, which do not appear to me to arise in the present case. It seems to me that in this case the plaintiffs were not bound by the French law; and therefore, assuming that the defendants would be discharged by French law, this case must be determined by the law of England. With regard to the suggestion that there ought to be a stay of proceedings, the answer appears to me to be this. If the judgment given by the learned judge was right, I think there is no ground at the present stage why a stay should be granted. If the judgment were wrong, then no stay would be needed. It seems to me unnecessary to go into the question whether the judge

at the trial could grant a stay when the case came on before him for trial, and equally unnecessary to go into the question whether, after judgment pronounced, he could stay proceedings generally, or could only stay execution pending an appeal. I see no ground in law on which any such stay ought to be granted. For these reasons I am of opinion that the judgment was right and should be affirmed.

LINDLEY, L.J. The first thing to be borne in mind is that the contracts sued upon are English contracts, made and to be performed in England. The defence set up is in substance, that the defendants are a French company which is being wound up in France. Where such is the case, there is no remedy by the French law against the defendants except in the winding-up proceedings. The question is whether that is a defence to an action brought here. The defendants must be considered as domiciled in France, and I will assume for a moment, though I think it doubtful, that liquidation proceedings are equivalent to bankruptcy. It is contended for the defendants that by reason of the bankruptcy law in France, in which country the defendants are domiciled, the action cannot proceed. Even if the defendants had obtained what was equivalent to a discharge in bankruptcy according to French law, I think that the proposition so contended

[*410] for is wrong. There is really no authority for it. An ingenious argument was based upon what I think was a misconception of the view taken by Lord Blackburn in *Bartley v. Hodges*. (1) He no doubt referred to the fact that the defendant was not stated to be domiciled in Victoria; but, when his actual judgment is considered, I do not think that the inference to be drawn from that must be extended too far. I cannot read the judgment as anything but an adoption by him of what Lord Kenyon said in *Smith v. Buchanan*. (2) He said in substance, that the contract was an English contract, and that neither the plaintiff nor defendant was stated to be domiciled in Victoria; but I do not think it is to be inferred because he made use of the latter expression that he meant that, if they had been, the result would have been different. The expressions so used by him with reference to the domicil of the parties have been considered by Mr. Westlake and Mr. Foote, in their books on Private International Law, and they both come to the conclusion that, if he meant to imply what has been suggested, his view is erroneous. But I do not think that he meant anything of the sort. I cannot see any principle upon which it can be said that the domicil of the defendant is in any respect material. The consequences of adopting the doctrine suggested by the defendants appear to me to be so startling that I decline to adopt it. But then it is said that the proceedings ought to have been stayed before judgment, or, if not, at any rate they ought to be stayed after it. I cannot conceive any reason why they should be stayed before judgment, or why the plaintiffs should not be allowed to ascertain their legal rights on these English contracts by this action. I should think that it would be the most convenient course for both parties that such rights should be so ascertained. As for staying execution after judgment, who ever heard of a judgment debtor asking for a stay of execution, except pending an appeal? But it is said that the liquidator might ask for a stay, and this is practically an application by the liquidator. I see no reason why such an application on behalf of the liquidator should be granted. Execution could only go against the property of the defendants, and to such execution the plaintiffs

(1) 1 B. S. 375.
(2) 1 East, 6.

[*411] have a right. If any property not belonging to the defendants is taken, it can be protected by interpleader proceedings. It seems to me doubtful upon the evidence as to the French law whether the property of the company has vested in the liquidator; but in any case no injustice can arise from allowing execution to go. On these grounds I think that the appeal fails.

LOPES, L.J. Assuming that there were what is equivalent to a discharge in bankruptcy in France, of which I am very doubtful, I am of opinion that such discharge cannot operate as a discharge in respect of a contract made in England, though the defendants be domiciled in France. That proposition seems to me to be the result of the judgment of Lord Kenyon in *Smith v. Buchanan* (1) and that of Lord Blackburn in *Bartley v. Hodges*. (2) As I read Lord Blackburn's judgment in that case, he entirely agreed with the passage from Story which he read, and adopted the judgment of Lord Kenyon in the earlier case. The result of these cases seems to me to be that the question of the defendants' domicil is immaterial. Consequently, there is no answer to this action. With regard to the suggestion that there ought to be a stay of proceedings, all I can say is, that I fail to see any ground whatever for it. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

(1) 1 East, 6.
(2) 1 B. S. 375.

E. L.

In re Oi S.A. (Chapter 15 Case No. 16-11791, Memorandum Decision, July 9, 2018)

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: OI S.A., et al., Debtors in a Foreign Proceeding.

Chapter 15 Case No. 16-11791 (SHL) (Jointly Administered)

July 9, 2018, Decided

For Antonio Reinaldo Rabelo Filho as Petitioner and Foreign Representative: John K. Cunningham, Esq., Mark P. Franke, Esq., WHITE & CASE LLP, New York, New York; Jason N Zakia, Esq., Richard S. Kebrdle, Esq., Gregory L. Warren, Esq., Southeast Financial Center, Miami, Florida.

For Pharol, SGPS S.A., Bratel B.V. and Bratel S.À.R.L.: Ryan A. Wagner, Esq., GREENBERG TRAURIG, LLP, New York, New York; Mark D. Bloom, Esq., Paul J. Keenan, Jr., Esq., Miami, Florida.

For the Steering Committee: Richard J. Cooper, Esq., Luke A. Barefoot, Esq., Samuel P. Hershey, Esq., CLEARY GOTTLIEB STEEN & HAMILTON LLP, New York, New York; Allan S. Brilliant, Esq., Shmuel Vasser, Esq., Stephen M. Wolpert, Esq., DECHERT LLP, New York, New York; Corinne Ball, Esq., Stephen J. Pearson, Esq., Anna Kordas, Esq., JONES DAY, New York, New York.

For Solus Alternative Asset Management LP: Timothy Graulich, Esq., David Schiff, Esq., DAVIS POLK & WARDWELL LLP, New York, New York.

For Aurelius Capital Management, LP: David E. Blabey, Jr., Esq., KRAMER LEVIN NAFTALIS & FRANKEL LLP, New York, New York; Howard Seife, Esq., Marian Baldwin Fuerst, Esq., Francisco Vazquez, Esq., NORTON ROSE FULBRIGHT US LLP, New York, New York.

Sean H. Lane, UNITED STATES BANKRUPTCY JUDGE.

Sean H. Lane

DECISION GRANTING FOREIGN REPRESENTATIVE'S MOTION TO ENFORCE BRAZILIAN REORGANIZATION PLAN AND GRANT RELATED RELIEF [1]

SEAN H. LANE

UNITED STATES BANKRUPTCY JUDGE

Before the Court is the motion (the "Motion") [ECF No. 232] of Antonio Reinaldo Rabelo Filho, the foreign representative for the debtors in the above-captioned Chapter 15 cases (collectively, the "Chapter 15 Debtors"), requesting that this Court give full force and effect and grant comity in the United States to the foreign restructuring plan (the "Brazilian RJ Plan") confirmed in their Brazilian judicial reorganization (the "Brazilian RJ Proceeding") pending before the Seventh Business Court of Rio de Janeiro (the "Brazilian RJ Court") and also seeking related relief pursuant to **Sections 105(a)** ,**1145** , **1507(a)** ,**1521** and **1525(a)** of the Bankruptcy Code. The Chapter 15 Debtors include Oi S.A. ("Oi"), Telemar Norte Leste S.A. ("Telemar"), Oi Brasil Holdings Coöperatief U.A. ("Coop"), and Oi Móvel S.A. ("Móvel"). Three affiliates of Oi—Portugal Telecom International Finance B.V. ("PTIF"), Copart 4 Participações S.A. ("Copart 4"), and Copart 5 Participações S.A. ("Copart 5")—are also debtors in the Brazilian RJ Proceeding, but are not debtors in these Chapter 15 proceedings. These three affiliates, together with the Chapter 15 Debtors, are referred to collectively as the "Brazilian RJ Debtors." The Brazilian RJ Debtors and their non-debtor affiliates are referred to collectively as the "Oi Group."

Several parties have interposed objections to the language of the proposed order submitted by the Chapter 15 Debtors on the Motion, but these objections have since been resolved. That leaves only one objection to the Motion—an objection (the "Objection") [ECF No. 245] filed by Pharol, SGPS S.A. ("Pharol"), Bratel B.V. and Bratel S.À.R.L. ("Bratel," and, together with Pharol and Bratel B.V., the "Pharol Parties"), who [*2] are direct and indirect shareholders of Debtor Oi. Numerous other parties with an economic stake in the Brazilian RJ Proceedings have submitted statements in support of the Motion, including the Steering Committee for an Ad Hoc Group of Bondholders of Oi (the "Steering Committee"), the International Bondholder Committee (the "IBC"), and noteholder Solus Alternative Asset Management. One party, Jasper R. Berkenbosch, who is the insolvency trustee appointed in the Dutch insolvency proceeding of Chapter 15 Debtor Coop, has reserved his right to interpose an objection based on whether the plan proposed by Coop in those Dutch proceedings receives approval from creditors and the Dutch courts.

Nowhere in the Objection do the Pharol Parties ask this Court to rule on any of the legal issues that are still pending in proceedings in Brazil, including the pending appeals of decisions of the Brazilian RJ Court or an arbitration and mediation associated with the Brazilian RJ Proceeding. But the Pharol Parties do request that this Court exercise its discretion to delay giving full force and effect and granting comity to the Brazilian RJ Plan until all the proceedings in Brazil have been resolved. For the reasons discussed below, however, the Objection is overruled and the Motion is granted.

BACKGROUND

A. The Oi Group and the Filing of the Brazilian RJ Proceeding

The Oi Group is among the world's largest integrated telecommunications service providers, with over 70 million customers. *Declaration of Antonio Reinaldo Rabelo Filho in Support of the Motion for Order Granting Relief to (I) Enforce the Brazilian Reorganization Plan and (II) Grant Related Relief* (the "Supporting Factual Declaration") [ECF No. 230] at P 4. The Oi Group is also a critical source of telecommunications services in Brazil. *Id.* It is Brazil's largest fixed telephone service provider, with a market share of 34.5% of the total fixed-lines in service in the country. *Id.*

On June 20, 2016, the Brazilian RJ Debtors initiated the Brazilian RJ Proceeding through the filing of a joint voluntary bankruptcy petition in the Brazilian RJ Court. Supporting Factual Decl. at ¶ 20. The Brazilian RJ Debtors sought to restructure approximately BRL $65 billion in third-party debt, which constituted the largest restructuring case in Brazil's history. *Id.* Ojas N. Shah was initially appointed as the foreign representative for the Brazilian RJ Proceeding with respect to of the Chapter 15 Debtors. *Id.*

The third-party indebtedness of the Oi Group that is subject to the Brazilian RJ Proceeding consists generally of four types of debt: (i) unsecured export credit facilities guaranteed or insured by export credit agencies or other quasi-governmental financial institutions; (ii) unsecured bonds and like securities issued, varyingly, under New York law, English law, and Brazilian law; (iii) two series of securities issued through Brazilian financial institutions, which consist of interests in lease payments owed by certain of the Brazilian RJ Debtors for the use of real property [*3] leased from other Brazilian RJ Debtors; and (iv) secured and unsecured bilateral and syndicated Brazilian bank debt. *Id.* at ¶ 9. Because the Oi Group is financially integrated, certain of the group's entities engage in intercompany borrowing and lending. *Id.* at ¶ 10. As a result, certain of the Brazilian RJ Debtors owe intercompany debt, which is subject to restructuring under the Brazilian RJ Plan. *Id.*

B. Proceedings in this Court

On June 21, 2016, the day after commencing the Brazilian RJ Proceeding, Mr. Shah—on behalf of each of the Chapter 15 Debtors—petitioned for commencement of these Chapter 15 proceedings seeking recognition of the Brazilian RJ Proceeding as the foreign main proceeding of each of the Chapter 15 Debtors [ECF Nos. 7, 8]. On July 22, 2016, this Court entered the *Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief* [ECF No. 38], holding, among other things, that the center of main interests of each of the Chapter 15 Debtors is in Rio de Janeiro, Brazil, and recognizing the Brazilian RJ Proceeding as the foreign main proceeding of the Chapter 15 Debtors.

On July 18, 2017, consistent with an order of the Brazilian RJ Court and pursuant to a resolution of the board of directors for each of the Chapter 15 Debtors, the Chapter 15 Debtors simultaneously (i) revoked the appointment of Mr. Shah as foreign representative of its Brazilian RJ Proceeding in the United States and his related power-of-attorney, and (ii) appointed Antonio Reinaldo Rabelo Filho as foreign representative (the "Foreign Representative") in the United States for its Brazilian RJ Proceeding and granted him a power-of-attorney to act as such. *See Disclosure Pursuant to* ***11 U.S.C. § 1518*** *Regarding Substitution of Foreign Representative* ¶ 6 [ECF No. 79]. Thus, Mr. Rabelo replaced Mr. Shah as the foreign representative of the Brazilian RJ Proceeding for each of the Chapter 15 Debtors. Supporting Factual Decl. at ¶ 107.

On July 7, 2017, Mr. Berkenbosch commenced a Chapter 15 proceeding in this Court—Case No. 17-11888—requesting that this Court terminate its prior order recognizing the Brazilian RJ Proceeding as a foreign main proceeding for Chapter 15 Debtor Coop and instead recognize Coop's Dutch bankruptcy proceeding as its foreign main proceeding. [ECF No. 69]. Both Mr. Rabelo and the Steering Committee filed objections to this request. [ECF Nos. 105, 108]. Mr. Berkenbosch and the IBC filed replies to these objections. [ECF Nos. 123, 124]. After extensive

litigation—including a trial—this Court issued a memorandum decision denying recognition of the Dutch petition and declining to modify or terminate its prior recognition of the Brazilian RJ Proceeding as the foreign main proceeding for Coop. The issues in that litigation were complex and will not be discussed in depth here in the interest of brevity. But they are set forth in detail in two written decisions: *See In re Oi Brasil Holdings Cooperatief U.A.*, **578 B.R. 169** (Bankr. SDNY 2017) and **582 B.R. 358** (Bankr. S.D.N.Y. 2018) (denying request for partial reconsideration of that decision). Of note, however, is that the warring parties in that [illegible] litigation stand united today in support of the Foreign Representative's motion to grant comity to the Brazilian RJ Plan and for related relief.

C. Events in the Brazilian RJ Proceeding

Since the filing of the Brazilian RJ Proceeding, the Brazilian RJ Debtors have negotiated with stakeholders through the course of a highly contentious, year-and-a-half long, multijurisdictional restructuring process. Supporting Factual Decl. at ¶ 25. These discussions ultimately led to the consensual approval and subsequent confirmation of the Brazilian RJ Plan in Brazil. *Id.*

Several bondholder groups actively participated in the restructuring process, including through litigation in the Brazilian courts. Supporting Factual Dec . at ¶ 26. For instance, both the Steering Committee, as well as the IBC, filed pleadings with and requested relief from the Brazilian RJ Court throughout the Brazilian RJ Proceeding. *Id.* Creditors of Coop and PTIF, two entities of particular contention in the process, also participated extensively. Specifically, creditors Syzygy Capital Management, LTD. and Capricorn Capital Ltd.—funds managed by Aurelius Capital Management, LP—both filed pleadings with and requested relief from the Brazilian RJ Court. *Post-Trial Memorandum of Decision* [ECF No. 174] at 17.

The first draft of the Brazilian RJ Plan was filed on September 5, 2016, in compliance with the timeline required under the Brazilian bankruptcy law. Supporting Factual Decl. ¶ 27. Both prior and subsequent to this filing, company management attended in-person meetings in New York and Brazil with various parties-in-interest, including the Oi Group's Brazilian bank creditors, the Brazilian telecommunications regulator Agência Nacional de Telecomunicações ("ANATEL"), lenders under the Oi Group's export credit facilities, and representatives of bondholder groups, such as the Steering Committee, members of the IBC, and other significant holders of the notes issued by Oi, Coop and PTIF. Seventh Statement Notifying the Court of the Status of the Restructuring (the "Seventh Declaration") [ECF No. 201] at ¶ 3.

On March 28, 2017, the Brazilian RJ Debtors filed its first series of proposed modifications to the Brazilian RJ Plan, on the basis of requests made by parties during negotiations. Supporting Factual Decl. at ¶ 29. Further modifications were considered in the following months, and a revised version of the Brazilian RJ Plan was filed on October 11, 2017. *Id.* On numerous occasions during October, November and December of 2017—prior to the filing of the final version of the Brazilian RJ Plan—representatives from certain creditors met with the company and its financial and legal advisors to discuss additional modifications. *Id.* at ¶ 30.

On November 27, 2017, the company filed a new version of the Brazilian RJ Plan along with a modified draft term sheet that incorporated feedback from discussions with various stakeholders, including ANATEL, Caixa Econômica Federal, Itaú Unibanco, and Banco do Brasil. Seventh Declaration at ¶ 4. These modified terms went on to become [illegible] the material economic terms of the final Brazilian RJ Plan. *Id.* The Company also came to an agreement with the IBC and the Steering Committee on the material economic terms of a new equity capital infusion to follow implementation of the Brazilian RJ Plan and the backstop of that offering by certain bondholders. *See, e.g.*, Supporting Factual Decl. ¶¶ 27–31.

While the Brazilian RJ Plan was being revised, other events were taking place. Notice of the filing of the first draft of the Brazilian RJ Plan was published on September 30, 2016, after which creditors of the Brazilian RJ Debtors had 30 business days to file objections to the Brazilian RJ Plan. Supporting Factual Decl. at ¶ 28. Following the filing of various objections, the Brazilian RJ Court set the General Meeting of Creditors (the "GCM") on approval of the Brazilian RJ Plan for October 9, 2017 on first call and, if necessary, October 23, 2017 on second call. *Id.* The Brazilian RJ Court postponed the GCM several times, with final dates set for December 19 and 20, 2017 on first call and, if necessary, February 1 and 2, 2018 on second call. *Id.*

In anticipation of this pending creditor vote, on November 16, 2017, the Brazilian RJ Court entered a decision that revoked the power to participate in the restructuring process of those it found to be conflicted members of Oi's executive officers that had been appointed by Oi's board of directors (i.e., members nominated or appointed by certain of Oi's shareholders). Seventh Declaration at ¶ 5. In that decision, the Brazilian RJ Court also vested sole authority over the restructuring process with Oi's chief executive officer and directed him to present the final Brazilian RJ Plan no later than December 12, 2017. *Id.*

Following this decision, the Brazilian RJ Debtors filed a new version of the Brazilian RJ Plan on December 12, 2017. Supporting Factual Decl. at ¶ 31. The GCM was then held on December 19 and 20, 2017. *Id.* During the course of the GCM, the Brazilian RJ Plan was further modified with input from voting parties, and consolidated into a final version dated December 20, 2017. *Id.* This was the version approved by the creditors and ultimately confirmed, with certain modifications, by the Brazilian RJ Court. *Id.*

Under Brazilian bankruptcy law, the GCM could only be assembled on first call if attended by creditors, or their valid representatives, that held more than 50% of the value of total allowed claims in each of the Brazilian RJ Debtors' four creditor classes: labor-related claims ("Class I");

secured claims ("Class II"); unsecured claims, statutorily or generally privileged claims, and subordinated claims ("Class III"); and claims held by "small companies" under Brazilian law ("Class IV"). *Declaration of Sérgio Ricardo Savi Ferreira in Support of the Motion for Order Granting Relief to (I) Enforce the Brazilian Reorganization Plan and (II) Grant Related* Relief (the "Supporting Legal Declaration") [ECF No. 231] ¶¶ 29, 32. Attendance at the GCM easily met this quorum requirement, with the following percentages by value of claims in attendance: 92.28% of Class I, 100% of Class II, 98.57% of Class [illegible] III, and 59.04% of Class IV. Supporting Factual Declaration, Exhibit C at 5-6. Indeed, the GCM was of unprecedented size, drawing participation from over 36,000 creditors, in what the Brazilian RJ Court described as, "numbers never before seen in a Brazilian judicial reorganization proceeding." Supporting Factual Decl., Exhibit C at 11.

Creditors in attendance or represented at the GCM had the option of voting for, against, or abstaining from voting on, the Brazilian RJ Plan. Supporting Legal Decl. at ¶ 29; Supporting Factual Decl. at ¶ 48. But prior to voting on approval of the Brazilian RJ Plan itself, creditors voted on whether they wanted the Brazilian RJ Plan to proceed on the terms of a consolidation of the Brazilian RJ Debtors. Supporting Factual Decl. at ¶ 49. Since the Oi Group is economically interconnected through related intercompany agreements, guarantees, and obligations, and because managerial, administrative, and financial decisions are made by Oi for the benefit of the entire Oi Group, the Brazilian RJ Plan is based on the consolidation of the assets and liabilities of all the Brazilian RJ Debtors. *Id.* at ¶ 49. Consolidation was for voting and distribution purposes only and the Brazilian RJ Plan does not cause the corporate consolidation or merger of the Brazilian RJ Debtors. *Id.* This consolidation was overwhelmingly approved by the creditors of the Brazilian RJ Debtors at the GCM, with the following percentages by value of claims approving: 99.5% of Oi claim holders, 96.87% of Móvel claim holders, 99.88% of Telemar claim holders, 97.68% of Coop claim holders, 99.09% of PTIF claim holders and 100% of Copart 4 and Copart 5 claim holders. *See* Minutes of the GCM at 5-8, attached as Exhibit F to the Supporting Factual Decl.

Following the vote approving consolidation, the creditors of the Brazilian RJ Debtors voted on approval of the Brazilian RJ Plan on a consolidated basis. Supporting Factual Decl. at ¶ 53. The Brazilian RJ Plan was voted on and approved in overwhelming numbers in every class at a GCM that was also attended by a record number of creditors. *See* Order Confirming Brazilian RJ Plan (the "Brazilian Confirmation Order") [ECF No. 230-3] at 5-6, attached as Exhibit C to the Supporting Factual Decl. Specifically, when considered by number of claim holders per class, the following percentages voted for approval of the Brazilian RJ Plan: 100% of the claim holders in Classes I and II, 99.56% of claim holders in Class III, and 99.8% of claim holders in Class IV. Supporting Factual Decl. at ¶ 53.

On January 8, 2018, the Brazilian RJ Court entered the Brazilian Confirmation Order ratifying and confirming the Brazilian RJ Plan, but modified certain provisions relating to the reimbursement of creditors' advisor fees and the eligibility of bondholders to participate as backstop investors under the contemplated backstop agreement. *See* Brazilian Confirmation Order at 9, attached as Exhibit C to the Supporting Factual Decl. The Brazilian Confirmation Order was published on February 5, 2018. Supporting Factual Decl. at ¶ 56. Under Brazilian law, a creditor [illegible] has five business days from the publication of a confirmation order to file a motion for clarification, and, within fifteen business days after a decision on such motion is published, may file another motion for clarification or an interlocutory appeal of the same. Supporting Legal Decl. at ¶ 43.

Several motions for clarification and interlocutory appeals have been filed with respect to the Brazilian Conformation Order. Supporting Factual Decl. at ¶ 57. Although still subject to certain pending appeals, the Brazilian Confirmation Order and Brazilian RJ Plan have not been stayed, either fully or partially, and therefore remain in full force and effect, according to their terms, as of the date that the Foreign Representative's Motion was filed with this Court. Supporting Legal Decl. at ¶ 44; Supporting Factual Decl. at ¶ 57. A stay was sought by the Pharol Parties, among others, but was denied. *See* Decl. of Giuliano Colombo in Support of Steering Committee's Reply at ¶¶ 13-15, 17 (the "Colombo Declaration") [ECF No. 258]. The Brazilian Confirmation Order, according to its terms, is binding on all parties as long as its effects are not stayed. Supporting Legal Decl. at ¶ 44; Supporting Factual Decl. ¶ 60.

On January 9, 2018, Oi shareholder Pharol and its subsidiary Bratel, issued a statement that it was requesting a "partial reconsideration" of the Brazilian Confirmation Order (the "Partial Reconsideration Request") and calling for an extraordinary shareholders meeting (the "Extraordinary Meeting") to deliberate the terms of the Brazilian RJ Plan, among other issues. Supporting Factual Decl. at ¶ 118. The Brazilian RJ Court rejected the Partial Reconsideration Request, including the request for the Extraordinary Meeting. *Id.* Despite this, the Extraordinary Meeting was held and attended by a number of shareholders, including Pharol and Bratel. *Id.*

On February 13, 2018, the state public prosecutor filed a request with the Brazilian RJ Court to suspend the rights of the shareholders who attended and signed the minutes of the Extraordinary Meeting and that those shareholders be removed from their positions for at least two years starting from the granting of the judicial reorganization. *Id.* On March 7, 2018, the Brazilian RJ Court granted the prosecutor's request and issued a decision that suspended the "political rights" of those shareholders who voted at the Extraordinary Meeting and removed the members of the Board who were appointed by such shareholders, until the new equity contemplated by the Brazilian RJ Plan has been issued to creditors. *Id.* at ¶ 119.

Bratel has taken several appeals from decisions issued by the Brazilian RJ Court, including, but not limited to, an appeal of the Brazilian RJ Court's order revoking the power of the allegedly

conflicted members of Oi's executive officers and the Brazilian RJ Court's order vesting authority over the restructuring process in Oi's CEO. *See* Objection at 5-7. Bratel has also appealed the Brazilian Confirmation Order, and that appeal remains pending. Objection at ¶ 5. In its appeal of the Brazilian [*8] Confirmation Order, Bratel asserts that the Brazilian RJ Court lacked jurisdiction to rule that a shareholders' meeting is unnecessary and that the shareholder rights provided for under Brazilian corporate law are not eliminated or superseded by Brazilian insolvency law, and therefore confirmation of the Brazilian RJ Plan without shareholder involvement or participation violated their rights. Objection at ¶ 5.

The Pharol Parties are still actively pursuing their rights in the various proceedings in Brazil, including Bratel's appeals of the various decisions made by the Brazilian RJ Court and other Brazilian courts, as well as Bratel's pursuit of its interests as equity holders in both the mediation and the arbitration pending in Brazil.

D. Conditions Subsequent in the Brazilian RJ Plan

The Brazilian RJ Plan sets forth the following conditions subsequent: (1) the restructuring of certain bondholder credits under the Brazilian RJ Plan shall take place by July 31, 2018, (2) a contemplated capital increase shall occur by no later than July 31, 2018, and (3) the contemplated rights offering shall occur no later than February 28, 2019. Supporting Factual Decl., Exhibit A at § 12.1. The Brazilian RJ Plan provides that the relevant creditors may approve a waiver or modification of a condition subsequent, by resolution of the holder of a simple majority of claims present and voting at a meeting called for the purpose of waiving or modifying the condition(s) subsequent described above. *Id.* at § 12.2. Absent a waiver by the procedure set forth in the Brazilian RJ Plan, failure of any condition subsequent that is not waived may result in the termination of the Brazilian RJ Plan, at the discretion of the Brazilian RJ Court following consultation with the judicial administrator and public prosecutors. *Id.* at ¶ 83.

E. The Brazilian Arbitration

At some point, Bratel commenced an arbitration against Oi, pursuant to an arbitration clause in Section 68 of Oi's bylaws. Objection at ¶ 6. The arbitration was commenced to, among other things, call a shareholders meeting to discuss the terms of the Brazilian RJ Plan affecting shareholders (i.e., dilution, capital increases and corporate governance issues), issues on which shareholders contend they have a right under Brazilian corporate law to appear and be heard and to prevent Oi from implementing the terms of the Brazilian RJ Plan that the Pharol Parties assert violate shareholders' rights. Objection at ¶ 6.

Oi initiated a proceeding before the Superior Court of Justice to determine which entity—the Brazilian RJ Court or the arbitrator—has jurisdiction over these issues. Objection at 8. Oi objected to the arbitration on the basis that only the Brazilian RJ Court has jurisdiction, and Bratel argued in response that there was no legal basis to transfer jurisdiction from the arbitrator to the Brazilian RJ Court. Objection at ¶ 6. This jurisdictional question is currently pending decision. Objection at ¶ 6.

Bratel sought a preliminary injunction in the arbitration. In a decision on [*9] March 5, 2018, the arbitrator issued an order that, among other things, (i) recognized arbitral jurisdiction to consider the issues raised by Bratel; (ii) suspended the effects of possible approval of any resolution resulting from the meeting of Oi's Board of Directors on March 5, 2018, in which the Board deliberated on the capital increase, debt exchange, issuance of new shares and subscription bonus contemplated under the Brazilian RJ Plan. Objection at 8. The arbitrator's decision precluded Oi from implementing the capital increase, subject to a monetary penalty. *Id.*

However, the Superior Court of Justice granted a preliminary injunction at Oi's request, staying the effects of the decision rendered by the arbitrator. Objection at 8-9. The Superior Court of Justice also appointed the Brazilian RJ Court to decide any other preliminary injunction requests. Objection at 9. Bratel has filed an appeal of this injunction, which is currently pending. *Id.* It is the Pharol Parties' position that the arbitrator's decision is stayed only as to the penalty, and that therefore under the arbitrator's decision Oi may not proceed with the implementation of the capital increase. Objection at 9.

F. The Brazilian Mediation

In addition to the arbitration, on April 2, 2018, the Brazilian RJ Court ordered Oi and shareholders Bratel and Société Mondiale to participate in mediation in an effort to resolve their disputes. Objection at ¶ 7. Rejecting Oi's effort to exclude Société Mondiale from the mediation, the Brazilian RJ Court issued its decision on April 18, 2018, approving Société Mondiale's participation and ordering mediation to proceed. *Id.* A mediator has been appointed, and substantive meetings were scheduled throughout the remainder of May. All parties to the mediation, including Oi, were to participate in a joint mediation conference during the week of May 21, 2018. Objection at ¶ 8.

G. Ancillary Proceedings

In addition to all of the various proceedings in Brazil, certain of the Brazilian RJ Debtors are subject to ancillary and other plenary restructuring proceedings in various countries. Supporting Factual Decl. at ¶ 108. In addition to this U.S. Chapter 15 proceeding, these include the previously discussed Dutch insolvency proceeding, an English insolvency proceeding and a Portuguese insolvency proceeding. The Court will provide only a short description of each of these proceedings, all of which are referenced in more detail in the parties' submissions.

As to the Dutch insolvency proceeding, Coop and PTIF on April 10, 2018—that is, after entry of the Brazilian Confirmation Order—offered composition plans to their unsecured creditors as part of their Dutch bankruptcy proceedings. *Id.* The voting deadline for the Coop Dutch composition plan was May 15, 2018, and the voting deadline for the PTIF Dutch composition plan was April 30, 2018. *Id.* The Dutch composition plans are consistent in all material respects with the terms of the Brazilian RJ Plan that was already approved by stakeholders. *Id.* At a verification meeting held on June [illegible] 1, 2018 in the Netherlands, Coop's creditors voted in favor of its Dutch composition plan. *See* Insolvency Trustee's Statement on the Dutch Proceedings at 2 (ECF No. 271). With this approval by creditors, the Dutch court is now set to consider the Dutch composition plans for approval at a further hearing, which will take place between eight and fourteen days following the already completed verification meeting. Supporting Factual Decl. at ¶ 108.

As for the English recognition proceedings, the High Court of England and Wales issued orders on June 23, 2017 with respect to Oi, Móvel, and Telemar recognizing the Brazilian RJ Proceeding as a "foreign main proceeding" in the proceedings opened under the Cross-Border Insolvency Regulations 2006, which implements the Model Law in Great Britain. See First 1518 Declaration [ECF No. 32] at ¶ 10.

As to the Portuguese recognition proceeding, Oi and Telemar petitioned the Judicial Court of the Region of Lisbon on November 18, 2016 to recognize the Brazilian RJ Proceeding in relation to Oi and Telemar. Supporting Factual Decl. at ¶ 117. On July 11, 2017, that request was extended to Móvel as well. *Id.* The Portuguese court granted the petitions with respect to Oi and Telemar on March 6, 2017, and with respect to Móvel on August 11, 2017. *Id.*

DISCUSSION

A. Legal Standard :

The stated purpose of Chapter 15 is to "incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency." **11 U.S.C. § 1501(a)** . Section 1501(a) provides that Chapter 15 is intended to serve the following objectives:

> (1) cooperation between
>
> > (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession, and
> >
> > (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases.
>
> (2) greater legal certainty for trade and investment;
>
> (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
>
> (4) protection and maximization of the value of the debtor's assets; and
>
> (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

11 U.S.C. § 1501(a) .

"Chapter 15 . . . provides courts with broad, flexible rules to fashion relief that is appropriate to effectuate the objectives of the chapter in accordance with comity." *In re Rede Energia S.A.*, **515 B.R. 69** , 91 (Bankr. S.D.N.Y. 2014) (citing *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, **389 B.R. 325** , 333-34 (S.D.N.Y.2008); *In re SPhinX, Ltd.*, **351 B.R. 103** , 112 (Bankr.S.D.N.Y.2006) (Chapter 15 maintains—and in some respects enhances—the 'maximum flexibility' . . . that former Section 304 provided bankruptcy courts in handling ancillary cases in light of principles of international comity and respect for the laws and judgments of other nations) (citations omitted), *aff'd*, **371 B.R. 10** (S.D.N.Y.2007)). The importance of comity and international cooperation is reflected throughout Chapter 15. As the House Judiciary Committee states in its report, "comity is raised to the introductory language to make clear that it is the central concept to be addressed." H.R. Rep. No. 109-31, pt. 1, at 109 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 172; *see also* **11 U.S.C. § 1509(b)(2)** -(3) (providing that once recognition is granted in the United States, the foreign representative may apply directly to a court in the United States for appropriate relief in that court and a court in the United States shall grant comity to the foreign representative); **11 U.S.C. § 1525(a)** (providing that, consistent with Section 1501, the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee); *Canada S. Ry. Co. v. Gebhard*, **109 U.S. 527** , 539 , **3 S. Ct. 363** , **27 L. Ed. 1020** (1883) ("[T]he true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.").

The Foreign Representative here requests that this Court grant comity in the United States to the Brazilian RJ Plan and the order of the Brazilian RJ Court confirming the Brazilian RJ Plan. "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." *See Victrix S.S. Co., v. Salen Dry Cargo A.B.*, **825 F.2d 709** , 713 (2d Cir. 1987) (citing *Hilton v. Guyot*, **159 U.S. 113** , 202-03 , **16 S. Ct. 139** , **40 L. Ed. 95** (1895)); *see also Cunard*

S.S. Co. v. Salen Reefer Servs. A.B., **773 F.2d 452 , 456-57** (2d Cir. 1985); *In re Atlas Shipping A/S*, **404 B.R. 726** , 733 (Bankr. S.D.N.Y. 2009). "American courts have long recognized the need to extend comity to foreign bankruptcy proceedings," because "[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding: if all creditors could not be bound, a plan of reorganization would fail." *Victrix*, **825 F.2d at 713-14** ; *see also Finanz AG Zurich v. Banco Economico S.A.*, **192 F.3d 240** , 246 (2d. Cir. 1999), *In re Maxwell Commc'n Corp.*, **93 F.3d 1036** , 1048 (2d Cir. 1996); Salen Reefer, **773 F.2d at 458** ; *QUI Fin. LLC v. Dellar*, **[2013 BL 279744]**, 2013 U.S. Dist. LEXIS 146214 , **[2013 BL 279744]**, 2013 WL 5568732 , at *5 (S.D.N.Y Oct. 9, 2013).

The burden rests on the Foreign Representative to demonstrate that he is entitled to the requested relief. *See, e.g., In re Sivec SRL, as successor in liquidation to Strz SRL*, **476 B.R. 310** , 323 (Bankr. E.D. Okla. 2012) ("The burden of proof is on the party urging comity.") (citing *Reserve Intern. Liquidity Fund, Ltd. v. Caxton Intern. Ltd.*, **[2010 BL 94363]**, 2010 U.S. Dist. LEXIS 42216 , at *13 (S.D.N.Y., Apr. 29, 2010); *CSL Australia Pty. Ltd. v. Britannia Bulkers PLC*, No. 08-8290, **[2009 BL 191376]**, 2009 U.S. Dist. LEXIS 81173 , at *3 (S.D.N.Y., Sept. 8, 2009) ("The burden of establishing international comity rests on the party asserting it.") (citation omitted); *see also Fox v. Bank Mandiri (In re Perry H. Koplik & Sons, Inc.)*, **357 B.R. 231** , 239 (Bankr. S.D.N.Y. 2006) (noting that "the moving party carries the burden of proving that comity is appropriate") (citation omitted).

Two sections of the Bankruptcy Code, Sections 1521 (a) and 1507, are relevant to the Court's analysis. "It is evident that recognition assistance of the types available under [these] sections is 'largely discretionary and turns on subjective factors that embody principles of comity.'" *In re Rede*, **515 B.R. at 91** (quoting *In re Toft*, **453 B.R. 186** , 190 (Bankr. S.D.N.Y. 2011); *see also In re Bear Stearns*, **389 B.R. at 333** . The determination of whether to enforce a plan confirmed in a foreign proceeding should be made on a case-by-case basis. *See In re Treco*, **240 F.3d 148** , 156 (2d Cir. 2001) (stating with respect to former Section 304 that "[a]lthough some of the considerations in determining whether to defer to a certain country's bankruptcy proceedings may be constant from case to case, other factors vary."); *In re Bd. of Directors of Telecom Argentina, S.A.*, **528 F.3d 162** , **174** (2d Cir. 2008) (making ruling under former **Section 304** "based on the specific facts of this case and in light of all the circumstances") (citing *In re Treco*, **240 F.3d at 156**); *In re Garcia Avila*, **296 B.R. 95** , **107-08** (Bankr. S.D.N.Y. 2003) (in making determination under former **Section 304** , stating that "court must apply the factors on a case-by-case basis. Accordingly, a prior decision to defer to a particular foreign court in one case is not determinative in different case.") (citing *In re Treco*, **240 F.3d at 154** , **156**).

1. Section 1521(a)

Section 1521(a) of the Bankruptcy Code provides that "[u]pon recognition of a foreign proceeding, . . . where necessary to effectuate the purpose of this chapter and 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. . . ." **11 U.S.C. § 1521(a)** . Such "appropriate relief" includes a non-exhaustive list of certain types of relief that is enumerated by the statute, including "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)** ." **11 U.S.C. § 1521(a)(7)** . Courts have found such "appropriate relief" to be the same type of relief that was previously available under Chapter 15's predecessor, **Section 304** of the Bankruptcy Code. *In re Vitro S.A.B. de C.V.*, **701 F.3d 1031** , **1054** (5th Cir. 2012). The Court may grant relief under **Section 1521(a)** "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." **11 U.S.C. § 1522(a)** . Courts have acknowledged that "the policy underlying **section 1522** is that there should be 'a balance between relief that may be granted to the foreign representative and the interests of the person that may be affected by such relief.'" *In re Rede*, **515 B.R. at 90** (quoting *In re Int'l Banking Corp. B.S.C.*, **439 B.R. 614** , **626** (Bankr.S.D.N.Y.2010)); *see also Jaffé v. Samsung Elecs. Co.*, **737 F.3d 14** , **27-28** (4th Cir. 2013) ("The analysis required by **§ 1522(a)** is . . . logically best done by balancing the respective [*11] interests based on the relative harms and benefits in light of the circumstances presented, thus inherently calling for application of a balancing test. . . .").

2. Section 1507

Section 1507 of the Bankruptcy Code also permits the Court to grant post-recognition relief in the form of "additional assistance to a foreign representative under this title or under other laws of the United States." **11 U.S.C.** § 1507(a) . **Section 1507** provides that the Court, in its discretion, may grant the "additional assistance," only after balancing the various factors set forth in **Section 1507(b)** . *See* **11 U.S.C. § 1507** . In determining whether to provide such relief, a court

> 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) . Thus, the language of **Section 1507(b)** explicitly incorporates the principle of comity in a court's consideration of whether to grant additional assistance. *See id* .

B. Analysis Under Sections 1521 and 1507 of the Bankruptcy Code

In the Motion, the Chapter 15 Debtors rely on both **Section 1521** and **Section 1507** . *See* Motion ¶¶ 121-122. The Pharol Parties appear to agree that these sections govern here *See* Objection ¶¶ 14, 16-17. But the Pharol Parties disagree with the Chapter 15 Debtors as to whether the Court should exercise its discretion under these provisions to grant comity in the United States to the Brazilian RJ Plan—and related relief —while there are still proceedings pending in Brazil. *See* Objection ¶ 14. Applying the applicable legal principles to the facts of the case at hand, the Court finds that the Chapter 15 Debtors have satisfied the requirements for relief under both **Section 1521** and **1507** and, therefore, will grant the Motion, notwithstanding the proceedings still pending in Brazil.

As to **Section 1521** , the Court finds that the relief requested by the Foreign Representative is "appropriate relief" under **Section 1521(a)(7)** because it is the type of relief that was available under former **Section 304** and routinely granted under U.S. law. *See In re Rede*, **515 B.R. at 92-93** (finding that relief to enforce Brazilian plan is proper under **Section 1521**) (citing *In re Vitro*, **701 F.3d at 1054**). For instance, the Foreign Representative requests that this Court give full force and effect and grant comity in the United States to the Brazilian RJ Plan, including enjoining acts in the United States that would interfere with the Brazilian RJ Plan or the Brazilian Confirmation Order. *See Foreign Representative Motion for Order Granting Relief to Enforce the Brazilian Reorganization Plan* [ECF No. 232] at 59-62. This is the type of relief that courts have previously granted under former **Section 304** of the Bankruptcy Code and other applicable U.S. law. *See In re Rede*, **515 B.R. at 93** (citing *Bd. of Dirs. of Telecom Arg.*, **528 F.3d at 174-76** ; *In re Avila*, **296 B.R. at 114-15** ; **11 U.S.C. § 1141(d)(1)(A)** (granting discharge to Chapter 11 debtor upon confirmation except as otherwise provided for in the plan); **11 U.S.C. § 524(a)** (describing the effect of a discharge)). Similarly, the requests for instructions directing the Indenture Trustee to take certain actions with respect to securities in accordance with the terms of the Brazilian RJ Plan, is also relief of a type available under U.S. law. *See In re Rede*, **515 B.R. at 93** (citing **11 U.S.C. § 1142(b)** (providing that a court "may direct ... any ... necessary party to execute or deliver or join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act ... that is necessary for the consummation of the plan"); *In re Washington Mut., Inc.*, [**2012 BL 400290**], 2012 Bankr. LEXIS 895 , at *38 (Bankr. D. Del. Feb. 24, 2012) (directing indenture trustee to make distributions in order to effectuate plan transactions)).

Moreover, the Court finds that it is appropriate to exercise its discretion under **Section 1521** to grant comity to the Brazilian RJ Plan. That plan is the culmination and ultimate resolution of the extensive Brazilian RJ Proceeding that was already granted recognition by this Court. It is impossible for the Brazilian RJ Plan to be fully consummated without granting recognition given the conditions subsequent in the plan. These conditions subsequent include, among other things, the issuance of U.S. securities which cannot take place without an order granting the relief requested by the foreign representative. Granting the Foreign Representative's Motion is, therefore, essential to implementation of the restructuring and complete distributions and therefore consummation of the Brazilian RJ Plan. In granting the requested relief, the Court notes that the Brazilian RJ Plan is overwhelmingly supported by the stakeholders in the case, and that all stakeholders have had the opportunity to be heard in the Brazilian RJ Proceeding and to protect their rights under Brazilian law As to the Pharol Parties, this is amply demonstrated by the extensive proceedings involving them in Brazil, including Bratel's appeals of decisions of the Brazilian RJ Court, as well as the existence of the arbitration and mediation in Brazil.

In addition, the Court also concludes that the relief requested by the Foreign Representative here properly constitutes "additional assistance" pursuant to **Section 1507** of the Bankruptcy Code. Specifically, the relief requested by the Foreign Administrator meets each of the factors in **Section 1507** .

The first factor of **Section 1507(b)** examines whether the additional assistance will reasonably assure "just treatment of all holders of claims against or interests in the debtor's property." **11 U.S.C. § 1507(b)(1)** . Case law relating to former **Section 304(c)** found this requirement to be satisfied where the foreign insolvency law provides a comprehensive procedure for the [*13] orderly resolution of claims and the equitable distribution of assets among all of the estate's creditors in one proceeding. See, e.g., *In re Treco*, **240 F.3d at 158** ; *In re Culmer*, **25 B.R. 621 . 629** (Bankr. S.D.N.Y. 1982). As described in greater detail in the Supporting Legal Declaration, Brazilian bankruptcy law provides such a comprehensive procedure, while at the same time maintaining the company's business and activities. Supporting Legal Decl. at ¶¶ 4-5, 15 Consensual approval of a plan under Brazilian law requires votes from a specified majority of each class of claims. *Id.* at ¶ 33. This requirement has been met because all classes under the Brazilian RJ Plan voted overwhelmingly in its favor.

Brazilian bankruptcy law also provides additional creditor protections that justify granting comity in these circumstances. For instance, under Brazilian bankruptcy law creditors have the right to object to a plan within 30 business days after notice of its publication. *Id.* at ¶ 23. Creditors may also oppose a plan and propose amendments thereto during the GCM, up until a final approval by creditors. *Id.* at ¶ 27. Additionally, within five days of publication of a confirmation order,

creditors may file a motion for clarification, and, within fifteen days of its publication, creditors may file an interlocutory appeal to the appellate court. *Id.* at ¶ 43. Creditors are also given notice of decisions made by the Brazilian RJ Court, with the deadlines for filing appeals commencing from the date on which creditors are notified of such decision by means of a publication. *Id.* A judicially appointed administrator also provides additional oversight of the process, ensuring that accurate information is distributed to the creditors and informing the Brazilian RJ Court if a debtor fails to meet its obligations under a confirmed plan or commits an act that violates the Brazilian bankruptcy law. *Id.* at ¶ 15-17, 39.

The second factor in favor of granting comity under **Section 1507** requires that the additional assistance reasonably assure "protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding." **11 U.S.C. § 1507(b)(2)**. This factor is satisfied where, as here, creditors are given adequate notice of the timing and procedures for filing claims, and such procedures do not create additional burdens for a foreign creditor seeking to file a claim. *See, e.g., Treco*, **240 F.3d at 158**; *In re Hourani*, **180 B.R. 58**, **68** (Bankr. S.D.N.Y. 1995). Under Brazilian bankruptcy law, foreign creditors have the same status, the same rights and protections, and are subject to the same procedures, as local creditors with respect to the filing of claims. Supporting Legal Decl. at ¶ 12. Upon issuing the decision to accept a debtor's petition for judicial reorganization under Brazilian bankruptcy law, a Brazilian judge orders the publication of the decision along with a list of creditors presented by the debtor. *Id.* at ¶ 10. Within 15 business days from the publication of such list, the creditors may present their proofs of holdings or objections to such list. *Id.* After analyzing the proof of holdings [illegible] and objections, the judicial administrator will publish a second creditors' list, to which all creditors, the debtors or the public prosecutor's office may present new objections within 10 business days of publication. *Id.* The Brazilian court then rules on any objections filed and orders the presentation of the final list of creditors and claims. *Id.*

The third factor in **Section 1507(b)** requires that the additional assistance requested reasonably assures "prevention of preferential or fraudulent dispositions of property of the debtor." **11 U.S.C. § 1507(b)(3)**. This factor is satisfied here given that when a debtor is declared bankrupt under Brazilian law—any creditor, the Brazilian public attorney's office or the judicial administrator may bring an action to avoid transfers that were made to third parties with the intention to harm creditors or damage the debtor's estate. *Id.* at ¶ 19.

The fourth factor of **Section 1507(b)** requires that the additional assistance reasonably assures "distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by" the Bankruptcy Code. **11 U.S.C. § 1507(b)(4)**; *see also In re Gee*, 53 **B.R. 891**, **904** (Bankr. S.D.N.Y. 1985); *Hsaanhuis v. Kunnan Enters., Ltd.*, **177 F.3d 1007**, **336 U.S. App. D.C. 174** (D.C. Cir. 1999) (Taiwanese distribution system was substantially in accordance with U.S. law because priority afforded to certain classes of claims as under the Bankruptcy Code). This factor requires simply that the "foreign distribution scheme be 'substantially in accordance' with United States bankruptcy law; it does not have to mirror the United States distribution rules." *In re Ionica*, **241 B.R. 829**, **836** (Bankr. S.D.N.Y. 1999) (citations omitted). This factor is satisfied here because the distribution scheme under Brazilian bankruptcy law substantially accords with the distribution scheme under the Bankruptcy Code. In a consensually approved Brazilian plan (without the use of "cram-down" provisions), for example, the claims of affected creditors are paid in accordance with the plan, which must be approved by all classes of creditors, including secured creditors and unsecured creditors. Supporting Legal Decl. at ¶¶ 27, 33. The Bankruptcy Code ensures that secured creditors receive priority over unsecured creditors, and under the Brazilian RJ Plan, secured creditors are entitled to payment in full. Additionally, Brazilian bankruptcy law provides "meaningful protections that are similar to the protections embodied in U.S. law," and the Brazilian RJ Plan's different treatment of certain unsecured creditors has a reasonable basis and was necessary to consummate the RJ Plan. *See In re Rede*, **515 B.R. at 97**.

The Court also finds that granting comity to the Brazilian RJ Plan is appropriate because it ensures that the Brazilian RJ Plan will be implemented in a manner consistent with its terms and without unnecessary delay and costs.

In granting comity to the Brazilian RJ Plan and the Brazilian Confirmation Order, the Court notes that comity is most often withheld when the recognition of foreign proceedings would be adverse to the public policy interests of the United States. *See* **11 U.S.C. § 1506** ("Nothing in this [illegible] chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."); *see also Somportex, Ltd. v. Phila. Chewing Gum Corp.*, **453 F.2d 435**, **440** (3d Cir. 1971); *Salen Reefer*, **773 F.2d at 457** (citing *Somportex*, **453 F.2d at 440**). But this and other courts have found that Brazilian bankruptcy law is consistent with U.S. policy and provides to creditors meaningful protections similar to those provided under U.S. law. *See, e.g., In re Rede*, **515 B.R. at 98** (rejecting argument that Brazilian bankruptcy proceedings there violated **Section 1506** and concluding that "Brazilian bankruptcy law meets our fundamental standards of fairness and accords with the course of civilized jurisprudence."); *In re OAS S.A.*, **533 B.R. 83**, **103** (Bankr. S.D.N.Y. 2015) (noting that "Brazil has a comprehensive bankruptcy law that in many ways mirrors our own" and agreeing with the *Rede* decision that Brazilian bankruptcy law is not contrary to U.S. public policy).[2]

For all these reasons, then, the Court finds that the Brazilian RJ Proceeding is not contrary or prejudicial to the interests of creditors in the United States and that the doctrine of comity supports the granting of permanent relief enforcing the Brazilian RJ Plan and the Brazilian Confirmation Order under **Sections 1507** and **1521** of the Bankruptcy Code.[3]

C. Pharol Parties' Objection

The Court now turns to the specific arguments raised by the Pharol Parties. The Pharol Parties generally assert that granting the relief requested by the Foreign Representative would be inconsistent with the purposes of Chapter 15, and that the Court should instead delay granting any relief until after all of the proceedings in Brazil are completed, including the appeals, the arbitration and the mediation. *See* Objection at ¶ 13. This argument takes several forms.

As a threshold matter, the Pharol Parties suggest that the Foreign Representative is trying to rush these enforcement proceedings through the Court too quickly. But this is wrong on several levels. The Foreign Representative's Motion was scheduled on ordinary notice in this Court and all interested parties were given a chance to be heard. Moreover, the Brazilian RJ Plan was confirmed over four months prior to the hearing on the Motion and all parties in interest have had at least that much notice of the plan's milestones and timeline, which were expressly incorporated in the Brazilian RJ Plan. Even before that point, multiple creditor constituencies were involved in active negotiations with the Brazilian RJ Debtors for months about the mechanics of any plan. To suggest that the Chapter 15 Debtors are now seeking an expedited request here to somehow short-circuit the process in Brazil is a clear mischaracterization of the facts.

Additionally, the Pharol Parties provide no timeline for how long this Court should wait until deciding the Foreign Representative's Motion. *See* Objection at 21 (subsection caption stating that: "The Enforcement Motion should be adjourned until all appeals, arbitration and mediation proceedings have been exhausted [sic] in Brazil."). In the face of a complaint by the Chapter 15 Debtors about the lack of any temporal limits to the Pharol Parties' approach, the Pharol Parties suggested at the hearing on the Motion that the Court simply delay proceedings until a further status conference on June 18, 2018. *See* Hr'g Tr. 78:3-6, May 29, 2018 (counsel for the Pharol Parties suggesting that parties come back for a status conference on June 18th when they might have a clearer picture on unresolved issues). Such a timeline would be highly problematic, however, as this is only a few days' prior to the deadline for at least two of the conditions subsequent that require relief from this Court to implement. Moreover, this approach would effectively provide the very same stay pending appeal that the Pharol Parties sought and were denied by the Brazilian courts. It is not this Court's role to effectively second-guess or overrule the determinations made by the Brazilian courts, particularly under the guise of comity.

Perhaps to address these problems, the Pharol Parties suggest that the Chapter 15 Debtors call a meeting to allow creditors to vote on waiving the deadlines contained in the Brazilian RJ Plan. As a threshold matter, such an approach is exceedingly unlikely to offer a lasting solution here. *See* Hr'g Tr. 61:12-19, May 29, 2018 (counsel to the Foreign Representative noting that "to let all of the so-called unfinished business in Brazil play out" could take years). But it is also exceedingly unlikely to work. As counsel to the Steering Committee noted at the hearing on the Motion, such a meeting would be extremely difficult to convene due to the thousands of creditors involved in the case and, in any case, his own client is currently not prepared to extend or waive the deadlines in the Brazilian RJ Plan. *See* Hr'g Tr. 85:5-15, May 29, 2018. That is not surprising given that the Brazilian RJ Plan was approved only after a lengthy and highly contentious process, and the deadlines contained therein were heavily negotiated. *See id.* Against this backdrop, the possibility of getting all creditors to vote in favor of delay—much less the extended delay sought by the Pharol Parties—is highly implausible. More importantly, it would be starkly at odds with comity for this Court to insert itself into the Brazilian process in such an intrusive way by effectively requiring the Brazilian RJ Debtors to convene another meeting of creditors. *See SNP Boat Serv. S.A. v. Hotel Le St. James*, **483 B.R. 776 , 786** (S.D. Fla. 2012) ("To inquire into a specific foreign proceeding is not only inefficient and a waste of judicial resources, but more importantly, necessarily undermines the equitable and orderly distribution of a debtor's property by transforming a domestic court into a foreign appellate court where creditors are always afforded the proverbial 'second bite at the apple.' Chapter 15's directive that courts be guided by principles of comity was intended to avoid such a result.").

The Pharol Parties note that both **Section 1521** and **Section 1507** incorporate a balancing test, which they argue weighs in their favor. [sic] But these tests actually weigh against their position. As detailed above, the Brazilian RJ Debtors, various parties in interest and numerous creditor constituencies were involved in extensive negotiations regarding the terms of the Brazilian RJ Plan. These negotiations were ultimately successful, as the vast majority of creditors voted overwhelmingly in favor of the Brazilian RJ Plan. The Brazilian RJ Plan has been confirmed and such confirmation has not been stayed by the Brazilian courts. Numerous creditors have acted in reliance on the timely consummation of the transactions required by the Brazilian RJ Plan. Denying the relief requested by the Foreign Representative would work to the detriment of these vast creditor constituencies, instead serving only the parochial interests of the Pharol Parties. Indeed, three major creditor constituencies—the Steering Committee, the International Bondholder Committee and Solus—have all filed pleadings supporting the relief requested by the Foreign Representative. To grant the objection would essentially give the Pharol Parties—that do not even claim to speak for the interests of all shareholders—a pocket veto over the entire process, notwithstanding the wishes of the vast majority of stakeholders.

Relatedly, the Pharol Parties suggest that granting the Foreign Representative's request would "create[] a significant risk of legal and commercial uncertainty surrounding the outcome of the pending appeals in Brazil." Objection at ¶ 31. As a basis for this argument, the Pharol Parties posit that if it were to ultimately succeed in its appeals, the transactions that took place in the United States would have to be unwound. *Id.* But courts in this jurisdiction have granted plan enforcement orders despite the pendency of appeals in the foreign main proceeding. *See In re Ocean Rig UDW Inc.*, Case No. 17-10736 (MG) (Bankr. S.D.N.Y. Sept., 20, 2017) (granting full

force and effect to scheme approved in Cayman Islands despite pending action by a creditor for a fraudulent transfer claim); *In re Sino-Forest Corp.*, **501 B.R. 655 , 666** (Bankr. S.D.N.Y. 2013) (enforcing Canadian reorganization plan and settlement over objection of party pursuing appeals in Canada and stating that possible appeal in Canada was not a "reason to wait" and that "at least one additional ruling is required from the trial court in Canada, seeking approval of a plan of distribution, before the settlement can become final, so this Court's ruling does not provide the last word in any event."); *In re Rede*, **515 B.R. at 95** (balancing the foreign debtor's interests against those of objecting party and concluding that plan enforcement relief meets the requirements of **Sections 1522(a)** and 1521 of the Bankruptcy Code, and noting that party objecting to plan enforcement relief "simply wants another chance to renegotiate the terms of the Brazilian Reorganization Plan," and that granting such relief "does not prevent the [objector] from continuing to assert its rights under Brazilian law in the pending appeals of the decisions of the Brazilian Bankruptcy [Trial] Court."); *In re Gerova Financial Group, Ltd.*, **482 B.R. 86 , 94** (Bankr. S.D.N.Y. 2012) (holding in context of recognition proceeding that nothing in statutory language of Chapter 15 required that a decision of a foreign court be final or non-appealable).

Moreover, the Court disagrees with the Pharol Parties' premise about uncertainty arising out of a grant of the Motion. In fact, failure to grant the Motion and implement the Brazilian RJ Plan by the deadlines provided would cause more uncertainty. It would seriously risk the failure of the restructuring under Brazilian law and create the possibility of a mandatory liquidation of the Oi Group. That is because the Brazilian RJ Debtors' proceeding may be converted to a bankruptcy liquidation proceeding known as a *falido* following the occurrence of certain events, one of which is the failure of the Brazilian RJ Debtors to comply with the terms of an approved and confirmed judicial reorganization plan. Supplemental Legal Decl. ¶ 13. Following conversion to such a proceeding, a debtor is declared not capable of reorganizing and the debtor's assets are placed into liquidation. *Id.* Thus, denial of the Motion would put at risk the entire global restructuring of the Brazilian RJ Debtors and their non-debtor affiliates.

Moreover, a delay in granting the Motion would adversely affect creditors that are holding over USD $20 billion in restructured debt, including over USD $5 billion in New York law-governed bonds that have already been novated by the Brazilian RJ Plan under Brazilian law, and are entitled under the plan to receive a distribution of new securities. Foreign Representative's Reply to Objection of Pharol at ¶ 5 [ECF No. 253]. Without a grant of the relief requested by the Foreign Representative, the Oi Group will be unable to successfully restructure its New York law-governed debt per the terms of the Brazilian RJ Plan. As explained above, the Brazilian RJ Plan has a timeline by which certain conditions subsequent must occur for the plan to become effective. The Brazilian RJ Plan provides that the non-occurrence of these events by July 31, 2018 results in termination of the plan. *See* Brazilian RJ Plan § 12.1, attached as Exhibit A to the Supporting Factual Declaration [ECF No. 230-1]. These conditions require, among other things, the issuance of U.S. securities, which cannot take place without this Court granting the relief requested by the Foreign Representative. Granting the Foreign Representative's Motion is, therefore, a prerequisite to implementation of the restructuring and complete distributions, and therefore consummation of the Brazilian RJ Plan. Importantly, the steps and timeline discussed above were incorporated in the Brazilian RJ Plan, which was subsequently approved by the Brazilian court in the Brazilian Confirmation Order. A delay in granting the relief requested could result in those parties having their claims discharged in Brazil, but not in the United States, which in turn could lead to the Chapter 15 Debtors facing lawsuits in the United States for debts that [they] have already been discharged under Brazilian law. Foreign Representative's Reply to Objection of Pharol at ¶ 5. The equities therefore clearly weigh in favor of granting the relief that these creditors approved of through their votes in favor of the Brazilian RJ Plan.

A grant of the Motion now is also consistent with the notion that Chapter 15 affords greater deference after the recognition of a foreign proceeding:

> Once a case is recognized as a foreign main proceeding, [C]hapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity. There is a logical reason for this. Deference to foreign insolvency proceedings will often facilitate the distribution of the debtor's assets in an equitable, orderly, efficient, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion. Chapter 15 mandate[s] that the court cooperate 'to the maximum extent possible' with a foreign court or representative . . . .

In re Atlas Shipping, **404 B.R. at 738-39** (internal citations and quotations omitted). As noted by the Foreign Representative, "the Chapter 15 Court's role is to assist the foreign insolvency proceeding, not to supervise it." Foreign Representative's Reply to Objection of Pharol at 2. This Court finds that, considering all the circumstances of this case, the issues of Brazilian law should be resolved by the Brazilian courts, including the question of whether the pending litigation in Brazil justifies a stay of the Brazilian RJ Plan.

Thus, if the Pharol Parties believe that pending proceedings in Brazil should prevent enforcement of the Brazilian RJ Plan, then the proper recourse would be to seek relief from the Brazilian courts in the form of a stay. But the Brazilian courts have denied such requests for a stay, knowing full well the consequences.[4] *See* Colombo Declaration at ¶¶ 13-15, 17, 20 (noting lack of stay effect of Brazilian court orders and affirmative denial of stays by Brazilian courts); Hr'g Tr. 12:13-17, May 29, 2018 (parties agree that there is no stay in place in Brazil); id. at 48:5-9 (Pharol Parties' counsel stating that they were unsuccessful in obtaining stay pending appeal in Brazil and that Brazilian arbitration and mediation do not implement a stay). Having failed to obtain such relief in Brazil, the Pharol Parties should not now indirectly be granted what they failed to obtain directly. "A U.S. bankruptcy court is not required to make an

independent determination about the propriety of individual acts of a foreign court." *In re Metcalfe & Mansfield Alternative Investments*, **421 B.R. 685 , 697** (Bankr. S.D.N.Y. 2010); *see In re Fairfield Sentry Ltd.*, **484 B.R. 615 , 628** (Bankr. S.D.N.Y. 2013) ("Chapter 15 was not designed to permit parties to mix and match multiple countries' laws, which would lead to haphazard, erratic or piecemeal adjudication of the distribution of assets . . . as the administration and disbursement of the same assets would be handled by different tribunals in different countries according to different laws . . . ."). It is simply not this Court's role to second guess the wisdom of the Brazilian courts or overrule [their] their decisions, which would be fundamentally inconsistent with comity. *See, e.g., SNP Boat Serv.*, **483 B.R. at 786** ; *c.f. In re Rede*, **515 B.R. at 100** (stating with respect to public policy exception of **Section 1506** that "it is not appropriate for this Court to superimpose requirements of U.S. law on a case in Brazil or to second-guess the findings of the foreign court.").[5]

The Pharol Parties try to distinguish the cases that grant relief similar to that being sought here —such as in the *Rede* and *Gerova* cases - by arguing that the Brazilian RJ Plan here has not yet been substantially consummated in Brazil, and that this Court would be the vehicle through which substantial consummation was achieved. But the Pharol Parties' attempt to distinguish these cases - particularly *Rede*—are unavailing. The principles of comity behind those decisions are very much at odds with the Pharol Parties' position. Indeed, other cases in this jurisdiction have enforced foreign orders approving plans before those plans have become effective. See, e.g., *Bibby Offshore Services Plc*, No. 17-13588 (MG) (Bankr. S.D.N.Y. Jan. 18, 2018) [ECF Nos. 2, 16] (recognizing, granting comity to, and entitling "full force and effect" to scheme of arrangement where the "Restructuring contemplated by the Scheme...which [would] only be implemented through the Scheme if the Noteholders vote[d] to approve the Scheme...and sanctioned by the English Court" was not yet carried out, with court stating that " [a]bsent the requested relief, the efforts of the Debtor, the English Court, and the Petitioner in conducting the UK Proceeding and effecting the Restructuring under the Scheme and English law may be thwarted by the actions of certain creditors, a result inimical to the purposes of chapter 15."); *In re Odebrecht Óleo e Gás S.A.*, No. 17-13130 (JLG) (Bankr. S.D.N.Y. Dec. 13, 2017) [ECF Nos. 4, 28] (giving full force and effect to "Brazilian Confirmation Order and the Brazilian Reorganization Plans" where Brazilian Reorganization Plans had not been consummated or effectuated, but petitioner was seeking assistance from the court "pertaining to the actions necessary to give effect to the terms of the Brazilian Reorganization Plans, including...exchange of the Existing Securities...in consideration for the issuance of the New Securities"); *In re CGG S.A.*, **579 B.R. 716 , 720** (Bankr. S.D.N.Y. 2017) ("'[E]nforcement of the Sanctioning Order is necessary to ensure that the Financial Restructuring contemplated by the Safeguard Plan and the confirmed Chapter 11 plan can be implemented."). Furthermore, the Pharol Parties' argument is counterintuitive, since the relief requested by the Foreign Representative is necessary for substantial consummation to take place in Brazil. The Chapter 15 Debtors assert that they would be in violation of U.S. securities law if they were to try to substantially consummate the Brazilian RJ Plan by making distributions of new securities to bondholders without obtaining prior relief from this Court.

The Pharol Parties also argue that the absence of the equitable mootness doctrine in Brazil should weigh against this Court granting relief.[6] But it is hard to [illegible] see how this supports the Pharol Parties' position. The Brazilian courts are no doubt aware that this doctrine does not exist in Brazil and nonetheless decided to deny a stay of the order approving the Brazilian RJ Plan. Should the Pharol Parties prevail in their legal challenges, there are undoubtedly provisions in both Brazilian and U.S. law that will govern proceedings going forward in both countries and the scope of appropriate relief. In the event that the Brazilian Confirmation Order is reversed on appeal, the Pharol Parties have acknowledged that they can seek relief in this Court including, but not limited to, relief under **Rule 60(b)(5) of the Federal Rules of Civil Procedure** . *See* Objection ¶ 27 n.16.; *see also In re Oi Brasil Holdings Cooperatief*, **578 B.R. at 203** ("Chapter 15 maintains, and in some respects enhances, the 'maximum flexibility' of bankruptcy courts in handling ancillary cases in light of principles of international comity and respect for the laws and judgments of other nations."); **11 U.S.C. § 1522** (bankruptcy court may "modify or terminate" relief it has previously granted); *In re SPhinX*, **351 B.R. at 112** ("This flexibility is evident not only in the policy statement in **section 1501(a)** but also in Bankruptcy Code **section 1522** , which provides that the Court may grant or modify interim . . . or additional relief[.]"). Conversely, if this Court does not grant the Pharol Parties the delay that they request, there will be no change to the status quo in the Brazilian litigation and the Pharol Parties' rights in Brazil are unaffected.

Lastly, the Pharol Parties raised an issue at the hearing with respect to certain language contained in the Foreign Representative's proposed order relating to the Motion. This language provided that if the Brazilian RJ Plan were ever terminated under Brazilian law, then the order of this Court granting the relief requested by the Foreign Representative and all actions contemplated thereby would be, "null and void and of no force or effect." *Blackline Against First Proposed Order* at ¶ 18 [ECF No. 269-2]. The Pharol Parties suggested that this language would somehow differ from the *ex tunc* and *void ab initio* effect that the Pharol Parties believe would be appropriate under Brazilian law. The language in the proposed order, however, has been further revised to incorporate the Pharol Parties' concerns, and now additionally provides that in the event of a termination of the Brazilian RJ Plan, this Court's order would "be deemed *void ab initio* to the extent rendered as such under Brazilian law." *Id.* Moreover, as the Court stated at the hearing, the Pharol Parties can always return to this Court to protect their rights under U.S. law to the extent necessary, a fact the Pharol Parties recognize. *See, e.g.*, Objection at 20 n.16. For these reasons, therefore, the Court finds that any legitimate issues raised by the Pharol Parties as to the proposed order have been properly addressed.

CONCLUSION

For all these reasons, the Court grants the Motion and the relief requested by the Foreign Representative and overrules the Objection in its entirety.

Dated: New York, New York

July 9, 2018

/s/ Sean H. Lane

UNITED STATES BANKRUPTCY [*22] JUDGE

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fn 1

This written decision memorializes the Court's bench ruling that was read into the record on June 14, 2018. While the substance of the decision remains the same, edits have been made for ease of comprehension.

fn 2

In fact, the Pharol Parties have not argued that the relief requested here would violate the public policy interests of the United States.

fn 3

The Court also finds that the other relief requested by the Foreign Representative is appropriate under the circumstances, including the requested injunctions, exculpations, and exemption relief under **Section 1145** of the Bankruptcy Code. As this additional relief is not subject to a specific objection by the Pharol Parties, the Court will refrain from a detailed analysis as to each of these requests for relief.

fn 4

The Pharol Parties complain that granting the relief now would frustrate processes overseas such as the mediation. *See* Objection at ¶ 23. But as the Brazilian courts that ordered the mediation also refused to grant a stay of the confirmation order, it is difficult to see how the existence of the mediation weighs in favor of the Pharol Parties.

fn 5

Of course, the Court takes no position on the merits of the Pharol Parties' appeals or other proceedings in Brazil. Despite the Pharol Parties having attached no less than four legal opinions regarding Brazilian law to its papers, the parties here actually have agreed that these issues of Brazilian law are not for this Court to decide. See Objection at ¶ 21 n.14 (noting that the Pharol Parties offer the opinions not for the purpose of asking the Court to revisit the Brazilian Confirmation Order or to prejudge the outcome of the appeals, but rather to establish that the appeals are not frivolous).

fn 6

The Objection appears to be inconsistent on the issue of equitable mootness. On the one hand, it complains that the relief sought here could render foreign appeals moot while, on the other hand, it states that Brazilian law does not recognize the doctrine of equitable mootness. *See* Objection at ¶¶ 19-20.

Drawbridge Special Opportunities Fund, LP v. Katherine Elizabeth Barnet (In re Barnet),
737 F. 3d 238 (2d Cir. 2013)

In re Barnet, 737 F.3d 238 (2013)
70 Collier Bankr.Cas.2d 1203, 58 Bankr.Ct.Dec. 251, Bankr. L. Rep. P 82,554

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by In re Avanti Communications Group PLC, Bankr.S.D.N.Y., April 9, 2018

737 F.3d 238
United States Court of Appeals,
Second Circuit.

In re Katherine Elizabeth BARNET,
Drawbridge Special Opportunities Fund LP, Appellant,
v.
Katherine Elizabeth Barnet, Foreign Representative, William John Fletcher, Foreign Representative, Appellees.

Docket No. 13–612.
|
Argued: Oct. 15, 2013.
|
Decided: Dec. 11, 2013.

Synopsis

Background: Foreign representatives sought recognition of "external administration" of debtor in Australia as foreign main proceeding. The United States Bankruptcy Court for the Southern District of New York, Shelley C. Chapman, J., granted recognition. The court denied motion to stay discovery that had been brought by United States affiliate of debtor, and granted foreign representatives' discovery motion. Subsequently, the court granted a joint application for certification of recognition order for direct appeal. The Court of Appeals granted the joint application.

Holdings: The Court of Appeals, Straub, Circuit Judge, held that:

[1] order by bankruptcy court recognizing "external administration" of debtor in Australia as foreign main proceeding was not appealable by United States affiliate of debtor when issued;

[2] discovery order was appealable;

[3] subsequent appealable discovery order ripened premature notice of appeal from initial recognition order, and thus recognition order was properly before Court of Appeals; and

[4] provision defining eligibility to be a debtor had to be satisfied before a bankruptcy court could grant recognition of foreign proceeding.

Vacated and remanded.

West Headnotes (15)

[1] **Bankruptcy** ⟵ Right of review and persons entitled;parties;waiver or estoppel

Order by bankruptcy court recognizing "external administration" of debtor in Australia as foreign main proceeding was not appealable by United States affiliate of debtor when issued; although foreign representatives

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who sought recognition stated their "intention to take discovery" of affiliate's directors, potential harm to affiliate was insufficient to justify appellate standing. 11 U.S.C.A. § 1520.

7 Cases that cite this headnote

[2] **Bankruptcy** ⇐ Right of review and persons entitled;parties;waiver or estoppel

In order to have standing to appeal from a bankruptcy court ruling, an appellant must be a person aggrieved, which is a person directly and adversely affected pecuniarily by the challenged order of the bankruptcy court; this test is stricter than Article III's "injury in fact" test, and its stringency is rooted in a concern that freely granting open-ended appeals to those persons affected by bankruptcy court orders will sound the death knell of the orderly disposition of bankruptcy matters. U.S.C.A. Const. Art. 3, § 1 et seq.

20 Cases that cite this headnote

[3] **Bankruptcy** ⇐ Right of review and persons entitled;parties;waiver or estoppel

Even absent a direct pecuniary interest in the litigation, a public interest may give a sufficient stake in the outcome of a bankruptcy case to confer appellate standing.

5 Cases that cite this headnote

[4] **Bankruptcy** ⇐ Finality

Bankruptcy court's order granting foreign representatives' motion for discovery with regard to United States affiliate of foreign debtor, that court had granted after recognizing "external administration" of debtor in Australia as foreign main proceeding, was appealable, since discovery order constituted final resolution of petition to take discovery in aid of foreign proceeding in that there would not be final resolution on the merits beyond discovery relief itself. 11 U.S.C.A. §§ 1515, 1520.

3 Cases that cite this headnote

[5] **Bankruptcy** ⇐ Right of review and persons entitled;parties;waiver or estoppel

A bankruptcy court's order recognizing a foreign proceeding as a foreign main proceeding is not itself appealable by a party that is not directly affected by the relief that the order provides. 11 U.S.C.A. § 1520.

8 Cases that cite this headnote

[6] **Bankruptcy** ⇐ Decisions Reviewable

As a general rule, discovery orders are not appealable unless the object of the discovery order refuses to comply and is held in contempt.

Cases that cite this headnote

[7] **Bankruptcy** ⇐ Notice of Appeal;Time

Bankruptcy ⇐ Scope of review in general

Subsequent appealable order granting foreign representatives' motion for discovery with regard to United States affiliate of foreign debtor ripened premature notice of appeal from initial order by bankruptcy court recognizing "external administration" of debtor in Australia as foreign main proceeding, and thus recognition order properly was before Court of Appeals, since direct appeal of recognition order had occurred after court

had granted discovery motion and those orders had merged; mistake in form of notice by parties not discussing discovery order in their joint request for direct appeal was not fatal because resolution of validity of recognition order would be dispositive of whether discovery was available and foreign representatives otherwise did not suffer prejudice. 11 U.S.C.A. §§ 1515, 1520, 1521(a)(4), 1782(a); 28 U.S.C.A. § 158(d)(2)(A)(i, iii), (d)(2)(B)(i); F.R.A.P.Rule 3(c)(4), 28 U.S.C.A.

4 Cases that cite this headnote

[8] **Bankruptcy** ⟵ Notice of Appeal;Time

A premature notice of appeal from a nonfinal order may ripen into a valid notice of appeal if a final judgment has been entered by the time the appeal is heard and the appellee suffers no prejudice; this rule applies even if the final judgment was not itself appealed.

2 Cases that cite this headnote

[9] **Bankruptcy** ⟵ Conclusions of law;de novo review

Bankruptcy ⟵ Clear error

The Court of Appeals reviews a bankruptcy court's legal conclusions de novo, accepting the bankruptcy court's factual findings unless clearly erroneous.

6 Cases that cite this headnote

[10] **Bankruptcy** ⟵ Conclusions of law;de novo review

A lower court decision interpreting the meaning of a statute is reviewed de novo.

1 Cases that cite this headnote

[11] **Statutes** ⟵ Plain language;plain, ordinary, common, or literal meaning

Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.

2 Cases that cite this headnote

[12] **Statutes** ⟵ Plain Language;Plain, Ordinary, or Common Meaning

Statutes ⟵ Language

Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms; indeed, the preeminent canon of statutory interpretation requires Court of Appeals to presume that the legislature says in a statute what it means and means in a statute what it says there.

8 Cases that cite this headnote

[13] **Statutes** ⟵ Statute as a Whole;Relation of Parts to Whole and to One Another

Statutory enactments should be read so as to give effect, if possible, to every clause and word of a statute.

7 Cases that cite this headnote

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[14] **Bankruptcy** ⇐ Cases Ancillary to Foreign Proceedings

Provision defining eligibility to be a debtor had to be satisfied before a bankruptcy court could grant recognition of foreign proceeding; although foreign representatives, not debtor, sought recognition, presence of debtor was inextricably intertwined with very nature of a foreign proceeding, both in terms of how such proceeding was defined and in terms of relief that could be granted. 11 U.S.C.A. §§ 109(a), 1515, 1520.

7 Cases that cite this headnote

[15] **Statutes** ⇐ Context

A properly limited contextual analysis of statutory language is encompassed within the ambit of a textual analysis.

2 Cases that cite this headnote

Attorneys and Law Firms

*240 David F. Heroy (Jacob Kaplan, Baker & McKenzie LLP, New York, NY; Erin Elizabeth Broderick, Baker & McKenzie LLP, Chicago, IL, on the brief), Baker & McKenzie LLP, New York, NY, for Appellant.

Howard Seife (Madlyn Gleich Primoff, Kaye Scholer LLP, New York, on the brief), Chadbourne & Parke LLP, New York, NY, for Appellees.

Before: JACOBS, STRAUB, Circuit Judges, and KUNTZ, * District Judge.

Opinion

STRAUB, Circuit Judge:

Drawbridge Special Opportunities Fund LP ("Drawbridge") appeals from a September 6, 2012 order of the United States *241 Bankruptcy Court for the Southern District of New York (Shelley C. Chapman, *Bankruptcy Judge*) granting recognition of a foreign main proceeding ("Recognition Order"). Because we find that 11 U.S.C. § 109(a) applies to the debtor in a foreign main proceeding under Chapter 15 of the Bankruptcy Code, we **VACATE** and **REMAND** to the Bankruptcy Court for further proceedings consistent with this opinion.

BACKGROUND

Foreign Representatives are the liquidators of Octaviar Administration Pty Ltd. ("OA"), a company incorporated in Queensland, Australia. OA was placed into "external administration" in Australia on October 3, 2008. On July 31, 2009, the Supreme Court of Queensland ordered that OA be liquidated. As part of the investigation into OA's affairs, various Australian affiliates of Drawbridge have been investigated and, on April 3, 2012, a lawsuit was commenced in Australia against certain of those affiliates seeking AUD 210,000,000.

On August 13, 2012, Foreign Representatives petitioned the Bankruptcy Court for an order recognizing the Australian OA liquidation proceeding as a foreign main proceeding pursuant to 11 U.S.C. § 1515. Drawbridge appeared and filed an objection on August 30, 2012. On September 6, 2012, the Bankruptcy Court entered the Recognition Order, and Drawbridge filed a notice of appeal to the District Court on September 20. On October 5, 2012, Foreign Representatives

filed a motion seeking discovery from Drawbridge and other parties. On October 9, 2012, Drawbridge sought a stay pending appeal.

On November 28, 2012, the Bankruptcy Court granted a joint application for certification of the Recognition Order for direct appeal to this Court pursuant to 28 U.S.C. § 158(d)(2)(A)(i), (A)(iii) and (B)(i). The same day, the court entered an opinion explaining its decision. The court determined that (1) there was no controlling precedent governing its holding "that a debtor within the meaning of chapter 15 is not required to have a domicile, residence, place of business or property in the United States"; (2) the same issue was "a matter of public importance" that would "dramatically impact the jurisdiction of the United States bankruptcy courts and the use of Chapter 15 to assist in the administration of cross-border insolvency cases and the legitimate investigation of claims and assets in the United States"; and (3) a direct appeal would "materially advance the progress of this Chapter 15 case." Mem. Op. in Supp. of Certification of Direct Appeal to the Court of Appeals for the Second Circuit at 6, 9, *In re Barnet*, No. 12-13443, Dkt. No. 47 (Bankr.S.D.N.Y. Nov. 28, 2012).

The Bankruptcy Court denied Drawbridge's motion to stay discovery on December 10, 2012, and granted Foreign Representatives' discovery motion on December 12. The parties filed a joint application for direct appeal on December 21. On February 21, 2013, we granted the joint application and issued a stay of 17 discovery.

DISCUSSION

I. Appellate Standing

[1] This case presents an unusual jurisdictional thicket. Foreign Representatives argue that Drawbridge lacks appellate standing because Drawbridge is not aggrieved by the Recognition Order—the order named in the parties' joint request for direct appeal. We agree that, under the facts of this case, Drawbridge may not appeal from the Recognition Order. However, that conclusion does not end our ***242** analysis. The Bankruptcy Court's subsequent discovery order cured the jurisdictional infirmity notwithstanding the parties' failure to discuss the discovery order in the joint request for direct appeal. In effect, we construe the appeal as being from the discovery order, which appeal brings up for review the non-final Recognition Order that was a necessary prerequisite to discovery.

A. The Recognition Order

We first consider whether Drawbridge is permitted to appeal from the Recognition Order. As this appeal is direct, the issue of appellate standing was not expressly addressed by any lower court opinion. Regardless, we review jurisdictional questions of law *de novo*. *See Adams v. Zarnel (In re Zarnel)*, 619 F.3d 156, 161 (2d Cir.2010) ("[W]e must first determine whether we have jurisdiction. ... We review these legal issues [standing and mootness] *de novo*.").

[2] [3] "The current Bankruptcy Code prescribes no limits on standing beyond those implicit in Article III of the United States Constitution. Congress has given us jurisdiction over all final decisions, judgments, orders, and decrees of the district courts in bankruptcy cases.. ." *DISH Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 88 (2d Cir.2011) (internal citations and quotation marks omitted). Nonetheless, our precedents establish " 'that in order to have standing to appeal from a bankruptcy court ruling, an appellant must be a person aggrieved --a person directly and adversely affected pecuniarily by the challenged order of the bankruptcy court.' " *Id.* at 89 (internal quotation marks omitted) (quoting *Int'l Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d 744, 747 (2d Cir.1991)).[1] This test is "stricter than Article III's 'injury in fact' test," and its "stringency ... is rooted in a concern that freely granting open-ended appeals to those persons affected by bankruptcy court orders will sound the death knell of the orderly disposition of bankruptcy matters." *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 388 (2d Cir.1997); *see In re DBSD N. Am., Inc.*, 634 F.3d at 110 (quoting *In re Gucci*, 126 F.3d at 388).

The Recognition Order neither names Drawbridge nor directs any relief against Drawbridge. Nor does Drawbridge argue that it is affected by the automatic relief provided for in 11 U.S.C. § 1520.[2] *See Morning Mist Holdings Ltd. v. Krys (In* ***243** *re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir.2013) (considering an appeal from a recognition order by the party aggrieved by the automatic stay imposed by 11 U.S.C. § 1520(a)(1)). Instead, Drawbridge relies on the fact that at oral argument on the Recognition Order, Foreign Representatives stated their "intention ... to take discovery" of the American "directors of the Drawbridge affiliates that were sued in Australia." Tr. of Record at 28:2–5, *In re Octaviar Administration Pty. Ltd.*, No. 12-13443 (Bankr.S.D.N.Y. Sept. 6, 2012).

Were we to accept this argument, however, it would undermine the pecuniary interest test and ignore our "concern that if appellate standing is not limited, bankruptcy litigation will become mired in endless appeals brought by the myriad of parties who are indirectly affected by every bankruptcy court order." *Kabro Assocs. of W. Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 273 (2d Cir.1997) (internal quotation marks omitted). It is not the intentions of a litigant that cause pecuniary harm but the relief directed by a Bankruptcy Court, and here the Recognition Order contained no relief that affected Drawbridge.

Indeed, we have explicitly stated that "potential harm" from a bankruptcy court order is insufficient to justify appellate standing. *See Kane v. Johns-Manville Corp. (In re Johns–Manville Corp.)*, 843 F.2d 636, 642 n. 3 (2d Cir.1988) (noting that "potential harm incident to the bankruptcy court's orders" is insufficient to render a party "directly and pecuniarily affected by them"). *Accord Nat'l Fire Ins. Co. of Hartford v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 393 Fed.Appx. 467, 469 (9th Cir.2010) (summary order) ("Courts of appeal routinely deny standing 'to marginal parties involved in bankruptcy proceedings who, even though they may be exposed to some potential harm incident to the bankruptcy court's order, are not directly affected by that order.' " (quoting *Travelers Ins. Co. v. H.K. Porter Co.*, 45 F.3d 737, 741 (3d Cir.1995))); *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.)*, 177 F.3d 774, 778 (9th Cir.1999) (endorsing our distinction in *In re Johns–Manville* between a "creditor opposing a plan of reorganization," who has standing, and "marginal parties ... who face potential harm," who do not).

Here, the Recognition Order subjected Drawbridge only to potential future harm. To hold otherwise would ignore the Bankruptcy Court's discretion to deny discovery under 11 U.S.C. § 1521. It follows that the Recognition Order was not appealable by Drawbridge when issued.

B. The Discovery Order

[4] **[5]** Although we conclude that a recognition order is not itself appealable by a party that is not directly affected by the relief that order provides, this conclusion does not end our standing analysis. Here, Drawbridge is aggrieved by an order of the Bankruptcy Court—the discovery order issued on December 12, 2012. We next consider whether that order is appealable and conclude that it is.

[6] Because they are not final orders, the general rule is that discovery orders are not appealable unless the object of the discovery order refuses to comply and is held in contempt. *See, e.g., Golan v. Am. Airlines, Inc. (In re Air Crash at Belle Harbor, N.Y. on Nov. 12, 2001)*, 490 F.3d 99, 104 (2d Cir.2007); *Glotzer v. Stewart (In re S.E.C. ex rel. Glotzer)*, 374 F.3d 184, 188 (2d Cir.2004) ("[G]enerally, a litigant who wants to challenge a discovery order must disobey the order, be held in contempt of court, then bring an appeal....").

***244** This rule has an exception for discovery orders issued pursuant to 28 U.S.C. § 1782(a), which provides for discovery "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a); *see Chevron Corp. v. Berlinger*, 629 F.3d 297, 306 (2d Cir.2011). In *Chevron Corp.*, we reasoned that the discovery order "constitutes the final resolution of a petition to take discovery in aid of a foreign proceeding" and is, therefore, "immediately appealable." 629 F.3d at 306. The same reasoning applies in this context. Chapter 15 proceedings, like Section 1782 proceedings, are ancillary to

a "suit in another tribunal," *id.*, such that there will never be a final resolution on the merits beyond the discovery relief itself. It follows that the discovery order entered by the Bankruptcy Court was appealable.

Moreover, we have previously entertained an appeal from a party aggrieved by the automatic relief imposed by Section 1520. *See In re Fairfield Sentry Ltd.*, 714 F.3d at 131. Appellate standing was warranted in *Fairfield* precisely because once recognition is granted, the imposition of automatic relief requires no further action by the Bankruptcy Court. The discretionary relief permitted by Section 1521 requires an extra step, but once that step is taken and the Bankruptcy Court has chosen to exercise its discretion, a party aggrieved by Section 1521 stands in the same position as one aggrieved by Section 1520. If appellate review is available to one, therefore, it should be available to the other.

[7] Having concluded that we would have jurisdiction over an appeal from the discovery order, two questions remain: (1) whether the discovery order grants us jurisdiction over a premature notice of appeal from the Recognition Order; and (2) if so, whether an appeal from the discovery order brings up for review the Recognition Order. We answer both questions in the affirmative.

The notice of appeal filed on September 20, 2012, was directed to the District Court, not to this Court. Before the District Court assumed jurisdiction, however, the Bankruptcy Court, *sua sponte*, suggested that the parties seek certification for direct appeal to this Court, giving as its reason that Drawbridge and its affiliates "really don't want to produce documents and [Foreign Representatives] really want the documents." Tr. of Record at 25:3–7, *In re Octaviar Administration Pty. Ltd.*, No. 12–13443 (Bankr.S.D.N.Y. Oct. 23, 2012). Earlier in the same proceeding, Foreign Representatives had already made their argument that Drawbridge lacked appellate standing. *See id.* at 6:1–14:11. The Bankruptcy Court's statement that appellate review should be sought to expedite discovery, therefore, did not occur in a vacuum. Rather, the Bankruptcy Court believed that our resolution of the validity of the Recognition Order would be dispositive of whether discovery was available. The parties then jointly petitioned the Bankruptcy Court for certification of direct appeal, which was granted on November 28, 2012. The Bankruptcy Court issued its discovery order on December 12, 2012, and the parties did not file their joint request for direct appeal to this Court until December 21, 2012. At no time, therefore, was any notice of appeal or request for direct appeal pending in this Court before the 17 discovery order had been issued.

[8] "We have held that a premature notice of appeal from a nonfinal order may ripen into a valid notice of appeal if a final judgment has been entered by the time the appeal is heard and the appellee suffers no prejudice. This rule applies even if the final judgment was not itself appealed." ***245** *Community Bank, N.A. v. Riffle*, 617 F.3d 171, 174 (2d Cir.2010) (per curiam) (internal citations and quotation marks omitted); *see Berlin v. Renaissance Rental Partners, LLC*, 723 F.3d 119, 128 (2d Cir.2013) (same as first sentence of *Riffle* quote).

In *Riffle*, we exercised jurisdiction over an appeal from a non-final (and, hence, non-appealable) denial of a motion to dismiss because by the time the appeal reached us, the underlying bankruptcy proceeding was rendered final (and appealable) by a subsequent confirmation order. 617 F.3d at 173–74. As in this case, the notice of appeal in *Riffle* was filed after the order that rendered the lower court proceeding final. *Id.* at 173. The discovery order, therefore, caused the "premature notice of appeal from" the Recognition Order to "ripen into a valid notice of appeal." *Id.* at 174.

We would reach the same result applying the Federal Rules of Appellate Procedure. In *Smith v. Barry*, the Supreme Court ruled that "[i]f a document filed 18 within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." *Smith v. Barry*, 502 U.S. 244, 248–49, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992); *see id.* ("[W]hen papers are technically at variance with the letter of Rule 3, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.... Although courts should construe Rule 3 liberally when determining whether it has been complied with, noncompliance is fatal to an appeal." (internal quotation marks and brackets omitted)). The year after *Barry*, the Federal Rules of Appellate Procedure were amended to add what is now Rule 3(c)(4), providing that "[a]n appeal must not be dismissed for informality of form or title of the

notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Rule 3(c)(4), therefore, codifies *Barry's* instruction to "construe Rule 3 liberally" and to overlook technical variances.

Our precedents are in accord. Invoking Rule 3(c)(4), we interpreted a notice of appeal from a final judgment entered "on the 25th day of April, 2012, and from each part thereof" as also appealing from orders entered on five other days ranging from June 3, 2008, to April 24, 2012. *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty., Inc.*, 710 F.3d 57, 63 n. 3 (2d Cir.2013). We have similarly construed an appeal from the denial of a habeas petition as also appealing from a subsequent motion for reconsideration. *See Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 54–55 (2d Cir.2004). In *Marrero Pichardo*, we noted that "[i]n determining whether to permit a defective notice of appeal, this court considers the notice of appeal so as to remain faithful to the intent of the appellant, fair to the appellee, and consistent with the jurisdictional authority of this court." *Id.* at 55 (internal quotation marks omitted).

In this case, there can be no argument that Foreign Representatives were in any way deprived of the "notice required by Rule 3" or otherwise suffered prejudice. The only legal issues raised on appeal concern the validity of the Recognition Order, which is mentioned in the joint request for direct appeal. Moreover, the Bankruptcy Court itself suggested that the purpose of direct appeal was to resolve the question of discovery by determining the validity of the Recognition Order. *See* Tr. of Record at 25:3–7, *In re Octaviar Administration Pty. Ltd.*, No. 12–13443 (Bankr.S.D.N.Y. Oct. 23, 2012). On the Bankruptcy Court's suggestion, the parties jointly pursued a direct appeal, which request was only filed with this Court after the appealable order had been issued by ***246** the Bankruptcy Court. The failure to specifically identify the December 12 discovery order, therefore, was a mistake of form for which the "appeal must not be dismissed." Fed. R.App. P. 3(c)(4).

Finally, a correctly noticed appeal from the discovery order would bring up for review the Recognition Order. Such an appeal, as with an appeal from any other final order, "opens the record and permits review of all rulings that led up to the judgment." 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3905.1 (2d ed.); *see Fielding v. Tollaksen*, 510 F.3d 175, 179 (2d Cir.2007) ("[W]hen a district court enters a final judgment in a case, interlocutory orders rendered in the case typically merge with the judgment for purposes of appellate review." (internal quotation marks omitted)); *Anobile v. Pelligrino*, 303 F.3d 107, 115 (2d Cir.2002) ("Generally, absent prejudice to the appellees, this Court interprets an appeal from a specific order disposing of the case as an appeal from the final judgment, which incorporates all previous interlocutory judgments in that case and permits their review on appeal."). Indeed, in this case, the Recognition Order was a necessary prerequisite to ordering discovery. *See* 11 U.S.C. § 1521(a)(4) (providing for discovery "[u]pon recognition"). The Recognition Order is properly before us, therefore, as it has merged with the subsequent discovery order.

Indeed, in our prior cases considering premature notices of appeal that ripen into valid notices of appeal we have considered the issues raised by the non-final orders appealed from. *See Berlin*, 723 F.3d at 127–28 (considering issues arising from the non-final attorneys' fees order); *Riffle*, 617 F.3d at 173–74 (considering issues arising from the non-final denial of a motion to dismiss). We see no reason not to do the same here.

II. The Recognition Order

[9] [10] Having determined that we have jurisdiction over this appeal, we now turn to the merits, *i.e.*, whether Section 109(a) applies to a debtor in a Chapter 15 proceeding. We review a "bankruptcy court's legal conclusions *de novo* " "accepting the bankruptcy court's factual findings unless clearly erroneous." *In re Fairfield Sentry*, 714 F.3d at 132; *accord Super Nova 330 LLC v. Gazes*, 693 F.3d 138, 141 (2d Cir.2012) (applying the same standard). A lower court decision "interpreting the meaning of a statute" is also reviewed *de novo*. *United States v. DiCristina*, 726 F.3d 92, 96 (2d Cir.2013); *see Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 137 (2d Cir.2013) ("We review *de novo* the District Court's ... interpretation of the Constitution and federal statutes and regulations.").

[11] [12] "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir.2008) (internal quotation marks omitted). " 'Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms.' " *DiCristina*, 726 F.3d at 96 (quoting *Kozeny*, 541 F.3d at 171). Indeed, "[t]he preeminent canon of statutory interpretation requires us to 'presume that the legislature says in a statute what it means and means in a statute what it says there.' " *BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (plurality op.) (internal brackets omitted) (quoting *Ct. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)); *see Dodd v. United* ***247** *States*, 545 U.S. 353, 357, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005) (quoting *Germain*, 503 U.S. at 253–54, 112 S.Ct. 1146).

[13] "Statutory enactments should, moreover, be read so as 'to give effect, if possible, to every clause and word of a statute.' " *DiCristina*, 726 F.3d at 96 (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)); *see Nwozuzu v. Holder*, 726 F.3d 323, 328 (2d Cir.2013) ("[A] statute must be construed to give effect, if possible, to every clause and word...." (internal quotation marks omitted)); *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir.2013) ("One of the most basic interpretive canons is that a statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks and brackets omitted)).

"The recognition of foreign proceedings is governed by Sections 1515 through 1524." *In re Fairfield Sentry*, 714 F.3d at 132. The basic requirements for recognition are outlined in 11 U.S.C. § 1517(a): (1) the proceeding "is a foreign main proceeding or foreign nonmain proceeding" as defined by 11 U.S.C. § 1502; (2) "the foreign representative applying for recognition is a person or body"; and (3) the petition for recognition meets the requirements of 11 U.S.C. § 1515.

A "foreign main proceeding"—the category relevant to this appeal—is "a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4). A "foreign proceeding" is "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 17 the purposes of reorganization or liquidation." 11 U.S.C. § 101(23). Debtor is defined, "[f]or the purposes of this chapter [15]," as "an entity that is the subject of a foreign proceeding." 11 U.S.C. § 1502(1).

[14] The question presented by this appeal is whether 11 U.S.C. § 109(a) applies to a debtor under Chapter 15. Section 109(a) provides: "Notwithstanding 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." Section 103(a) of Title 11 provides that, other than for an exception not relevant here, Chapter 1 "of this title ... appl[ies] in a case under chapter 15." Section 109, of course, is within Chapter 1 of Title 11 and so, by the plain terms of the statute, it applies "in a case under chapter 15." Because Foreign Representatives made no attempt to establish that OA had a domicile, place of business or property in the United States, recognition should not have been granted.

The straightforward nature of our statutory interpretation bears emphasis. Section 103(a) makes all of Chapter 1 applicable to Chapter 15. Section 109(a)—within Chapter 1—creates a requirement that must be met by any debtor. Chapter 15 governs the recognition of foreign proceedings, which are defined as proceedings in which "the assets and affairs of the debtor are subject to control or supervision by a foreign court." 11 U.S.C. § 101(23). The debtor that is the subject of the foreign proceeding, therefore, must meet the requirements of Section 109(a) before a bankruptcy court may grant recognition of the foreign proceeding.

Commentators have reached the same conclusion. *See* Collier on Bankruptcy ¶ 1501.03 (Alan N. Resnick & Henry J. Somme eds., 16th ed.) ("Although chapter ***248** 15 is the principal chapter of the Bankruptcy Code that governs the conduct of ancillary cases, several other sections of the Bankruptcy Code ... directly affect cases under chapter 15. These include ... section 109, which limits the types of debtors eligible for chapter 15...."); Susan Power Johnston, *Conflict*

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Between Bankruptcy Code §§ 109(a) and 1515: Do U.S. Bankruptcy Courts Have Jurisdiction Over Chapter 15 Cases If the Foreign Debtor Has No Assets or Presence in the U.S.?, 17 J. Bankr.L. & Prac. 5, art. 6 (Aug.2008), at 1 ("[S]ection 109(a) cannot be reconciled with Chapter 15 and ... contrary to Congress' intent, foreign representatives of foreign debtors without assets in the U.S. are not, on the face of the statute, entitled to the assistance of U.S. bankruptcy courts.").

Foreign Representatives advance several arguments to resist this conclusion. *First,* they argue that Section 109(a) creates a requirement for debtors "under this title," whereas OA is a debtor under the Australian Corporations Act, not under Title 11. Put another way, Foreign Representatives argue that they are not seeking recognition of a debtor and that no debtor appeared before the Bankruptcy Court: rather, Foreign Representatives appeared seeking recognition of a foreign proceeding.

This argument fails, however, because the presence of a debtor is inextricably intertwined with the very nature of a Chapter 15 proceeding, both in terms of how such a proceeding is defined and in terms of the relief that can be granted. It stretches credulity to argue that the ubiquitous references to a debtor in both Chapter 15 and the relevant definitions of Chapter 1 do not refer to a debtor under the title that contains both chapters.

Although Foreign Representatives are correct that recognition is sought by a foreign representative, not by a debtor, 11 U.S.C. § 1515(a), "[t]he term 'foreign representative' means a person or body ... authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs," 11 U.S.C. § 101(24). Similarly, as noted above, a foreign main proceeding is a foreign proceeding "pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4). Moreover, Section 1502 defines a "debtor" as "the subject of a foreign proceeding," and the definition of "foreign proceeding" identifies "the assets and affairs of the debtor" as its subject. 11 U.S.C. §§ 101(23), 1502(1).

In addition, both the automatic and discretionary relief provisions that accompany recognition of a foreign main proceeding are directed towards debtors. 11 U.S.C. § 1520(a) applies 11 U.S.C. §§ 361–63, 549 and 552 to "the debtor," "the property of the debtor," or "an interest of the debtor in property," as appropriate. Section 362, in turn, provides for, *inter alia,* the stay of any "proceeding against the debtor." 11 U.S.C. § 362(a)(1); *see also* 11 U.S.C. § 552(a) (governing post-petition "property acquired by the estate or by the debtor"). The discretionary relief provisions follow the same pattern. *See* 11 U.S.C. § 1521 (providing for, *e.g.*, "entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative," "staying execution against the debtor's assets," and "granting any additional relief that may be available to a trustee"). Even the relief that Foreign Representatives seek requires a debtor under Title 11, as Section 1521(a)(4) provides for "the examination of witnesses ... concerning the debtor's assets, affairs, rights, obligations or liabilities."

***249** *Second,* Foreign Representatives argue that even if OA must qualify as a debtor under Title 11, it is only required to meet the Chapter 15–specific definition of "debtor" contained in Section 1502, and not also the requirements of Section 109. As noted above, Section 1502 defines a debtor "[f]or the purposes of this chapter" as "an entity that is the subject of a foreign proceeding." This argument also fails, as we cannot see how such a preclusive reading of Section 1502 is reconcilable with the explicit instruction in Section 103(a) to apply Chapter 1 to Chapter 15.

But even if the definition of "debtor" in Section 1502 blocked application of Section 109 within Chapter 15, that would not support the conclusion that OA need not satisfy Section 109 in order for Foreign Representatives to obtain recognition of the foreign proceeding. Given its broadest reading, Section 1502 still could not affect the definitions contained within Chapter 1 because Section 1502's scope is expressly limited to "this chapter" (Chapter 15). It follows that the definitions of "foreign proceeding" and "foreign representative," which both occur within Chapter 1, would not be affected. 11 U.S.C. § 101(23)-(24). Because 17 they both require a debtor, as discussed above, OA would need to satisfy Section 109 in order to meet the requirements contained within Chapter 15 that rely upon those definitions.

The definition of "debtor" in Section 1502, however, does not block application of Section 109 within Chapter 15. Chapter 1 contains a definition of "debtor" introduced by the phrase, "[t]he term 'debtor' means." 11 U.S.C. § 101(13). Section 109(a) does not say that the term debtor "means" anything. Rather, it adds a requirement for the kinds of "person" that "may be a debtor under this title." 11 U.S.C. § 109(a). Section 1502, like Section 101, introduces its definition with the phrase "the term—(1) 'debtor' means." This linguistic parallelism makes clear that Section 1502 supplants Section 101—*i.e.*, it supplants the definition of debtor within the context of Chapter 15—but it does not supplant requirements for "a debtor under this title" not included in the definition. *Cf. DiCristina*, 726 F.3d at 99 (" 'When an exclusive definition is intended the word 'means' is employed.' " (internal brackets and ellipsis omitted) (quoting *Gronan v. Comm'r of Internal Revenue*, 302 U.S. 82, 86, 58 S.Ct. 108, 82 L.Ed. 63 (1937))).

The Foreign Representatives' proposed interpretation also fails because it would render Section 109(a) meaningless. They argue that what debtor "means" in Chapter 15 supplants a requirement placed on a debtor "under this title." But consistency would then require that what a debtor "means" in Chapter 1 would have the same effect. The result would be that Section 109(a) would have no application under any circumstances because the definition in Chapter 1 applies generally. This violates the "most basic interpretive canon[ ]" requiring us to interpret statutes such that "no part will be inoperative or superfluous." *Mary Jo C.*, 707 F.3d at 156. Foreign Representatives' argument, therefore, must be incorrect.

Finally, Foreign Representatives offer no explanation as to why, if Congress wished to exclude Chapter 15 from the reach of Section 109(a), it did not say as much. Congress' silence is particularly inexplicable in light of the fact that Congress did expressly restrict the application of Section 109(b) to Chapter 15 by removing a prohibition on application to foreign insurance companies. 11 U.S.C. § 1501(c) ("This chapter does not apply to—(1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b).").

***250 [15]** We would end our "plain meaning" analysis here. However, Foreign Representatives argue that the context and purpose of Chapter 15 support their reading of the statute. A properly limited contextual analysis of statutory language is encompassed within the ambit of a textual analysis. *See In re Application of N. Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 406 (2d Cir.2009) ("[W]e examine the text of the statute itself, interpreting provisions in light of their ordinary meaning and their contextual setting."); *United States v. Magassouba*, 544 F.3d 387, 404 (2d Cir.2008) ("In determining whether statutory language is ambiguous, we 'reference the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' " (internal ellipsis omitted) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997))).

Such an analysis, however, supports application of Section 109(a) to Chapter 15. Congress amended Section 103 to state that Chapter 1 applies to Chapter 15 at the same time as it enacted Chapter 15. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109–8, §§ 801–02, 119 Stat. 23. This strongly supports the conclusion that Congress intended Section 103(a) to mean what it says, namely, that Chapter 1 applies to Chapter 15. *Cf. United States v. Battista*, 575 F.3d 226, 234 (2d Cir.2009) ("[W]hen two sections 17 share the same purpose, the parallel provisions can, as a matter of general statutory construction, be interpreted to be *in pari materia*." (internal quotation marks omitted)).

Foreign Representatives argue that application of Section 109(a) to Chapter 15 would be inconsistent with 11 U.S.C. § 1528 and 28 U.S.C. § 1410. Section 1528 states 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." Foreign Representatives argue that the necessary implication is that a foreign main proceeding may be recognized even when there are no assets in the United States– *i.e.*, Section 109(a) does not apply to Chapter 15 proceedings.

This argument fails, however, because Section 109(a) requires "a domicile, a place of business, or property in the United States." Section 1528, therefore, is more restrictive than Section 109. It follows that there is nothing contradictory or

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disharmonious about applying Section 109(a) to Chapter 15 and then further requiring that Section 1528 is met before a case under another chapter of Title 11 may be commenced.

Foreign Representatives come closer to the mark with their argument that 28 U.S.C. § 1410 provides a venue for Chapter 15 cases even when "the debtor does not have a place of business or assets in the United States." This venue statute, however, is purely procedural. Given the unambiguous nature of the substantive and restrictive language used in Sections 103 and 109 of Chapter 15, to allow the venue statute to control the outcome would be to allow the tail to wag the dog.

Finally, Foreign Representatives argue that the purpose of Chapter 15 would be undermined by application of Section 109(a). "[W]e look first to the text and structure of the statute as the surest guide to congressional intent." *Mary Jo C.*, 707 F.3d at 168 (internal quotation marks omitted). Here, Chapter 15 contains an express purpose section that states: "The 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 objectives of": (1) international ***251** cooperation; (2) "greater legal certainty for trade and investment"; (3) "fair and efficient administration of cross-border insolvencies"; (4) "protection and maximization of the value of the debtor's assets; and (5) facilitation of the rescue of financially troubled businesses." 11 U.S.C. § 1501(a). None of these stated purposes are dispositive as they could all be accomplished with or without imposition of Section 109(a). It is true that the Model Law does not contain an express requirement akin to Section 109(a), *see generally* United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross–Border Insolvency with Guide to Enactment, available at* http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e. pdf (last accessed Dec. 9, 2013), but the Model Law also states that "a State may modify or leave out some of its provisions" *id.* at Part 2 ¶ 12. Regardless, the omission of Section 109(a), or its equivalent, from the Model Law does not suffice to outweigh the express language Congress used in adopting Sections 109(a) and 103(a). This is especially true where other provisions of federal law provide the relief that the Model Law was intended to provide. Here, 28 U.S.C. § 1782(a) provides for discovery in aid of foreign proceedings without any requirement akin to Section 109(a).[3] Congress, therefore, may have intended to limit the relief provided by Chapter 15 because it knew that additional relief was already 13 available outside of Chapter 15.

CONCLUSION

Because we find that 11 U.S.C. § 109(a) applies to the debtor in a foreign main proceeding under Chapter 15 of the Bankruptcy Code, we **VACATE** and **REMAND** to the Bankruptcy Court for further proceedings consistent with this opinion.

We direct the Clerk of Court to forward copies of this opinion to Congress following the specified protocol adopted by the Judicial Conference.

All Citations

737 F.3d 238, 70 Collier Bankr.Cas.2d 1203, 58 Bankr.Ct.Dec. 251, Bankr. L. Rep. P 82,554

Footnotes

* The Honorable William F. Kuntz, II, of the United States District Court for the Eastern District of New York, sitting by designation.

1 " 'While the pecuniary interest formulation is an often used and often useful test of standing in the bankruptcy context, it is not the only test.' " *In re DBSD N. Am., Inc.*, 634 F.3d at 89 n. 3 (quoting *In re Zarnel*, 619 F.3d at 162). "Instead, even absent a direct pecuniary interest in the litigation, *a public* interest may also give a sufficient stake in the outcome of a bankruptcy case to confer appellate standing." *In re Zarnel*, 619 F.3d at 162 (internal quotation marks omitted); *see id.* (finding that the U.S.

Trustee's "responsibility to represent and protect the public interest affords it a substantial interest in, and therefore standing to proceed with" an appeal). In this case, however, no party argues that the pecuniary interest test is not appropriate.

2 Section 1520 prescribes the "effects of recognition of a foreign main proceeding," which include permitting a foreign representative to "operate the debtor's business and ... exercise the rights and powers of a trustee," limiting the transfer and control of the debtor's property within the United States, and invoking 11 U.S.C. § 362's automatic stay provisions. The automatic relief imposed by Section 1520 stands in contrast to the discretionary relief that "may be granted upon recognition" pursuant to 11 U.S.C. § 1521. That discretionary relief includes enlarging the automatic stay, enforcing additional restrictions on transfer of the debtor's property, the taking of discovery, and granting relief that "may be available to a trustee," with some exceptions. 11 U.S.C. § 1521(a).

3 Indeed, we note that Foreign Representatives have commenced an action under 28 U.S.C. § 1782 and have entered into a stipulation with Drawbridge and others calling for production of documents within sixty days of October 3, 2013. *See* Stip. & Order, *In re Application of Barnet*, 13-Misc. -214, Dkt. No. 32 (S.D.N.Y. Oct. 4, 2013).

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In re Berau Capital Resources PTE Ltd., 540 B.R. 80 (Bankr. S.D.N.Y. 2015)

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: BERAU CAPITAL RESOURCES PTE LTD, Debtor in a Foreign Proceeding.

Chapter 15 Case No. 15-11804 (MG)

October 28, 2015, Decided

For Kin Chan, as Foreign Representative: Edward J. LoBello, Esq., Thomas R. Slome, Esq., Jil Mazer-Marino, Esq., MEYER, SOUZZI, ENGLISH & KLEIN, P.C., New York, NY.

MARTIN GLENN, UNITED STATES BANKRUPTCY JUDGE.

MARTIN GLENN

MEMORANDUM OPINION GRANTING RECOGNITION OF FOREIGN MAIN PROCEEDING

MARTIN GLENN

UNITED STATES BANKRUPTCY JUDGE

An issue in chapter 15 cases is whether a foreign debtor must have a place of business or property in the United States to be eligible to file a chapter 15 petition. In *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, **737 F.3d 238** (2d Cir. 2013), the Second Circuit held that **section 109(a)** of the Bankruptcy Code applies to chapter 15 cases and requires that a foreign debtor must reside, have a domicile or place of business, or property in the United States to be eligible to file a chapter 15 petition. The *Barnet* decision continues to be a frequent subject of discussion and criticism at international insolvency conferences and in [*82] scholarly writing. *See generally* Daniel M Glosband and Jay Lawrence Westbrook, *Chapter 15 Recognition in the United States: Is a Debtor "Presence" Required?*, 24 INT'L INSOLV. REV. 28 (2015) (available at Wiley Online Library (wileyonlinelibrary.com)). No other federal circuit appears to have addressed the "property in the United States" issue in chapter 15 cases so far.

Barnet is binding on this Court. Foreign debtors who wish to file chapter 15 cases in New York often have no place of business in the United States; therefore, the focus shifts to whether the foreign debtor has property in New York that will establish eligibility and venue in this district.[1]

Section 109(a) of the Bankruptcy Code does not specify how much property must be present or when or for how long property has had a situs in New York. Earlier cases have identified bank accounts, attorney retainers deposited in New York, or causes of action owned by the foreign debtor with a situs in New York, as satisfying the "property in the United States" eligibility requirement. *See In re Octaviar Admin. Pty Ltd*, **511 B.R. 361 , 369-74** (Bankr. S.D.N.Y. 2014).

The foreign debtor in this case, Berau Capital Resources Pte Ltd ("Berau"), does not have a place of business in the United States. Berau filed an insolvency proceeding in Singapore, where the company has its headquarters. The foreign representative originally focused solely on the attorney retainer held by the foreign representative's New York counsel as the basis for eligibility. The Court is satisfied that the retainer provides a sufficient basis for eligibility in this case. *Octaviar*, **511 B.R. at 372-74** . However, it is apparent that another substantial (and frequently recurring) basis for chapter 15 eligibility exists here.

Berau is an obligor on over $450 million of U.S. dollar denominated debt; New York law expressly governs the debt indenture, which also includes a New York choice of forum clause. Under the indenture, Berau appointed an authorized agent for service of process in New York,

and numerous acts must be performed in New York City.[2] The debt was in default when the foreign representative filed the chapter 15 case.

Dollar denominated debt subject to New York governing law and New York forum selection are quite common in international finance. They are highly desirable attributes [***3] for global trade and investment, providing certainty, predictability and respected courts in the event of disputes. It would be ironic if a foreign debtor's creditors could sue to enforce the debt in New York, but in the event of a foreign insolvency proceeding, the foreign representative could not file and obtain protection under chapter 15 from a New York bankruptcy court.[3] The Court concludes that no such conundrum exists because the indenture is property of Berau in the United States, thereby satisfying the section 109(a) eligibility requirement.

Contracts create property rights for the parties to the contract. A debtor's contract rights are intangible property of the debtor.[4] *U.S. Bank N.A. v. Am. Airlines, Inc.*, **485 B.R. 279** , **295** (Bankr. S.D.N.Y. 2013), *aff'd*, **730 F.3d 88** (2d Cir. 2013), *see also Wallach v. Nowak (In re Sherlock Homes of W.N.Y., Inc.)*, **246 B.R. 19** , 23-24 (Bankr. W.D.N.Y. 2000) (stating that listing contracts between the debtor/broker dealer and prospective sellers bestowed contractual rights upon the parties and the contract rights were assets of the debtor); *Slater v. Town of Albion (In re Albion Disposal, Inc.)*, **217 B.R. 394** , **407-08** (W.D.N.Y. 1997) (noting that "it is well-established . . . that a debtor's contractual rights—including rights arising under post-petition contracts—are included in the property of the estate"). State law governs property rights in bankruptcy cases. *Butner v. United States*, **440 U.S. 48** , **99 S. Ct. 914** , **59 L. Ed. 2d 136** (1979). Section 1502(8) of the Bankruptcy Code expressly provides that the location of intangible property rights is to be determined under applicable nonbankruptcy law. *See In re Fairfield Sentry Ltd.*, **484 B.R. 615** , **623** (Bankr. S.D.N.Y. 2013), *aff'd sub nom. Krys v. Hamm Place I LC (In re Fairfield Sentry, Ltd.)*, 13 Civ. 1524 (AKH), **[2013 BL 370732]**, 2013 U.S. Dist. LEXIS 188911 (S.D.N.Y. July 3, 2013), *vacated*, **768 F.3d 239** (2d Cir. 2014).

It has long been recognized under New York law that intangible property rights, such those arising from contracts, may have more than one situs. As Chief Judge Cardozo wrote in *Severnoe Sec. Corp. v. London & Lancashire Ins. Co.*, **255 N.Y. 120** , **174 N.E. 299** , 300 (N.Y. 1931), "[t]he situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found." Chief Judge Cardozo's framing of the issue has stood the test of time. *See Bankers Trust Co. v. Equitable Life Assur. Soc.*, **19 N.Y.2d 552** , **227 N.E.2d 863** , **865-66** , **281 N.Y.S.2d 57** (N.Y. 1967) ("In addition, as Judge Cardozo observed, determination of situs for one purpose has no necessary bearing on its determination for another purpose . . . which, of course, follows if determination of situs is to be made upon the basis [***4] of considerations of 'justice and convenience in particular conditions' "). *Octavia*, **511 B.R. at 371** . In the case of the Berau indenture, as already indicated, the notes issued under the indenture are to be discharged in New York City. The attributes of the indenture would be sufficient to establish the situs of the property in New York, but in addition, the New York Legislature had adopted several laws clearly making New York a situs of the property.

The New York Legislature makes contracts of substantial size with New York governing law and choice of forum provisions—most certainly applicable to this debt indenture—enforceable in this State. Three statutory provisions are relevant here, two in the General Obligations Law and one in the Civil Practice Law and Rules ("CPLR").

N.Y. General Obligations Law § 5-1401 (Choice of Law) provides, with exceptions not relevant here, that the parties to any contract arising out of a transaction covering not less than $250,000 "may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract . . . bears a reasonable relation to this state." **N.Y. General Obligation Law § 5-1402** (Choice of Forum) provides, again with exceptions not relevant here, that any person may maintain an action in a New York court against a foreign corporation that relates to a contract made in whole or in part pursuant to **section 5-1401** and that arises out of a transaction involving not less than $1 million. **CPLR 327(b)** provides that a court may not stay or dismiss an action on grounds of inconvenient forum where the action relates to a contract to which **sections 5-1401** and **5-1402** apply.

These three sections reflect a legislative policy to permit contract counterparties to establish a contract situs in this state by designating New York governing law and a New York forum for contracts involving transactions of the requisite amounts. The Berau indenture easily satisfies these requirements. This is sufficient to fix the situs of the contracts in New York, whether the contract has a situs elsewhere for other purposes. The Court concludes that the presence of the New York choice of law and forum selection clauses in the Berau indenture satisfies the section 109(a) "property in the United States" eligibility requirement.[5] Of course, the other requirements for recognition must also be satisfied, but none of those requirements were in dispute here.

CONCLUSION

No objections to recognition were filed and all requirements for recognition were satisfied. On October 16, 2015, the Court entered an order recognizing Berau's Singapore proceeding as a foreign main proceeding. (ECF Doc. # 32.) This Opinion addresses only whether the debt indenture satisfies the section 109(a) requirement of "property in the United States," an issue likely to recur in other cases. As explained above, the Court concludes that the foreign debtor

has property in the United States, satisfying the eligibility requirement in **section 109(a)**. Venue in the Southern District of New York was likewise established.

IT IS SO ORDERED.

Dated: October 28, 2015

New York, New York

Martin Glenn

MARTIN GLENN

United States Bankruptcy Judge

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fn 1

The venue statute for chapter 15 cases, **28 U.S.C. § 1410**, permits a chapter 15 case to be filed in a district in which the debtor has its principal place of business or principal assets; and absent a place of business or assets, in a district in which there is an action or proceeding pending against the debtor in a federal or state court. *Id.* **§ 1410(1)—(2)**. If neither of those requirements is satisfied, the chapter 15 case may be filed in a district "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." *Id.* **§ 1410(3)**.

fn 2

The Indenture outlines acts that can only be done at the Bank of New York Mellon in New York City, including: (a) to have the Trustee authenticate and deliver notes issued by the Foreign Debtor to the Foreign Debtor or upon the order of the Foreign Debtor (Indenture § 2.01, ECF Doc. # 24, Ex. B); (b) to have the Trustee maintain a registry of noteholders and to authenticate and deliver notes or new notes to transferees of notes (§ 2.05); (c) to redeem the notes (§§ 3.01, 3.02); (d) to discharge the notes and defease certain covenants (§ 8.01); (e) to recover cash or securities posted in connection with such defeasance (§ 8.04); (f) to make certain amendments to the Indenture without noteholder consents (§§ 9.01, 9.02); and (g) to require the Trustee to release collateral (§ 12.02).

fn 3

Barnet concluded that the venue provision in **28 U.S.C. § 1410** does not relieve the foreign debtor of the requirement of property in the United States to satisfy the section 109(a) eligibility requirement. *Barnet*, **737 F.3d at 250**.

fn 4

Upon an order recognizing a proceeding as a foreign main proceeding, **section 1520** makes **sections 361** and **362** applicable with respect to the debtor and property of the debtor within the jurisdiction of the United States. The statute refers to "property of the debtor" to distinguish it from the "property of the estate" that is created under **section 541(a)**. In a chapter 15 case, there is no "estate"; nevertheless, **section 1520(a)** imposes an automatic stay on any action with respect to the debtor's property located in the United States. *See In re Pro-Fit Holdings Ltd.*, **391 B.R. 850, 864** n.48 (Bankr. C.D. Cal. 2008).

fn 5

Other types of contracts—such as patent, trademark or intellectual property licensing agreements—entered into by a foreign debtor that include New York choice of law and forum selection clauses may satisfy the requirements of **N.Y. General Obligation Law §§ 5-1401** and **5-1402**. The Court does not decide whether such contracts satisfy the section 109(a) "property in the United States" eligibility requirement.

UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation

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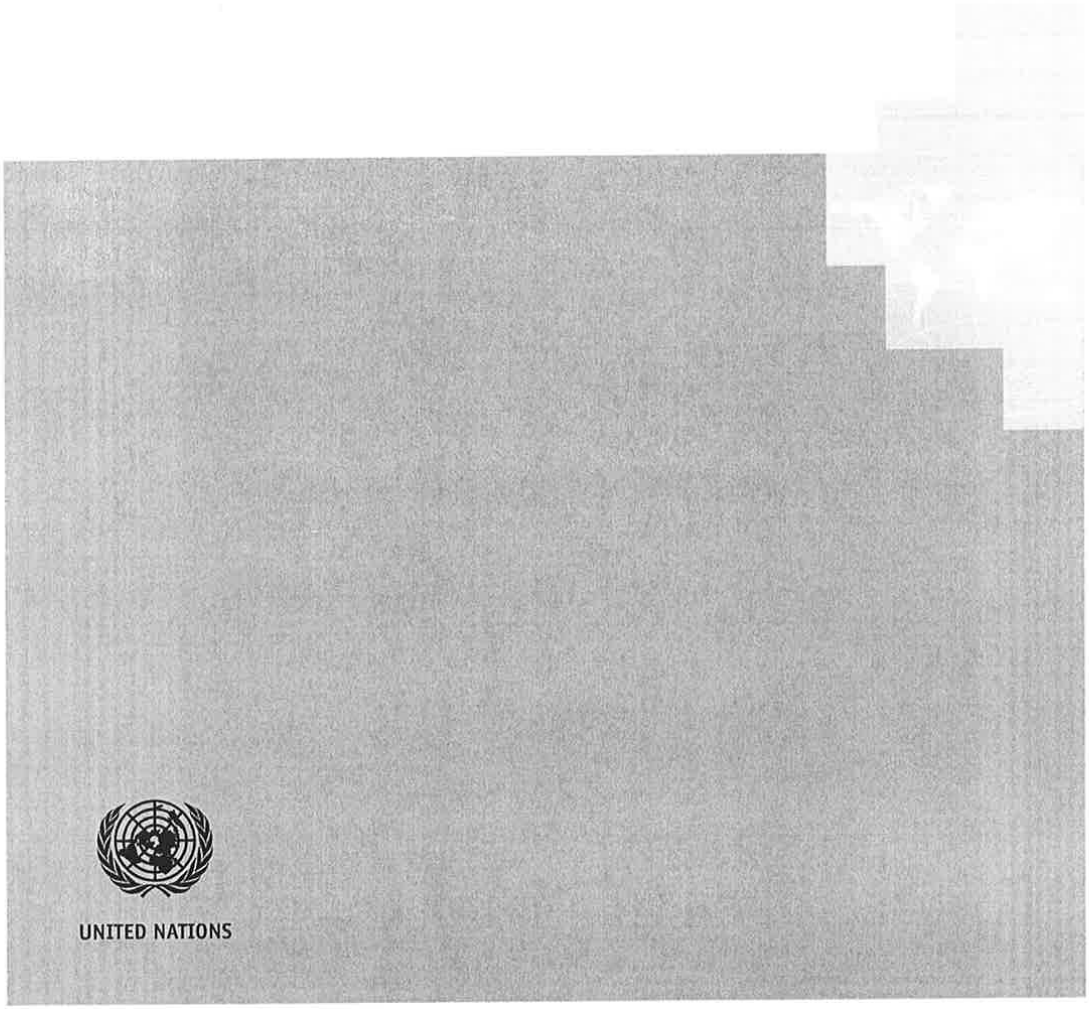

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Contents

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.

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

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

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

Article 9. Right of direct access

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

Article 10. Limited jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 15. Application for recognition of a foreign proceeding

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

2. An application for recognition shall be accompanied by:

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

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

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

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

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

Article 16. Presumptions concerning recognition

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

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

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

Article 17. Decision to recognize a foreign proceeding

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

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

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

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

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

2. The foreign proceeding shall be recognized:

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

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

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

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

Article 18. Subsequent information

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

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

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

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

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

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

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

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

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

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

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

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

Article 20. Effects of recognition of a foreign main proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 22. Protection of creditors and other interested persons

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

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

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

Article 23. Actions to avoid acts detrimental to creditors

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

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

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

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

CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

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

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

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

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

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

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

Article 27. Forms of cooperation

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

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

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

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

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

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

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

CHAPTER V. CONCURRENT PROCEEDINGS

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

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

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

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

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

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

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

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

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

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

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

Article 30. Coordination of more than one foreign proceeding

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

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

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

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

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

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

Article 32. Rule of payment in concurrent proceedings

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

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

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

[1] The "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

[2] European Treaty Series, No. 136.

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

[4] Available 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.

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[5] The 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.

[7] For 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.

[8] The 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.

[9] For 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.

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[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

[13] This 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 proceeding[14] 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.

[15] The *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.

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[16] The *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 *(a)* and *(c)*.

[17] Recommendations 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.

(b) Guide to Enactment

A/CN.9/436, paras. 39-42.

A/CN.9/442, paras. 57-66.

(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.

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 up[18] 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 contained[19] 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 proceedings[23] 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. 71.

(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*].

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

Nothing in this Law affects the provisions in force in 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

(a) Model Law

A/52/17, paras. 163-166.

A/CN.9/419, para. 69.

A/CN.9/WG.V/WP.44, p. 11.

A/CN.9/422, paras. 68-69.

A/CN.9/WG.V/WP.46, p. 8.

A/CN.9/433, paras. 44-45.

A/CN.9/WG.V/WP.48, pp. 8-9.

A/CN.9/435, paras. 118-122.

(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/52/17, paras. 167-169.

A/CN.9/419, paras. 36-39.

A/CN.9/WG.V/WP.44, p. 12.

A/CN.9/422, paras. 70-74.

A/CN.9/WG.V/WP.46, p. 8.

A/CN.9/433, paras. 46-49.

A/CN.9/WG.V/WP.48, p. 9.

A/CN.9/435, paras. 123-124.

(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 standing[25] 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) Model Law

A/52/17, paras. 183-187.

A/CN.9/WG.V/WP.44, pp. 24-25.

A/CN.9/422, paras. 170-177.

A/CN.9/WG.V/WP.46, p. 11.

A/CN.9/433, paras. 71-75.

A/CN.9/WG.V/WP.48, p. 11.

A/CN.9/435, paras. 137-146.

[25] Also known as "procedural legitimation", "active legitimation" 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, standing[25] 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]

[2]The 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.

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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 1961[29] 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

[32] As 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

[33] In 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

[34] Under 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.

(b) Guide to Enactment

A/CN.9/436, para. 85.

A/CN.9/442, paras. 161-164.

(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.

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 standing[25] 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 standing[25] 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 standing[25] 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.

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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 standing[25] 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.

(b) Guide to Enactment

A/CN.9/436, paras. 89-90.

A/CN.9/442, paras. 168-172.

(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.

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.

(b) Guide to Enactment

A/CN.9/436, paras. 91-95.

A/CN.9/442, paras. 173-183.

(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.

[36] See 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) Model Law

A/52/17, paras. 94-101.

A/CN.9/WG.V/WP.44, pp. 26-29.

A/CN.9/422, paras. 192-197.

A/CN.9/WG.V/WP.46, p. 18.

A/CN.9/433, paras. 173-181.

A/CN.9/WG.V/WP.48, p. 23.

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 hotchpotch 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;*

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

*The *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 Insolvency[37] 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 Law[38] 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 intergovernmental 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."

[19] *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 17* (A/68/17), para. 197.

UNCITRAL Draft Model Law on Enterprise Group Insolvency

Draft model law on enterprise group insolvency

Part A. Core provisions

Chapter I. General provisions

Preamble

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

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

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

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

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

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

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

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

Article 1. Scope

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

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

Article 2. Definitions

For the purposes of this Law:

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

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

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

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

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

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

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

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

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

(iii) A group representative has been appointed;

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

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

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

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

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

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

Article 3. International obligations of this State

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

Article 4. Jurisdiction of the enacting State

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

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

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

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

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

Article 5. Competent court or authority

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

Article 6. Public policy exception

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

Article 7. Interpretation

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

Article 8. Additional assistance under other laws

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

Chapter 2. Cooperation and coordination

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

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with other courts, insolvency representatives and any group representative appointed, either directly or through an insolvency representative appointed in this State or a person appointed to act at the direction of the court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 12. Coordination of hearings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 16. Authority to enter into agreements concerning the coordination of insolvency proceedings

An insolvency representative and any group representative appointed may enter into an agreement concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed.

Article 17. Appointment of a single or the same insolvency representative

A court may coordinate with other courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group.

Article 18. Participation by enterprise group members in an insolvency proceeding commenced in this State

1. Subject to paragraph 2, if an insolvency proceeding has commenced in this State with respect to an enterprise group member that has the centre of its main interests in this State, any other enterprise group member may participate in that insolvency proceeding for the purpose of facilitating cooperation and coordination under this Law, including developing and implementing a group insolvency solution.

2. An enterprise group member that has the centre of its main interests in another State may participate in an insolvency proceeding referred to in paragraph 1 unless a court in that other State prohibits it from so doing.

3. Participation by any other enterprise group member in an insolvency proceeding referred to in paragraph 1 is voluntary. An enterprise group member may commence its participation or opt out of participation at any stage of such a proceeding.

4. An enterprise group member participating in an insolvency proceeding referred to in paragraph 1 has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member's interests and to take part in the development and implementation of a group insolvency solution. The sole fact that an enterprise group member is participating in such a proceeding does not subject the enterprise group member to the jurisdiction of the courts of this State for any purpose unrelated to that participation.

5. A participating enterprise group member shall be notified of actions taken with respect to the development of a group insolvency solution.

Chapter 3. Relief available in a planning proceeding in this State

Article 19. Appointment of a group representative and authority to seek relief

1. When the requirements of article 2, subparagraphs (g)(i) and (ii) are met, the court may appoint a group representative. Upon that appointment, a group representative shall seek to develop and implement a group insolvency solution.

2. To support the development and implementation of a group insolvency solution, a group representative is authorized to seek relief pursuant to article 20 in this State.

3. A group representative is authorized to act in a foreign State on behalf of the planning proceeding and, in particular, to:

(a) Seek recognition of the planning proceeding and relief to support the development and implementation of a group insolvency solution;

(b) Seek to participate in a foreign proceeding relating to an enterprise group member participating in the planning proceeding; and

(c) Seek to participate in a foreign proceeding relating to an enterprise group member not participating in the planning proceeding.

Article 20. Relief available to a planning proceeding

1. To the extent needed to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any appropriate relief, including:

(a) Staying execution against the assets of the enterprise group member;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(d) Entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court, in order to protect, preserve, realize or enhance the value of assets;

(e) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(f) Staying any insolvency proceeding concerning a participating enterprise group member;

(g) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(h) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

3. With respect to the assets and operations located in this State of an enterprise group member that has the centre of its main interests in another State, relief under this article may only be granted if that relief does not interfere with the administration of insolvency proceedings taking place in that other State.

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 21. Application for recognition of a foreign planning proceeding

1. A group representative may apply in this State for recognition of the foreign planning proceeding to which the group representative was appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision appointing the group representative; or

(b) A certificate from the foreign court affirming the appointment of the group representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence concerning the appointment of the group representative that is acceptable to the court.

3. An application for recognition shall also be accompanied by:

(a) A statement identifying each enterprise group member participating in the foreign planning proceeding;

(b) A statement identifying all members of the enterprise group and all insolvency proceedings that are known to the group representative that have been commenced in respect of enterprise group members participating in the foreign planning proceeding; and

(c) A statement to the effect that the enterprise group member subject to the foreign planning proceeding has the centre of its main interests in the State in which that planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members subject to or participating in that proceeding.

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

5. The sole fact that an application pursuant to this Law is made to a court in this State by a group representative does not subject the group representative to the jurisdiction of the courts of this State for any purpose other than the application.

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

Article 22. Provisional relief that may be granted upon application for recognition of a foreign planning proceeding

1. From the time of filing an application for recognition of a foreign planning proceeding until the application is decided upon, where relief is urgently needed to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court may, at the request of the group representative, grant relief of a provisional nature, including:

(a) Staying execution against the assets of the enterprise group member;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying any insolvency proceeding concerning the enterprise group member;

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(e) In order to protect, preserve, realize or enhance the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(g) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(h) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. [*Insert provisions of the enacting State relating to notice.*]

3. Unless extended under article 24, subparagraph 1(a), the relief granted under this article terminates when the application for recognition is decided upon.

4. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a foreign planning proceeding if that group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

5. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place where an enterprise group member participating in the foreign planning proceeding has the centre of its main interests.

Article 23. Recognition of a foreign planning proceeding

1. A foreign planning proceeding shall be recognized if:

(a) The application meets the requirements of article 21, paragraphs 2 and 3;

(b) The proceeding is a planning proceeding within the meaning of article 2, subparagraph (g); and

(c) The application has been submitted to the court referred to in article 5.

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

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 3, the group representative shall inform the court of material changes in the status of the foreign planning proceeding or in the status of its own appointment occurring after the application for recognition is made, as well as changes that might bear upon the relief granted on the basis of recognition.

Article 24. Relief that may be granted upon recognition of a foreign planning proceeding

1. Upon recognition of a foreign planning proceeding, where necessary to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in the foreign planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any appropriate relief, including:

(a) Extending any relief granted under article 22, paragraph 1;

(b) Staying execution against the assets of the enterprise group member;

(c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(d) Staying any insolvency proceeding concerning the enterprise group member;

(e) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;

(f) In order to protect, preserve, realize or enhance the value of assets for the purpose of developing or implementing a group insolvency solution, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;

(g) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(h) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(i) Granting any additional relief that may be available to an insolvency representative under the laws of this State

2. In order to protect, preserve, realize or enhance the value of assets for the purposes of developing or implementing a group insolvency solution, the distribution of all or part of the enterprise group member's assets located in this State may be entrusted to an insolvency representative appointed in this State. Where that insolvency representative is not able to distribute all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task.

3. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a foreign planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place where an enterprise group member participating in the foreign planning proceeding has the centre of its main interests.

Article 25. Participation of a group representative in proceedings in this State

1. Upon recognition of a foreign planning proceeding, the group representative may participate in any proceeding concerning an enterprise group member that is participating in the foreign planning proceeding.

2. The court may approve participation by a group representative in any insolvency proceeding in this State concerning an enterprise group member that is not participating in the foreign planning proceeding.

Article 26. Approval of a group insolvency solution

1. Where a group insolvency solution affects an enterprise group member that has the centre of its main interests or an establishment in this State, the portion of the group solution affecting that enterprise group member shall have effect in this State once it has received any approvals and confirmations required in accordance with the law of this State.

2 A group representative is entitled to apply directly to a court in this State to be heard on issues related to approval and implementation of a group insolvency solution.

Chapter 5. Protection of creditors

Article 27. Protection of creditors and other interested persons

1. In granting, denying, modifying or terminating relief under this Law, the court must be satisfied that the interests of the creditors of each enterprise group member subject to or participating in a planning proceeding and other interested persons, including the enterprise group member subject to the relief to be granted, are adequately protected.

2. The court may subject relief granted under this Law to conditions it considers appropriate, including the provision of security.

3. The court may, at the request of the group representative or a person affected by relief granted under this Law, or at its own motion, modify or terminate such relief.

Chapter 6. Treatment of foreign claims

Article 28. Undertaking on the treatment of foreign claims: non-main proceedings

1. To minimize the commencement of non-main proceedings or facilitate the treatment of claims in an enterprise group insolvency, a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another State may be treated in a main proceeding commenced

in this State in accordance with the treatment it would be accorded in the non-main proceeding, provided:

(a) An undertaking to accord such treatment is given by the insolvency representative appointed in the main proceeding in this State. Where a group representative is appointed, the undertaking should be given jointly by the insolvency representative and the group representative;

(b) The undertaking meets the formal requirements, if any, of this State; and

(c) The court approves the treatment to be accorded in the main proceeding.

2. An undertaking given under paragraph 1 shall be enforceable and binding on the insolvency estate of the main proceeding.

Article 29. Powers of the court of this State with respect to an undertaking under article 28

If an insolvency representative or a group representative from another State in which a main proceeding is pending has given an undertaking in accordance with article 28, a court in this State, may:

(a) Approve the treatment to be provided in the foreign main proceeding to the claims of creditors located in this State; and

(b) Stay or decline to commence a non-main proceeding.

Part B. Supplemental provisions

Article 30. Undertaking on the treatment of foreign claims: main proceedings

To minimize the commencement of main proceedings or to facilitate the treatment of claims that could otherwise be brought by a creditor in an insolvency proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may undertake to accord to those claims the treatment in this State that they would have received in an insolvency proceeding in that other State and the court in this State may approve that treatment. Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.

Article 31. Powers of a court of this State with respect to an undertaking under article 30

If an insolvency representative or a group representative from another State in which an insolvency proceeding is pending has given an undertaking under article 30, a court in this State may:

(a) Approve the treatment in the foreign insolvency proceeding of the claims of creditors located in this State; and

(b) Stay or decline to commence a main proceeding.

Article 32. Additional relief

1. If, upon recognition of a foreign planning proceeding, the court is satisfied that the interests of the creditors of affected enterprise group members would be adequately protected in that proceeding, particularly where an undertaking under article 28 or 30 has been given, the court, in addition to granting any relief described in article 24, may stay or decline to

commence an insolvency proceeding in this State with respect to any enterprise group member participating in the foreign planning proceeding.

2. Notwithstanding article 26, if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of the creditors of the affected enterprise group member are or will be adequately protected, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article 24 that is necessary for implementation of the group insolvency solution.