AMERICAN BANKRUPTCY INSTITUTE

2019 International Insolvency & Restructuring Symposium

The Broad, Developing International Paradigm for Restructuring: The Latest on the American Perspective

William A. Brandt, Jr., Moderator
Development Specialists, Inc.; New York, USA

Stephen D. Lerner
Squire Patton Boggs (US) LLP; Cincinnati, Ohio, USA

Elizabeth R. McColm
Paul, Weiss, Rifkind, Wharton & Garrison LLP; New York, USA

Chief Judge Cecelia G. Morris
U.S. Bankruptcy Court (S.D.N.Y.); New York, USA

2019

The Broad, Developing International Paradigm for Restructuring:

The Latest on the American Perspective

ABI 15th International Insolvency & Restructuring Symposium

Paris, France

November 15, 2019

REFERENCE MATERIALS

William A. Brandt, Jr. – Development Specialists, Inc.; New York, N.Y., USA

Chief Judge Cecelia G. Morris – U.S. Bankruptcy Court (S.D.N.Y.); New York, N.Y., USA

Stephen D. Lerner – Squire Patton Boggs (US) LLP; Cincinnati, Ohio, USA

Elizabeth R. McColm – Paul, Weiss, Rifkind, Wharton & Garrison LLP; New York, N.Y., USA

TABLE OF CONTENTS

1. UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation
2. UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments
3. U.S. Bankruptcy Court for SDNY, Adoption of Judicial Insolvency Network ("JIN") Modalities of Court-to-Court Communications
4. In Re: Agrokor d.d., et al., Foreign Debtors, in SDNY
5. In Re: Platinum Partners Value Arbitrage Fund L.P., in SDNY
6. Reasons for Decision, *China Fishery Group Limited* [2019], in the Hong Kong Court of First Instance
7. In Re: Legend International Resorts Limited, in the High Court of the Hong Kong Special Administrative Region Court of Appeal
8. In Re: Zetta Jet Pte. Ltd. and Zetta Jet USA, Inc., in the High Court of the Republic of Singapore
9. In Re: Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, in the U.S. Court of Appeals for the Second Circuit
10. In Re: Application of Antonio Del Valle Ruiz and Others for an Order to Take Discovery for Use in Foreign Proceedings, in the U.S. Court of Appeals for the Second Circuit
11. "EU Restructuring Directive – A View From the United States," by Stephen Lerner of Squire Patton Boggs
12. European Union Restructuring Directive 2019/2023

UNCITRAL | UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation

UNITED NATIONS

Further information may be obtained from:
UNCITRAL Secretariat, Vienna International Centre
P.O. Box 500, 1400 Vienna, Austria
Telephone: (+43-1) 26060-4060 Telefax: (+43-1) 26060-5813
Internet: www.uncitral.org E-mail: uncitral@uncitral.org

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation

UNITED NATIONS
New York, 2014

Note

Symbols of United Nations documents are composed of letters combined with figures. Mention of such symbols indicates a reference to a United Nations document.

UNITED NATIONS PUBLICATION
Sales No.: E.14.V.2
ISBN 978-92-1-133819-5
e-ISBN 978-92-1-056399-4

© United Nations, January 2014. All rights reserved, worldwide.

The designations employed and the presentation of material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Information on uniform resource locators and links to Internet sites contained in the present publication are provided for the convenience of the reader and are correct at the time of issue. The United Nations takes no responsibility for the continued accuracy of that information or for the content of any external website.

This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

Contents

Page

Part One. UNCITRAL Model Law On Cross-Border Insolvency

Preamble 3

Chapter I. General provisions 3

Article 1. Scope of application 3

Article 2. Definitions 4

Article 3. International obligations of this State 4

Article 4. [*Competent court or authority*] 5

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 5

Article 6. Public policy exception 5

Article 7. Additional assistance under other laws 5

Article 8. Interpretation 5

Chapter II. Access of foreign representatives and creditors to courts in this State 6

Article 9. Right of direct access 6

Article 10. Limited jurisdiction 6

Article 11. Application by a foreign representative to commence a proceeding under [*identify laws of the enacting State relating to insolvency*] 6

Article 12. Participation of a foreign representative in a proceeding under [*identify laws of the enacting State relating to insolvency*] 6

Article 13. Access of foreign creditors to a proceeding under [*identify laws of the enacting State relating to insolvency*] 6

Article 14. Notification to foreign creditors of a proceeding under [*identify laws of the enacting State relating to insolvency*] 7

Chapter III. Recognition of a foreign proceeding and relief 8

Article 15. Application for recognition of a foreign proceeding 8

Article 16. Presumptions concerning recognition 8

Article 17. Decision to recognize a foreign proceeding 9

		Page
Article 18.	Subsequent information	9
Article 19.	Relief that may be granted upon application for recognition of foreign proceeding	9
Article 20.	Effects of recognition of a foreign main proceeding	10
Article 21.	Relief that may be granted upon recognition of a foreign proceeding	11
Article 22.	Protection of creditors and other interested persons	12
Article 23.	Actions to avoid acts detrimental to creditors	12
Article 24.	Intervention by a foreign representative in proceedings in this State	12
Chapter IV.	Cooperation with foreign courts and foreign representatives	13
Article 25.	Cooperation and direct communication between a court of this State and foreign courts or foreign representatives	13
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	13
Article 27.	Forms of cooperation	13
Chapter V.	Concurrent proceedings	14
Article 28.	Commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] after recognition of a foreign main proceeding	14
Article 29.	Coordination of a proceeding under [*identify laws of the enacting State relating to insolvency*] and a foreign proceeding	14
Article 30.	Coordination of more than one foreign proceeding	15
Article 31.	Presumption of insolvency based on recognition of a foreign main proceeding	15
Article 32.	Rule of payment in concurrent proceedings	15

Part Two. Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency

I.	Purpose and origin of the Model Law	19
A.	Purpose of the Model Law	19
B.	Origin of the Model Law	20
C.	Preparatory work and adoption	22
II.	Purpose of the Guide to Enactment and Interpretation	24

		Page
III.	The model Law as a vehicle for the harmonization of laws	24
	A. Flexibility of a model law	25
	B. Fitting the Model Law into existing national law	25
IV.	Main features of the model law	26
	A. Access	27
	B. Recognition	28
	C. Relief	29
	D. Cooperation and coordination	30
V.	Article-by-article remarks	32
	A. Preamble	32
	B. Chapter I. General provisions	34
	Article 1. Scope of application	34
	Article 2. Definitions	37
	Article 3. International obligations of this State	48
	Article 4. [*Competent court or authority*]	49
	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	51
	Article 6. Public policy exception	52
	Article 7. Additional assistance under other laws	53
	Article 8. Interpretation	54
	C. Chapter II. Access of foreign representatives and creditors to courts in this State	55
	Article 9. Right of direct access	55
	Article 10. Limited jurisdiction	55
	Article 11. Application by a foreign representative to commence a proceeding under [*identify laws of the enacting State relating to insolvency*]	57
	Article 12. Participation of a foreign representative in a proceeding under [*identify laws of the enacting State relating to insolvency*]	58
	Article 13. Access of foreign creditors to a proceeding under [*identify laws of the enacting State relating to insolvency*]	59
	Article 14. Notification to foreign creditors of a proceeding under [*identify laws of the enacting State relating to insolvency*]	60
	D. Chapter III. Recognition of a foreign proceeding and relief	64
	Article 15. Application for recognition of a foreign proceeding	64

Page

Article 16. Presumptions concerning recognition 68
Article 17. Decision to recognize a foreign proceeding 73
Article 18. Subsequent information 78
Article 19. Relief that may be granted upon application for recognition of a foreign proceeding 80
Article 20. Effects of recognition of a foreign main proceeding . . 82
Article 21. Relief that may be granted upon recognition of a foreign proceeding 87
Article 22. Protection of creditors and other interested persons . . 90
Article 23. Actions to avoid acts detrimental to creditors 91
Article 24. Intervention by a foreign representative in proceedings in this State 93

E. Chapter IV. Cooperation with foreign courts and foreign representatives 94
Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives. 97
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. 97
Article 27. Forms of cooperation 98

F. Chapter V. Concurrent proceedings 100
Article 28. Commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] after recognition of a foreign main proceeding 100
Article 29. Coordination of a proceeding under [*identify laws of the enacting State relating to insolvency*] and a foreign proceeding 102
Article 30. Coordination of more than one foreign proceeding . . . 104
Article 31. Presumption of insolvency based on recognition of a foreign main proceeding 105
Article 32. Rule of payment in concurrent proceedings 106

VI. Assistance from the UNCITRAL secretariat 108
A. Assistance in drafting legislation 108
B. Information on the interpretation of legislation based on the Model Law 108

Annexes

I. General Assembly resolution 52/158 of 15 December 1997 109
II. Decision of the United Nations Commission on International Trade Law 111

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.

---

[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.

---

[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.

---

[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.

---

[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 *(s)* and *(u)*.

[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. 7.1.

(c) Guide to Enactment and Interpretation (continued)

A/CN.9/WG.V/WP.103, paras. 67-68A, 71-72, 23-23G, 69-70, 31-31C and 73-75B.

A/CN.9/742, paras. 25-36 and 58.

A/CN.9/WG.V/WP.107, paras. 68, 23A-24G, 31 and 73-75B.

A/CN.9/763, paras. 23-25.

A/CN.9/WG.V/WP.112, paras. 68-68A, 71-72, 23-23C, 24-24G, 70, 31-31C and 73-75B.

A/CN.9/766, paras. 27-28.

Article 3. International obligations of this State

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

91. Article 3, expressing the principle of supremacy of international obligations of the enacting State over internal law, has been modelled on similar provisions in other model laws prepared by UNCITRAL.

92. In enacting the article, the legislator may wish to consider whether it would be desirable to take steps to avoid an unnecessarily broad interpretation of international treaties. For example, the article might result in giving precedence to international treaties that, while dealing with matters covered also by the Model Law (e.g. access to courts and cooperation between courts or administrative authorities), were aimed at the resolution of problems other than those the Model Law focuses on. Some of those treaties, only because of their imprecise or broad formulation, may be misunderstood as dealing also with matters dealt with by the Model Law. Such a result would compromise the goal of achieving uniformity and facilitating cross-border cooperation in insolvency matters and would reduce certainty and predictability in the application of the Model Law. The enacting State might wish to provide that, in order for article 3 to displace a provision of the national law, a sufficient link must exist between the international treaty concerned and the issue governed by the provision of the national law in question. Such a condition would avoid the inadvertent and excessive restriction of the effects of the legislation implementing the Model Law. However, such a provision should not go so far as to impose a condition that the treaty concerned has to deal specifically with insolvency matters in order to satisfy that condition.

93. While in some States binding international treaties are self-executing, in other States those treaties are, with certain exceptions, not self-executing in that they require internal legislation in order to become enforceable law. With respect to the latter group of States, in view of their normal practice in dealing with international treaties and agreements, it would be inappropriate or unnecessary to include article 3 in their legislation or it might be appropriate to include it in a modified form.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 159-162.

A/CN.9/WG.V/WP.44, p. 11.

A/CN.9/422, paras. 66-67.

A/CN.9/WG.V/WP.46, p. 7.

A/CN.9/433, paras. 42-43.

A/CN.9/WG.V/WP.48, pp. 7-8.

A/CN.9/435, paras. 114-117.

(b) Guide to Enactment

A/CN.9/436, para. 46.

A/CN.9/442, paras. 76-78.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.107, para. 78.

A/CN.9/763, para. 26.

A/CN.9/WG.V/WP.112, para. 78.

A/CN.9/766, para. 29.

Article 4. [Competent court or authority][1]

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

[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.

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.

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	*(b) Guide to Enactment*
A/52/17, paras. 111-112.	A/CN.9/442, paras. 192-193.

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

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

235. In some jurisdictions, proof that the debtor is insolvent is required for the commencement of insolvency proceedings. In other jurisdictions, insolvency proceedings may be commenced under specific circumstances defined by law that do not necessarily mean that the debtor is in fact insolvent; those circumstances may be, for example, cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissipation of its assets or abandonment of its establishment.

236. In jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of a foreign main proceeding, a rebuttable presumption of insolvency of the debtor for the purposes of commencing an insolvency proceeding in the enacting State. The presumption does not apply if the foreign proceeding is a non-main proceeding. The reason is that an insolvency proceeding commenced in a State other than the State where the debtor has the centre of its main interests does not necessarily mean that the debtor is to be subject to laws relating to insolvency in other States.

237. For the national laws where proof that the debtor is insolvent is not required for the commencement of insolvency proceedings, the presumption established in article 31 may be of little practical significance and the enacting State may decide not to enact it.

238. This rule, however, would be helpful in those legal systems in which commencement of an insolvency proceeding requires proof that the debtor is in fact insolvent. Article 31 would have particular significance when proving insolvency as the prerequisite for an insolvency proceeding would be a time-consuming exercise and of little additional benefit bearing in mind that the debtor is already in an insolvency proceeding in the State where it has the centre of its main interests and the commencement of a local proceeding may be urgently needed for the protection of local creditors. Nonetheless, the court of the enacting State is not bound by the decision of the foreign court, and local criteria for demonstrating insolvency remain operative, as is clarified by the words "in the absence of evidence to the contrary".

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 94 and 102-105.

A/CN.9/WG.V/WP.44, p. 27.

A/CN.9/422, para. 196.

A/CN.9/WG.V/WP.46, p. 18.

A/CN.9/433, paras. 173 and 180-181.

A/CN.9/WG.V/WP.48, p. 23.

A/CN.9/435, paras. 180 and 184.

(b) Guide to Enactment

A/CN.9/436, para. 97.

A/CN.9/442, paras. 194-197.

(c) Guide to Enactment and Interpretation

A/CN.9/WG.V/WP.103/Add.1, para. 197.

A/CN.9/742, para. 71.

A/CN.9/WG.V/WP.112, para. 197.

A/CN.9/766, para. 53.

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [*identify laws of the enacting State relating to insolvency*] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

239. The rule set forth in article 32 (sometimes referred to as the hotch-potch rule) is a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to avoid situations in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. For example, an unsecured creditor has received 5 per cent of its claim in a foreign insolvency proceeding; that creditor also participates in the insolvency proceeding in the enacting State, where the rate of distribution is 15 per cent; in order to put the creditor in the equal position as the other creditors in the enacting State, the creditor would receive 10 per cent of its claim in the enacting State.

240. Article 32 does not affect the ranking of claims as established by the law of the enacting State and is solely intended to establish the equal treatment of creditors of the same class. To the extent claims of secured creditors or creditors with rights *in rem* are paid in full (a matter that depends on the law of the State where the proceeding is conducted), those claims are not affected by the provision.

241. The words "secured claims" are used to refer generally to claims guaranteed by particular assets, while the words "rights *in rem*" are intended to indicate rights relating to a particular property that are enforceable also against third parties. A given right may fall within the ambit of both expressions, depending on the classification and terminology of the applicable law. The enacting State may use another term or terms for expressing those concepts.

Discussion in UNCITRAL and in the Working Group

(a) Model Law

A/52/17, paras. 130-134.

A/CN.9/419, paras. 89-93.

A/CN.9/WG.V/WP.44, pp. 29-30.

A/CN.9/422, paras. 198-199.

A/CN.9/WG.V/WP.46, p. 18.

A/CN.9/433, paras. 182-183.

A/CN.9/WG.V/WP.48, p. 23.

A/CN.9/435, paras. 96 and 197-198.

(b) Guide to Enactment

A/CN.9/436, para. 98.

A/CN.9/442, paras. 198-200.

VI. Assistance from the UNCITRAL Secretariat

A. Assistance in drafting legislation

242. The UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. Further information may be obtained from the UNCITRAL secretariat (mailing address: Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060-4060; facsimile: (+43-1) 26060-5813; e-mail: uncitral@uncitral.org; Internet home page: http://www.uncitral.org).

B. Information on the interpretation of legislation based on the Model Law

243. The Model Law is included in the Case Law on UNCITRAL Texts (CLOUT) information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws developed by UNCITRAL. The purpose of the system is to promote international awareness of those legislative texts and to facilitate their uniform interpretation and application. The secretariat publishes abstracts of decisions in the six official languages of the United Nations and the full, original decisions are available, upon request. The system is explained in a user's guide that is available on the above-mentioned Internet home page of UNCITRAL.

Annex I

General Assembly resolution 52/158 of 15 December 1997

52/158. Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it created the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Noting that increased cross-border trade and investment leads to greater incidence of cases where enterprises and individuals have assets in more than one State,

Noting also that when a debtor with assets in more than one State becomes subject to an insolvency proceeding, there often exists an urgent need for cross-border cooperation and coordination in the supervision and administration of the insolvent debtor's assets and affairs,

Considering that inadequate coordination and cooperation in cases of cross-border insolvency reduce the possibility of rescuing financially troubled but viable businesses, impede a fair and efficient administration of cross-border insolvencies, make it more likely that the debtor's assets would be concealed or dissipated and hinder reorganizations or liquidations of debtors' assets and affairs that would be the most advantageous for the creditors and other interested persons, including the debtors and the debtors' employees,

Noting that many States lack a legislative framework that would make possible or facilitate effective cross-border coordination and cooperation,

Convinced that fair and internationally harmonized legislation on cross-border insolvency that respects the national procedural and judicial systems and is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,

Considering that a set of internationally harmonized model legislative provisions on cross-border insolvency is needed to assist States in modernizing their legislation governing cross-border insolvency,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Cross-Border Insolvency contained in the annex to the present resolution;[a]

2. *Requests* the Secretary-General to transmit the text of the Model Law, together with the Guide to Enactment of the Model Law prepared by the Secretariat, to Governments and interested bodies;

3. *Recommends* that all States review their legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system and, in that review, give favourable consideration to the Model Law, bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency;

4. *Recommends also* that all efforts be made to ensure that the Model Law, together with the Guide, become generally known and available.

72nd plenary meeting
15 December 1997

[a] 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 inter-governmental and non-governmental organizations active in the field of insolvency law reform in the revision of the Guide to Enactment of the Model Law,

[37] General Assembly resolution 52/158, annex (model law only).
[38] A/CN.9/442, annex.

"*Expressing* its appreciation to Working Group V (Insolvency Law) for its work in revising the Guide to Enactment of the Model Law,

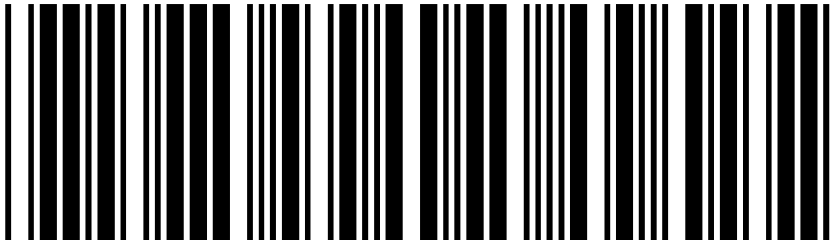
"1. *Adopts* the *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* contained in document A/CN.9/WG.V/WP.112, as revised by the Working Group at its forty-third session (set forth in document A/CN.9/766) and by the Commission at its current session,[39] and authorizes the Secretariat to edit and finalize the text of the Guide to Enactment and Interpretation in the light of those revisions;

"2. *Requests* the Secretary-General to publish, including electronically, the revised text of the Guide to Enactment and Interpretation of the Model Law, together with the text of the Model Law, and to transmit it to Governments and interested bodies, so that it becomes widely known and available;

"3. *Recommends* also that the *Guide to Enactment and Interpretation of the Model Law* be given due consideration, as appropriate, by legislators, policy makers, judges, insolvency practitioners and other individuals concerned with cross-border insolvency laws and proceedings; and

"4. *Recommends* that all States continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency and invites States that have enacted legislation based upon the Model Law to advise the Commission accordingly."

[39] *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 17* (A/68/17), para. 197.



V.13-86394—January 2014—400

V.13-86394
ISBN 978-92-1-133879-5

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

Decision of the United Nations Commission on International Trade Law (UNCITRAL)

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as fostering entrepreneurial activity and preserving employment,

Convinced that the law of recognition and enforcement of judgments is becoming more and more important in a world in which it is increasingly easy for enterprises and individuals have assets in more than one State and to move assets across borders,

Considering that international instruments on the recognition and enforcement of judgments in civil and commercial matters exclude insolvency-related judgments from their scope,

Concerned that inadequate coordination and cooperation in cases of cross-border insolvency, including uncertainties associated with recognition and enforcement of insolvency-related judgments, can operate as an obstacle to the fair, efficient and effective administration of cross-border insolvencies, reducing the possibility of rescuing financially troubled but viable businesses, making it more likely that the debtor's assets would be concealed or dissipated and hindering reorganizations or liquidations that would be the most advantageous for all interested persons, including the debtors, the debtors' employees and the creditors,

Convinced that fair and internationally harmonized legislation on cross-border insolvency that respects 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,

Appreciating the support for and the participation of international intergovernmental and non-governmental organizations active in the field of insolvency law reform in the development of a draft model law on recognition and enforcement of insolvency-related judgments and its guide to enactment,

Expressing its appreciation to Working Group V (Insolvency Law) for its work in developing the draft model law on recognition and enforcement of insolvency-related judgments and its guide to enactment,

1. *Adopts* the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, as it appears in annex II to the report of the fifty-first session of the Commission, and its Guide to Enactment, consisting of the text set forth in A/CN.9/WG.V/WP.157 with the amendments listed in document A/CN.9/955 and further amendments adopted by the Commission at its fifty-first session;

2. *Requests* the Secretary-General to publish the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments and the Guide to Enactment, including electronically, in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments when revising or adopting legislation relevant to insolvency and invites States that have used the Model Law to advise the Commission accordingly; and

4. *Recommends* also that all States continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency (1997).

1080th meeting
2 July 2018

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

Preamble

1. The purpose of this Law is:

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

(b) To avoid the duplication of insolvency proceedings;

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

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

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

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

2. This Law is not intended:

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

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

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

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

Article 1. Scope of application

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

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

Article 2. Definitions

For the purposes of this Law:

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

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

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

(d) "Insolvency-related judgment":

(i) Means a judgment that:

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

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

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

Article 3. International obligations of this State

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

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

Article 4. Competent court or authority

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

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

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

Article 6. Additional assistance under other laws

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

Article 7. Public policy exception

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

Article 8. Interpretation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 12. Provisional relief

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

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

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

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

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

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

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

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

(b) The person seeking recognition and enforcement of the insolvency-related judgment is an insolvency representative within the meaning of article 2, subparagraph (b), or another person entitled to seek recognition and enforcement of the judgment under article 11, paragraph 1;

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

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

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

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

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

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

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

(b) The judgment was obtained by fraud;

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

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

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

(f) The judgment:

(i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and

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

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

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

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

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

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

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

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

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

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

Article 15. Equivalent effect

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

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

Article 16. Severability

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

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

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

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

---

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

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----------X
In re:

ADOPTION OF JUDICIAL INSOLVENCY
NETWORK MODALITIES OF
COURT-TO-COURT COMMUNICATION
----------X

General Order M-532

WHEREAS, on February 1, 2017, the United States Bankruptcy Court for the Southern District of New York (the "Court") entered General Order M-511: Procedural Guidelines for Communication and Corporation Between Courts in Cross-Border Insolvency Matters, which adopted; the Guidelines proposed by the Judicial Insolvency Network ("JIN").

WHEREAS, on July 25, 2019, the JIN announced its proposal of the Modalities of Court-to-Court Communication (the "Modalities"); it is hereby

Ordered that:

1. Effective immediately, the Court adopts the Modalities attached hereto.

2. Pursuant to section 4 (c) of the Modalities, the Court appoints the Clerk of Court, and, in the Clerk of Court's absence, the Chief Deputy Clerk, as the Facilitator.

3. Pursuant to section 7 of the Modalities, the Court identifies English as the language in which initial communication may be made.

/s/ Cecelia G. Morris
Cecelia G. Morris
Chief United States Bankruptcy Judge

Dated: September 4, 2019

MODALITIES OF COURT-TO-COURT COMMUNICATION

Scope and definitions

1. These Modalities apply to direct communications (written or oral) between courts in specific cases of cross border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction ("Parallel Proceedings"). Nothing in this document precludes indirect means of communication between courts, (e.g., through the parties or by exchange of transcripts, etc.) This document is subject to any applicable law.

2. These Modalities govern only the mechanics of communication between courts in Parallel Proceedings. For the principles of communications (e.g., that court-to-court communications should not interfere with or take away from the jurisdiction or the exercise of jurisdiction by a court in any proceedings, etc.), reference may be made to General Order M-511: *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* (the "Guidelines").

3. These Modalities contemplate contact being initiated by an "Initiating Judge" (defined below). The parties before such judge may request him or her to initiate such contact, or the Initiating Judge may seek it on his or her own initiative.

4. In this document:
    a. "Initiating Judge" refer to the judge initiating communication in the first instance;
    b. "Receiving Judge" refers to the judge receiving communication in the first instance;
    c. "Facilitator" refers to the person(s) designated by the court where the Initiating Judge sits or the court where the Receiving Judge sits (as the case may be) to initiate or receive communications on behalf of the Initiating Judge or the Receiving Judge in relation to the Parallel Proceedings. The Facilitator shall be the Clerk of the Court, and in the Clerk of Court's absence, the Chief Deputy Clerk.

Designation of Facilitator

5. The Receiving Judge will supervise the initial steps in the communication process after being informed of the request by the Facilitator.

6. The Court will prominently publish the contact details of the Facilitator on its website.

7. The language in which initial communications may be made is English. The Court will prominently so state and decide the technology available to facilitate communication between or among courts (e.g. and disclose telephonic and/or video conference capabilities, any secure channel email capacity, etc.) on its website.

Initiating communication

8. To initiate communication in the first instance, the Initiating Judge may require the parties over whom he or she exercises jurisdiction to obtain the identity and contact details of the Facilitator of the other court in the Parallel Proceedings, unless the information is already known to the Initiating Judge.

9. The first contact with the Receiving Judge should be in writing, including by email, from the Facilitator of the Initiating Judge's court to the Facilitator of the Receiving Judge's court, and contain the following:
    a. the name and contact details of the Facilitator of the Initiating Judge's court;
    b. the name and title of the Initiating Judge as well as contact details of the Initiating Judge if the Receiving Judge wishes to contact the Initiating Judge directly and such contact is acceptable to the Initiating Judge;
    c. the reference number and title of the case filed before the Initiating Judge and the reference number and title (if known; otherwise, some other unique identifier) of the case filed before the Receiving Judge in the Parallel Proceedings;
    d. the nature of the case (with the due regard to confidentiality concerns);

e. whether the parties before the Initiating Judge have consented to the communication taking place (if there is any order of court, direction or protocol for court -to-court communication for the case approved by the Initiating Judge, this information should also be provided);
f. if appropriate, the proposed date and time for the communication requested (with due regard to time differences); and
g. the specific issue(s) on which communication is sought by the Initiating Judge.

Arrangements for communication

10. The Facilitator of the Initiating Judge's court and the Facilitator of the Receiving Judge's may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation of counsel or the parties unless otherwise ordered by one of the courts.

11. The time, method and language of communication should be to the satisfaction of the Initiating Judge and the Receiving Judge, with due regard given to the need for efficient management of the Parallel Proceedings.

12. Where translation or interpretation services are required, appropriate arrangements shall be made, as agreed by the courts. Where written communication is provided through translation, the communication in its original form should also be provided.

13. Where it is necessary for confidential information to be communicated, a secure means of communication should be employed where possible.

Communication between the Initiating Judge and the Receiving Judge

14. After the arrangements for communication have been made, discussion of the specific issue(s) on which communication was sought by the Initiating Judge and subsequent communications in relation thereto should, as far as possible, be carried out between the

Initiating Judge and the Receiving Judge in accordance with any protocol or order for communication and cooperation in Parallel Proceedings[1].

15. If the Receiving Judge wishes to by-pass the use of a Facilitator, and the Initiating Judge has indicated that he or she is amenable, the judges may communicate with each other about the arrangements for the communication without the necessity for the participation of counsel or the parties.

16. Nothing in this document should limit the discretion of the Initiating Judge to contact the Receiving Judge directly in exceptional circumstances.

[1] See Guideline 2 of the *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters.*

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: AGROKOR d.d., *et. al.*, Foreign Debtors.	**FOR PUBLICATION** Case No. 18-12104 Chapter 15

MEMORANDUM OPINION GRANTING RECOGNITION AND ENFORCEMENT OF FOREIGN DEBTORS' SETTLEMENT AGREEMENT WITHIN THE TERRITORIAL JURISDICTION OF THE UNITED STATES

***APPEARANCES*:**

KIRKLAND & ELLIS LLP
Counsel to the Foreign Representative
601 Lexington Avenue
New York, New York 10022
By: James H.M. Sprayregen, Esq.
Daniel Rudewicz, Esq.

KIRKLAND & ELLIS LLP
Counsel to the Foreign Representative
300 North LaSalle
Chicago, Illinois 60654
By: Adam C. Paul, Esq.
Brad Weiland, Esq.
Whitney Fogelberg, Esq.

MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

Agrokor d.d. ("Agrokor") and eight debtor affiliates filed these Chapter 15 cases.[1] They are a small part of a larger group of 77 companies headquartered in the Republic of Croatia that are the subject of an extraordinary administration proceeding in a Croatian court under a new Croatian law applicable to systemically important business entities or groups. The foreign

[1] The Chapter 15 cases were filed by Agrokor d.d.; Agrokor Trgovina d.o.o.; Belje d.d.; Ledo d.d.; Jamnica d.d.; Konzum d.d.; PIK-Vinkovci d.d.; Vupik d.d.; and Zvjezda d.d. (hereinafter, the "Foreign Debtors").

representative appointed by the Croatian court (the "Foreign Representative" or "Extraordinary Administrator") asks this Court to recognize the Croatian proceeding as a foreign main proceeding, to recognize him as the foreign representative and to recognize and enforce the restructuring plan reached in the Croatian proceeding (the "Settlement Agreement") within the territorial jurisdiction of the United States.

The proceeding in Croatia (the "Croatian Proceeding") was filed under Croatia's "Act on the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia" (the "EA Law"). The statute's purpose is the "protection of sustainability of operations of the companies of systemic importance for the Republic of Croatia which with its operations individually or together with its controlled or affiliated companies affect the entire economic, social, and financial stability of the Republic of Croatia." The law was adopted on April 7, 2017, shortly before Agrokor and its debtor affiliates commenced the proceeding in the Croatian court. The new law will be available to all companies that are determined to be systemically important to the Republic of Croatia; it is not a specialized law only applicable to Agrokor. That said, Agrokor and its debtor affiliates' (the "Agrokor Group") financial distress and the resulting threat of systemic impact upon the Croatian economy was, no doubt, the impetus for the creation of the new law.

One of the more controversial aspects of the EA Law is that its provisions for reorganization and adjustment of debts apply to enterprise groups of companies that have a principal place of business in Croatia and exist under Croatian law, though they may operate both in and outside of Croatia. In this case, while 77 companies of the group are based in Croatia, they are part of a larger group of approximately 155 companies that operate outside of

Croatia as well. How to deal with the cross-border insolvency of enterprise groups raises some of the most important issues in evolving cross-border insolvency law and practice.[2]

The Agrokor Group was, and remains, the largest private company by revenue in Croatia. It was insolvent and qualified by amount of debt and number of employees for eligibility to file under the EA Law. Once a company qualifies for an extraordinary administration proceeding, the Croatian statute includes provisions for the negotiation, acceptance by creditors and approval by the Croatian court of a settlement agreement—essentially a plan of reorganization that adjusts the debt and ownership interests of distressed companies. In accordance with the law's provisions, the Settlement Agreement was successfully negotiated, approved by the requisite vote of creditors and then approved by the Commercial Court of Zagreb in Croatia. Final approval of the Settlement Agreement is pending in the High Commercial Court, where 92 appeals were lodged against the ruling confirming the Settlement Agreement. According to counsel to the Foreign Representative's *Brief in Further Support*, the decisions of the High Commercial Court are not expected before the end of November 2018. ("Brief in Further Support," ECF Doc. # 24 ¶ 45.) The Foreign Representative asks that, in addition to recognizing him as the "foreign representative" within the meaning of the Bankruptcy Code and recognizing the Croatian Proceeding as a foreign main proceeding within the meaning of the Bankruptcy Code, this Court should also recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States.

The requests to recognize the Foreign Representative as the "foreign representative," and the Croatian Proceeding as a foreign main proceeding, present relatively straightforward

[2] UNCITRAL Working Group V continues its work developing principles for dealing with such issues. *See* UNCITRAL: WORKING GROUP V, http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html (last visited Oct. 22, 2018).

questions of the application of Chapter 15; both requests were approved by this Court in an Order entered on September 21, 2018. (ECF Doc. # 30.) That Order reserved decision on the request to recognize and enforce the Settlement Agreement, as it raised more challenging issues.

Recognition and enforcement of the Settlement Agreement within the territorial jurisdiction of the United States require this Court to determine whether it may and should enforce provisions of the Settlement Agreement that modify English law governed debt. While the Croatian Proceeding of Agrokor has been recognized as a foreign main proceeding in the High Court of England and Wales, that court has not so far been asked to recognize and enforce the Settlement Agreement. English case law may not permit a court outside of England and Wales (such as the Croatian court that approved the Settlement Agreement) to approve a discharge or modification of English law governed debt so that recognition and enforcement of the Settlement Agreement by that court might not be granted. For the reasons explained below, however, the Court resolves this challenging issue, recognizing and enforcing the Settlement Agreement, including the provisions modifying the English law governed debt, within the territorial jurisdiction of the United States.[3]

This case presents challenging issues with very practical consequences. The Foreign Debtors (with their COMI in Croatia) presently have over €1,660 million of debt governed by English law (English Law Governed Loans, defined below) and over €925 million of debt governed by New York law (New York Law Governed Notes, defined below); thus, the majority (about 64%) of the debt to be restructured under the Settlement Agreement is governed by

[3] Because final approval of the Settlement Agreement awaits the outcome of the pending appeals in Croatia, this Court will not enter an order recognizing and enforcing the Settlement Agreement unless and until the Settlement Agreement becomes effective in Croatia. If material changes are made in the Settlement Agreement before it becomes effective in Croatia, the Foreign Representative will need to seek further approval from the Court before an order recognizing and enforcing the Settlement Agreement, as amended, is entered.

English law. Can it really be that a court in Croatia that properly has jurisdiction over the Foreign Debtors' insolvency proceeding cannot oversee and approve the Foreign Debtors' reorganization, and the resolution of all claims against the Foreign Debtors, under a national insolvency law and court procedures that satisfy widely recognized standards of fairness and due process? More directly to the point, should a U.S. Bankruptcy Court decline to extend comity to the decision of the court in Croatia to recognize and enforce within the territorial jurisdiction of the United States the Settlement Agreement that was approved by the required vote of creditors and by the court in Croatia in a proceeding that satisfied due process standards? Of course, such a decision by this Court recognizing and enforcing the Settlement Agreement would not mean that the Settlement Agreement would be recognized and enforced in other countries. So, the Foreign Debtors might well be wise either to seek recognition and enforcement of the Settlement Agreement in the courts of England and Wales, or to commence an insolvency proceeding or scheme of arrangement in England, if either of those things can be done, even if it requires costly and duplicative proceedings in England.

The difficulties here arise because the courts in England and Wales still apply the so-called "*Gibbs*" rule, based on an 1890 decision of the Court of Appeal in *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 (hereinafter, "*Gibbs*"). While *Gibbs* is discussed further below, the essence of the decision is that where a debtor, in that case domiciled in France, made a contract governed by English law and to be performed in England, was declared a bankrupt and its debts discharged under foreign law in a foreign proceeding (there, French law in a French proceeding), the plaintiff was not bound by the discharge and could maintain an action on the contract and recover damages in an English court. *Id.* at 406. So, then, can Agrokor's creditors holding English law governed debt (or, at least,

those creditors who did not approve of the Settlement Agreement or did not submit to the jurisdiction of the court in Croatia) bring an action in the courts of England to recover damages on the old English law governed debt? And, even if the creditors can do so in the courts in England, should that prevent this Court from recognizing and enforcing the Settlement Agreement and barring any efforts by creditors to enforce the original debt obligations within the territorial jurisdiction of the United States? While not determinative of the outcome, it should not be lost on anyone that this Court, based on comity principles, has recognized and enforced an English court decision modifying New York law debt in an English scheme of arrangement proceeding. *See In re Avanti Commc'n Grp. PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018).

Whether the *Gibbs* rule as written still applies more than 120 years after the decision was rendered remains an important issue in cross-border insolvency cases, particularly because of the substantial changes that have taken place across the globe in insolvency laws and recognition and enforcement of decisions of other courts. Courts in England and Wales, and elsewhere, still grapple with the *Gibbs* rule and the issue is currently on appeal in the Court of Appeal of England and Wales. Whatever the outcome of that decision, the matter remains to be decided by this Court whether to recognize and enforce the Settlement Agreement approved by the court in Croatia within the territorial jurisdiction of the United States.[4]

[4] During the recognition hearing on August 27, 2018 the Court raised questions and suggested that it seemed more appropriate to defer decision whether the Croatian court could approve modification of English law debt to the court in England that has already recognized the Croatian Proceeding as a foreign main proceeding. As explained in this Opinion, the Court has concluded that it is appropriate for this Court to decide whether, in the exercise of comity, the Croatian court-approved Settlement Agreement—including provisions modifying English law debt—should be recognized and enforced *within the territorial jurisdiction of the United States.* Of course, if presented with the issue whether the Settlement Agreement should be recognized and enforced in England and Wales (and perhaps in other Commonwealth jurisdictions), the English court is obviously free to decide the issue as it believes appropriate. The Court has concluded that a U.S. court should not leave to another court (here the High Court in London) the decision whether U.S. comity principles entitle the Croatian court decision to recognition and enforcement. The Foreign Representative's counsel argued that a recognized exception to the *Gibbs* rule (*e.g.*, that creditors holding English law debt filed claims or submitted to the jurisdiction of the Croatian court and are therefore bound by the Settlement Agreement) allows this Court to decide that the *Gibbs* rule does not apply. The Court believes that is an issue for the English court to decide if the issue is raised in a proceeding in England.

In deciding whether to recognize and enforce the Settlement Agreement, the Court will also discuss the outcomes in recognition proceedings the Foreign Debtors filed in other jurisdictions. Those proceedings resulted in a patchwork of decisions, recognizing the Croatian Proceeding in cross-border cases in England and Switzerland and denying recognition in cross-border cases in Bosnia-Herzegovina, Montenegro, Serbia and Slovenia. As already stated, this Court has already entered an order recognizing the Croatian Proceeding as a foreign main proceeding. The Court will discuss the rationale of the courts that have either recognized or refused to recognize the Croatian Proceeding. But recognition of the Croatian Proceeding as a foreign main proceeding in this Court is determined by the relevant provisions of the Bankruptcy Code and not by the decisions of the other courts.

Additionally, the Settlement Agreement releases and discharges written guarantees by non-debtor affiliates of both the English law and New York law debt. In appropriate circumstances in Chapter 15 cases, this Court has recognized and enforced such releases. The Court concludes here that those provisions in the Settlement Agreement should be recognized and enforced in these Chapter 15 cases with respect to the nine Foreign Debtors that filed these Chapter 15 cases.

Based upon the analysis that follows, the Court believes that recognition and enforcement of the Settlement Agreement within the United States with respect to the nine Foreign Debtors is an appropriate exercise of comity and application of U.S. law.

I. BACKGROUND

A. The Agrokor Group

Agrokor is the parent company of more than 155 direct and indirect subsidiaries, including not fully owned subsidiaries. ("Settlement Agreement," ECF Doc. # 4 Exhibit C § 3.1.2.) It is a joint stock company under the laws of the Republic of Croatia and has registered share capital amounting to HRK 180.1 million. (*Id.* § 3.1.1.) The shares are divided into 360,246 regular registered shares (which are designated AGKR-R-A), each of which hold a nominal value of HRK 500.00 per share. (*Id.*)

According to the *Verified Petition for (I) Recognition of Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief Under Chapter 15 of the Bankruptcy Code* ("Verified Petition," ECF Doc. # 4), Agrokor and its subsidiaries that have at least 25% of their shares held by Agrokor are subject to the Croatian Proceeding and are referred to as the EA Group, as set forth in article 5, paragraph 2 of the EA Law, described below. There are currently 77 Agrokor Group entities that are parties in the Croatian Proceeding, although as already indicated, only nine of those companies filed the Chapter 15 petitions in these cases. (Verified Petition at 1.) Approximately 80 direct and indirect affiliates of Agrokor that are part of the Agrokor Group are not based in Croatia and are not parties to the extraordinary administration proceeding in Croatia. Those companies predominately operate in Slovenia, Serbia and Bosnia-Herzegovina.[5]

[5] Annex 2 to the Settlement Agreement lists the non-Croatian subsidiaries and affiliates of the Agrokor Group. 23 are located in Serbia, 18 are located in Bosnia and Herzegovina, 15 are located in Slovenia, 6 are in the U.S., 4 are in Montenegro, 3 are in Hungary, and 2 are located in both Macedonia and the Netherlands. There are approximately 11 remaining locations that each contain one or fewer Agrokor Group subsidiaries. Only Croatian subsidiaries and affiliates are subject to the Croatian Proceeding.

B. Business of the Agrokor Group

The Agrokor Group has been in operation since 1989 and, today, is one of the largest companies in Croatia. ("Declaration of Foreign Representative," ECF Doc. # 5 ¶ 4.) The Agrokor Group's primary businesses include Croatia's largest supermarket chain (Konzum d.d.), producer of mineral and spring water (Jamnica d.d.), and producer and distributor of ice cream and frozen foods (Ledo d.d.). In addition, the Agrokor Group contains businesses related to food, agriculture and other sectors. (Declaration of Foreign Representative ¶ 4.)

In April 2017, at the start of the Croatian Proceeding, Agrokor employed more than 60,000 people across Croatia, Slovenia, Serbia and Bosnia-Herzegovina. Its annual revenue was approximately €6.5 billion, which represents approximately 15 percent of the gross domestic product of Croatia. Suppliers and other businesses that are dependent on the Agrokor Group's operations represent a significant further proportion of Croatia's gross domestic product. (Declaration of Foreign Representative ¶ 5.)

Agrokor is structured as a holding company and has historically overseen M&A transactions on behalf of the Agrokor Group. It also sought to provide group-wide: (1) financial reporting, (2) management of capital markets financing and (3) facilitation of operational synergies following M&A transactions. Agrokor's main assets from a macroeconomic perspective are shareholdings in and loans to its operating subsidiaries. Additionally, these subsidiaries pay management fees to cover the costs of central management. (Settlement Agreement § 3.4.) In more concrete terms, Agrokor owns the following key assets, allowing it to perform the above operations, collectively forming the Agrokor Group: (1) shares in its subsidiaries and minority shareholdings in certain other entities; (2) loans, deposits and other

receivables due to the debtor; and (3) certain directly owned real estate (including buildings, tools, plants and machinery). (*Id.*)

C. Capital Structure

In late 2016, Agrokor undertook a substantial refinancing of its existing unsecured debt. (Declaration of Foreign Representative ¶ 6.) Lenders were granted springing maturity clauses in new and amended facilities. (*Id.*) The terms of these new and amended facilities were structured such that each facility would mature early if Agrokor failed to refinance a PIK loan issued by its non-debtor parent company, Adria Group Holding BV (the "PIK Loan") by March 8, 2018. (*Id.*) The PIK Loan was, in turn, secured by a pledge granted by Adria Group Holding BV of all shares it held in Agrokor. (*Id.*) As part of this refinancing, Agrokor also sought a syndicated facility (the "F2 Club Loan") to refinance its existing bonds. (*Id.* ¶ 7.) The F2 Club Loan was entered and the syndication process began in September 2016. (*Id.*) However, the syndication process failed approximately half a year later, in January 2017. (*Id.*) Agrokor began to experience liquidity strains because of, among other things, concerns arising from the failure of the F2 Club Loan syndication, the impact of the PIK Loan springing maturity clauses and the information provided in Agrokor's accounting records. (*Id.* ¶ 8.)

In response to these liquidity concerns, Agrokor sought new financing and ultimately entered the €100 million loan with Sberbank ("Sberbank Loan") in early 2017. (*Id.* ¶ 9.) The Sberbank Loan proved insufficient to avoid an insolvency proceeding. (*Id.*) As a result, on April 7, 2017, Agrokor filed for the commencement of the Croatian Proceeding under the EA Law. The Croatian Proceeding was commenced by order of the Commercial Court of Zagreb (the "Croatian Court") on April 10, 2017, supplemented on April 21, 2017, July 5, 2017 and July 13, 2017 (the "Commencement Order"). (*Id.*)

The valuation of the assets of the Agrokor Group took a substantial blow after the commencement of the Croatian Proceeding. Agrokor announced on April 27, 2017 that there were potential irregularities in its 2016 financial statements which would result in a delay of the publication of its financials. Following this announcement, in May of 2017, PricewaterhouseCoopers ("PWC") was appointed as auditor of the Agrokor Group's Croatia-based companies. In accordance with audit requirements, PwC undertook an audit of twenty-seven of the Agrokor Group's companies in the Republic of Croatia, three companies in Serbia and three companies in Bosnia-Herzegovina. (Settlement Agreement § 3.7.) The consolidated changes in equity in the period from December 31, 2015 to December 31, 2016 resulted in a total equity reduction of approximately €2.9 billion. Overall, this meant that liabilities exceeded total assets by HRK 14.5 billion (€1.9 billion) for that period. (*Id.*) On December 31, 2017, liabilities exceeded total assets by HRK 23.3 billion, a reduction of approximately HRK 9 billion from the preceding year.

The financial results for 2017, published by the Extraordinary Administrator on May 14, 2018, showed that liabilities exceeded assets for that period as well. This financial statement described a consolidation of 105 companies over which the Foreign Debtors exercised control, 52 of which are in the Republic of Croatia (the consolidated group as described in the 2017 Annual Report, "Consolidated Group"). (*Id.*)

1. U.S. Debt

As of the opening of the EA Proceeding, the Settlement Agreement described the total amount of third-party financial liabilities of Agrokor and some of its subsidiaries at HRK 31.5 billion. One large chunk of this debt is comprised of unsecured notes governed by New York

law. According to the Settlement Agreement, the Agrokor Group issued the following unsecured notes (the "New York Law Governed Notes" or "Notes"):

> (1) EUR 325 million 9.125% New York law governed senior notes due to mature in 2020 and USD 300 million 8.875% New York law governed senior notes due to mature in 2020 issued by the Debtor pursuant to an indenture dated as of 10 October 2012; and
> (2) EUR 300 million 9.875% New York law governed senior notes due to mature in 2019 issued by the Debtor pursuant to an indenture dated as of 25 April 2012.

(Settlement Agreement § 3.5.1.1; *see also* Brief in Further Support, ECF Doc. # 24 ¶ 12.)

2. English Debt

The Agrokor Group has substantial additional liabilities governed by English law. The Settlement Agreement lists the following unsecured bank debt obligations (the "English Law Governed Loans"):

> (1) EUR 600 million English law governed loan facility agreement dated 14th March 2014, as amended from time to time, between, among others, Agrokor and Sberbank of Russia and Sberbank Europe AG;
> (2) EUR 50 million English law governed loan facility agreement dated 16th July 2015, as amended from time to time, between, among others, Agrokor and Sberbank Europe AG;
> (3) EUR 350 million English law governed loan facility agreement dated 28th April 2016, as amended from time to time, between, among others, Agrokor and Sberbank of Russia;
> (4) EUR 100 million English law governed term loan facility agreement dated 21st February 2017, as amended from time to time, between, among others, Agrokor and Sberbank of Russia (the "EUR 100m Sberbank Loan");
> (5) EUR 100 million English law governed loan facility agreement dated 14th September 2016, as amended from time to time, between, among others, Agrokor and a group of lenders;
> (6) EUR 100 million English law governed syndicated loan facility agreement dated 14th September 2016, as amended from time to time, between, among others, Agrokor and a group of lenders (the F2 Club Loan); and
> (7) EUR 360 million English law governed loan facility agreement dated 21st June 2014, and as amended by way of an amendment agreement dated 28th October 2016, between, among others, Agrokor and VTB Bank (Austria) AG.

(Settlement Agreement § 3.5.1.2*; see also* Brief in Further Support ¶ 12.)

3. Third Party Releases

There are two forms of third-party releases contemplated by the Settlement Agreement. The Verified Petition of the Foreign Debtors argues that this Court should enforce the Settlement Agreement and the third-party releases contemplated therein. The Verified Petition provides, in relevant part: "The Settlement Agreement contains the Trustee Release and the Bosnian-Herzegovinian Guarantor Release. The Trustee Release Parties and the Bosnian-Herzegovinian Guarantors are not debtors in the Croatian Proceeding. As explained below, this Court may nevertheless adhere to principles of comity and enforce the Trustee Release and the Bosnian-Herzegovinian Guarantor Release." (Verified Petition ¶ 70.)

The English Law Governed Loans and New York Law Governed Notes both benefit from guarantees granted by the following entities: Agrokor Trgovina d.o.o.; Ledo d.d.; Jamnica d.d.; Konzum d.d.; PIK-Vinkovci d.d.; Zvijezda d.d.; Belje d.d.; Vupik d.d.; Ledo d.o.o. Čitluk; Sarajevski kiseljak d.d.; and Konzum d.o.o. Sarajevo. (Verified Petition ¶ 20.) Of the guarantors, the following are Foreign Debtors: Agrokor Trgovina d.o.o.; Ledo d.d.; Jamnica d.d.; Konzum d.d.; PIK- Vinkovci d.d.; Zvijezda d.d.; Belje d.d.; and Vupik d.d. The remaining entities—namely Ledo d.o.o. Čitluk; Sarajevski kiseljak d.d.; and Konzum d.o.o. Sarajevo—are the "Bosnian-Herzegovinian Guarantors," as described in the Verified Petition.[6] (Verified

[6] Paragraph 63 of the Verified Petition provides, "As part of this reorganization, the Settlement Agreement contemplates (i) a release of any and all claim claims, obligations, suits judgments, damages, rights, causes of action and liabilities arising from, in connection with, or relating to the Unsecured Notes or related indentures against The Bank of New York Mellon and BNY Mellon Corporate Trustee Services Limited in their respective capacities as trustee of the Unsecured Notes under the relevant indenture and its current and former affiliates and subsidiaries, and such entities' and their current and former officers, directors, managers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, assigns, principals, members, employees, agents, attorneys, consultants, advisors, representatives and other professionals (such parties, the 'Trustee Released Parties' and such release, the 'Trustee Release'), *see* Settlement Agreement, 18.3.2, and (ii) a release of certain bond

Petition ¶ 63.) These three entities are not Foreign Debtors in these Chapter 15 cases and nothing in this Opinion determines the rights of these entities or of their creditors. The Bosnian-Herzegovinian Guarantors are affiliates of Agrokor. (Annex 2 to the Settlement Agreement) (not available on ECF.) The Bosnian-Herzegovinian Guarantor Release is provided for in section 29.8 of the Settlement Agreement, which is titled "Releases." (Settlement Agreement § 29.8.)

The final sentence of section 29.8.1 of the Settlement Agreement, which deals with releases, contains a carve out. It clarifies that directors, officers and members of management or supervisory boards of any member of the Agrokor Group are not released from liability arising from their conduct. The section states:

> [N]othing in this Cl. 29.8.1 shall operate or be construed to release any person who was a director and/or officer (or member of the management board or supervisory board) of any member of the Agrokor Group prior to the commencement of the EA Proceedings from any liability arising from his or her conduct in such capacity prior to that time.

(Settlement Agreement § 29.8.1.) Two of the Bosnian-Herzegovinian Guarantors—Ledo d.o.o. Čitluk and Sarajevski kiseljak d.d.—are affiliates of the Foreign Debtors and listed as voting "FOR" the Settlement Agreement. ("Croatian Court Order Approving the Settlement Agreement," ECF Doc. # 4 Exhibit B at 302–07.) Both are listed as creditors in voting class B. (*Id.*)

The Court believes it must consider whether these "insider" votes (and any other "insider" votes) taint approval of the Settlement Agreement insofar as recognition and enforcement is concerned. As this Court explained in *In re Avanti Commc'ns. Grp. PLC*, 582 B.R. at 617–18, the Fifth Circuit in *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1043 (5th Cir.

---

guarantees governed by New York law, including guarantees by three non-debtor entities from Bosnia-Herzegovina granted by Ledo d.o.o. Čitluk, Sarajevski kiseljak d.d., and Konzum d.o.o. Sarajevo (such guarantors, the 'Bosnian-Herzegovinian Guarantors' and such release, the 'Bosnian- Herzegovinian Guarantor Release'), *see* Settlement Agreement, 29.8." (Verified Petition ¶ 63.)

2012), affirmed a bankruptcy court's decision in a Chapter 15 case declining to grant comity and to enforce a Mexican court order approving a Mexican reorganization plan that released guarantees of US-based non-debtor affiliates of the Mexican debtor's debt. The *Vitro* plan created only a single class of unsecured creditors and the necessary creditor votes to approve the plan were only achieved by counting the votes of insiders. *In re Vitro S.A.B. de C.V.*, 701 F.3d at 1039. Insider votes are not counted under the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(10) ("If a class is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, *determined without including any acceptance of the plan by any insider*.") (emphasis added). Absent the subsidiaries' votes of intercompany debt in favor of the plan, the *Vitro* plan could not have been approved. *Vitro*, 701 F.3d at 1039. Because the Settlement Agreement here was approved by the required majority vote of creditors, even excluding the "insider" affiliate votes, the Court concludes that *Vitro* does not stand in the way of recognition and enforcement of the Settlement Agreement. Of the total number of creditors entitled to vote, 78.52% of non-insiders by claim amount voted in favor of the plan—this is comfortably above the requisite two-thirds of all voting creditors by claim amount necessary to confirm the plan without including the votes of affiliates.

Section 18.3.2 of the Settlement Agreement discusses the trustee release of BNY Mellon. The agreement provides:

> To the maximum extent permitted under New York law, having regard for (i) the critical, ministerial services heretofore performed and to be performed by BNY Mellon in its respective capacity as trustee of the Notes under the relevant Indenture and pursuant to this Settlement Plan, (ii) the risk that BNY Mellon could incur further fees and expenses under the broad expense reimbursement and indemnification provisions of the Notes and the Indentures to the detriment of the [Agrokor], the Bond Guarantors, their Creditors and their estates, and (iii) the reasonable, commercial expectations of the Noteholders, the [Agrokor] and the Bond Guarantors that the terms of the Notes and the Indentures will be upheld and enforced

> as written under New York law, each of the [Agrokor], the Bond Guarantors and the Noteholders, as of the Settlement Confirmation Date, shall be deemed to have unconditionally released BNY Mellon in its respective capacity as trustee of the Notes under the relevant Indenture, and its current and former affiliates and subsidiaries, and such entities' and their current and former officers, directors, managers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, assigns, principals, members, employees, agents, attorneys, consultants, advisors, representatives and other professionals (the "Trustee Released Parties") from any and all claims, obligations, suits judgments, damages, rights, causes of action and liabilities arising from, in connection with, or relating to the Notes or the Indentures, which any such party may be entitled to assert, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise . . . .

(Settlement Agreement § 18.3.2.)

The section goes on to clarify that BNY Mellon will not be released from any claims for gross negligence or willful misconduct in BNY Mellon's actions as trustee of the Notes. Additionally, BNY Mellon is not deemed released from its obligations in its capacity as trustee of the Notes to take actions necessary under the Settlement Agreement. BNY Mellon and BNY Mellon Corporate Trustee Services Limited are shown as comprising their own class—class C—out of a list of 664 creditors grouped into classes A through E, as listed in the Croatian Court Order Approving the Settlement Agreement. (ECF Doc. # 4 Exhibit D at 287.)

D. Settlement Agreement

Under the Settlement Agreement,[7] the following waterfall is provided for the priority of claims:

> (1) Estate Claims. Unpaid prepetition employee claims; certain court costs, fees, and expenses incurred in connection with the Croatian Proceeding; and post- petition claims have priority over all other claims of the EA Group.
> (2) SPFA Claims. Amounts outstanding under the Super-Priority Term Facilities Agreement.
> (3) Unsecured Claims. All unsecured claims including deficiency claims, intercompany claims and unsecured guarantees of other entities' claims.
> (4) Equity Value. Equity value consists of the remaining Distributable Value after all debt claims are satisfied in full.

(Settlement Agreement § 7.5.)

Impaired claims with a Settlement Recovery amount of less than HRK 40,000 (equivalent to approximately $6,151.48 as of August 10, 2018) (the "Minor Impaired Claims") will receive a payment of a monetary amount in euros, corresponding to the Settlement Recovery of such claim (the "Cash-Out Payment"). (Settlement Agreement § 16.1.2.) The difference between the registered amount of the Minor Impaired Claim and the Settlement Recovery amount paid as a Cash-Out Payment will be discharged. (*Id.*)

Impaired Claims with a Settlement Recovery amount of HRK 40,000 and above will receive a combination of depository receipts of Aisle STAK, which holds all the shares of Aisle Dutch TopCo (the "Depository Receipts") and convertible bonds of Aisle Dutch TopCo in an aggregate nominal amount of up to €1,149 million (the "Convertible Bonds"). (Settlement Agreement § 5.4.) The percentage recovery to the holders of English Law Governed Loans and New York Law Governed Notes is projected to be 50.8 percent.

---

[7] Capitalized terms not defined within this section shall have the meaning attributed to them in the Settlement Agreement.

Each of the Foreign Debtors has secured debt obligations, including loans and operating leases to specific Agrokor Group entities that are secured by share pledges and fixed security over the Agrokor Group's real estate assets. Like section 506(a)(1) of the Bankruptcy Code, a portion of each secured claim against the Foreign Debtors in the Croatian Proceeding will be treated as an unsecured prepetition claim against the debtor entity (and an unsecured prepetition liability) to the extent that the amount of the secured claim exceeds the value of the related secured collateral. (*See* Settlement Agreement § 5.1.)

For secured claims with a separate satisfaction right ("SSR") against any of the Foreign Debtors where the debtor is either (a) the owner of the collateral of the relevant SSR (a "Sole Security Debtor") or (b) if more than one EA Group member granted an SSR, the owner of the collateral that comprises over 50 percent of the total value of SSR securing the relevant claim (a "Main Security Debtor") will assume the secured obligation. More specifically, the holder of such secured claim will retain its SSR and receive a monetary claim in an amount equal to the appraised value of the collateral. (*See* Settlement Agreement § 23.2.1.) This secured claim will be paid back over an eight-year term following a grace period, which is the greater of the original maturity date or two years after the Implementation Commencement Date, at an interest rate of three percent that accrues during the grace period and increases by two percent if in default. (Settlement Agreement § 23.2.1.)

For secured claims with an SSR against any of the Foreign Debtors where the debtor is not a Sole Security Debtor or the Main Security Debtor, the holder of such secured claim will retain its SSR and receive a monetary claim against Aisle HoldCo, in an amount equal to the appraised value of the collateral, and such claim will be paid back over an eight-year term following a grace period, which is the greater of the original maturity date or two years after and

the Implementation Commencement Date, at an interest rate of three percent that accrues during the grace period and increases by two percent if in default. The amount of any secured claim of any of the Foreign Debtors that exceeds the appraised value of all objects of the SSR is treated as an unsecured claim. (Settlement Agreement § 23.2.2.)

E. Recognition of the Croatian Proceeding in Other Jurisdictions

Though the EA Law aims to centralize a debtor's claims in a single court, several jurisdictions have refused to recognize the Croatian Proceeding under their own laws. According to the *Memo on Foreign Recognition Hearings* ("Memo on Foreign Hearings," ECF Doc. # 21) at least some of the Agrokor Group sought recognition of the Croatian Proceeding in six jurisdictions in addition to the United States. Of these foreign recognition requests, only Switzerland has made a final decision to recognize the commencement of the Croatian Proceeding and to give effect to the Extraordinary Administrator to represent debtors and to deal with their assets in Switzerland under the Swiss International Private Law Act. (*Id.* at 4.) The High Court of England and Wales also agreed to recognize the Croatian Proceeding of Agrokor, but an appeal of that decision is pending. Appeals of decisions *rejecting* recognition of the Croatian Proceeding are pending in Slovenia, Serbia, Bosnia-Herzegovina and Montenegro. (*Id.* at 13–122.) A summary of the foreign recognition proceedings relating to the Croatian Proceeding follows.[8] These decisions have no direct impact upon the decision to recognize and enforce the Croatian Proceeding and Settlement Agreement in the U.S.

[8] References to ECF Doc. # 21 in the following sections refer to copies or English translations of the foreign recognition opinions, which are appended to the Memo on Foreign Hearings. These opinions are cited according to page number (and paragraph where possible) for clarity.

1. Slovenia

The Supreme Court of the Republic of Slovenia ("Slovenian Court") decided the issue on March 14, 2018. (ECF Doc. # 21 at 13.) The Slovenian Court explained:

> Since the recognition of a foreign court decision means recognition of its legal effects on the territory of the Republic of Slovenia, only a decision (procedure) which corresponds to the fundamental legal principles of procedures due to insolvency under ZFPPIPP may be recognized. A recognition of a foreign extraordinary administration procedure, that does not ensure an equal treatment of creditors, would adversely affect the public interest of the Republic of Slovenia, which in domestic insolvency procedures determines (and safeguards) the common (basic) principle of equal treatment of creditors, whereas in insolvency procedures with an international element (on its territory) recognizes only financial restructuring procedures or liquidation procedures of the debtor for the joint account of all creditors (which corresponds to the principle of equal treatment of creditors).

(*Id.* at 27.)

The Slovenian Court proceeded to explain that the EA Law (and therefore the Croatian Proceeding) should not be recognized, primarily because it does not comply with Slovenia's insolvency rule that creditors of equal standing should be provided equal treatment. The Slovenian Court states, "it does not even provide the basic rights the creditors would have under the Slovenian insolvency legislation." (*Id.* at 28.) Additionally, the Slovenian Court argues that the extraordinary administration procedure envisioned by the EA Law is subordinated to the interests of Croatia, since the Croatian government selects the extraordinary administrator to conduct the debtor's business. (*Id.*) While not entirely clear, it appears that the Slovenian Court was concerned that the EA Law serves the purpose of protecting the Croatian economy by providing a new form of relief on a somewhat *ad hoc* basis as needed for Agrokor and its subsidiaries.

The Slovenian Court also notes that other countries rejected the recognition of the Croatian extraordinary administration procedure and argued that since several of these countries had laws arising out of the former Yugoslavian Compulsory Composition, Bankruptcy and Liquidation Act (SPPSL), that in a broader public policy context of the region, recognition would not be "justified and proportional." (*Id.* at 28.) Four days after the Supreme Court of the Republic of Slovenia rejected the application for recognition of the Croatian Proceeding, the Extraordinary Administrator appealed that decision to the Constitutional Court of Slovenia; that appeal remains pending.

2. Serbia

The Commercial Appellate Court for the Republic of Serbia confirmed rejection of the Croatian Proceeding on November 13, 2017. (*Id.* at 32.) The Serbian court found that under article 174, paragraph 2 of its Law on Bankruptcy, the Croatian extraordinary administration procedure could not be found to be a "foreign proceeding." (*Id*. at 45.) The court provides several grounds for this conclusion. One issue the Serbian court notes is that the EA Law is not a general law that governs all insolvency in Croatia, but rather is a *sui generis* regulation adopted to protect companies of systemic importance to the Republic of Croatia. The court found it problematic that the level of protection determined under the EA Law is determined by the interest of the Republic of Croatia as opposed to the interests of creditors. (*Id.*) The court states, "the aim of this regulation . . . is not the aim of the collective settlement of creditors, but the protection of the interests of the state, the creator of such a regulation." (*Id.* at 46.) On

December 20, 2017, the Croatian Extraordinary Administrator filed an appeal to the Constitutional Court of Serbia; that appeal remains pending.

3. Federation of Bosnia and Herzegovina

Article 205, Paragraph 1, item 3 of the Federation of Bosnia and Herzegovina ("FB&H") Bankruptcy Law states that to recognize a foreign decision on bankruptcy proceedings or proceedings similar to bankruptcy, such decision must not contravene the legal order of the Federation. (*Id.* at 52.) The court explains that the basic purpose of bankruptcy proceedings should be the collective settlement of creditors and that it does not believe that the EA Law was passed with creditors in mind. The court stated:

> The protection of economic, social and financial stability of the Republic of Croatia cannot jeopardize the FB&H legal order, and this opinion of the first instance court, contrary to the appeal, is not different from the international case law, according to which protection and maintenance of economic, social and financial stability of one country in the proceedings of recognition of a foreign ruling, in a situation where the compulsory regulations are opposed - which is the case here- cannot jeopardize the legal order of another country where the decision is to be recognized, as otherwise the principle of equality would be breached.

(*Id.* at 53.) The Extraordinary Administrator filed an appeal at the Constitutional Court on March 16, 2018; that appeal remains pending.

4. Montenegro

The Montenegro court held that extraordinary administration procedures under the EA Law did not meet the requirements of the Insolvency Act of Montenegro. The court explained:

> [T]he court finds that the extraordinary administration proceeding is not a foreign proceeding in terms of Article 178 paragraph 2 of the Insolvency Act, since it is not a proceeding aimed at the collective settlement of creditors, but at protecting and maintaining economic, social and financial stability of the Republic of Croatia, that is, the sustainability of business operations of certain companies that are of systemic importance for the Republic of Croatia.

(*Id.* at 109.) In other words, because the EA Law seemed primarily concerned with the protection of the interest of the Republic of Croatia rather than the creditors of a certain debtor, the proceeding did not comply with the requirements for recognition in Montenegro. An appeal filed in the Commercial Court of Montenegro is pending.

5. England and Wales

The High Court of England and Wales found that the EA Law and Croatian Proceeding sufficiently satisfied the requirements of a foreign main proceeding under the CBIR, England's adaptation of the Model Law, over the objections of respondent Sberbank. As with the above discussed foreign recognition decisions, it should be noted at the outset that the English decision was rendered before the Settlement Agreement was finalized or voted upon. The English decision was issued on September 11, 2017. Nearly a year later, creditors voted to approve the Settlement Agreement on July 4, 2018. The English decision specifically states that, "recognition of the settlement agreement is not the real question here. That is something for the future. Such recognition will depend at that stage on other considerations, for example the submission by the creditors to the jurisdiction of the foreign proceeding." (*Id.* at 97 ¶ 127.) Therefore, the decision only grants recognition of a foreign main proceeding; it does not make any decisions with respect to the later approved Settlement Agreement.

A transcript of the English hearing shows that several contentions were raised against recognition of the Croatian Proceeding under the Model Law and the CBIR. First, Sberbank's counsel argued that recognition of a "foreign proceeding" under the CBIR is limited to a single debtor and that recognition of the Croatian Proceeding would require recognizing a debtor grouped together with related, but separate entities, in one proceeding.[9] Counsel argued this was

[9] Though Sberbank opposed recognition of the Croatian Proceeding before the English court, it took an active role in negotiating the Settlement Agreement as one of the members of the five-entity interim creditors

problematic because it would allow (1) all the members of the group to participate in a restructuring without requiring each individual member to prove insolvency as a gateway issue and (2) in effect, by consolidating a group of entities, the combined procedure could block a creditor from asserting a distinct claim against a particular debtor. Counsel argued that the combined proceeding effectively created a set of third-party releases for affiliated or sub-companies—counsel for Sberbank gives the example that if someone has advanced finance on terms where they also have guarantees from companies B, C, D, E and F as well as principal debt from company A, consolidation into a single pool with one claim would eradicate the value of any guarantee. ("English Recognition Hearing Transcript," ECF Doc. # 24 Exhibit B at 42.) It argued it was further problematic as applied to Agrokor, because unless Agrokor and its affiliates are grouped as one debtor, the threshold number of employees required under the EA Law is not met. (English Recognition Hearing Transcript at 40.) However, when referencing these arguments, Sberbank's attorney also goes through pains to remind the English court that U.S. courts have adopted the Model Law differently and that the English court is only bound by the CBIR and not U.S. precedent. *(Id.* at 47.) Recognition in England also apparently was sought for a single debtor, Agrokor, on behalf of the whole group. As already stated, Chapter 15 cases were filed in this Court on behalf of nine separate entities.

The High Court of England and Wales ultimately rejected Sberbank's arguments. The High Court concluded:

> The important point is simply this. There is nothing in the CBIR to prevent a foreign proceeding being recognized, which in the foreign court involves a group of companies, but the recognition is sought in this country in

council. (Settlement Agreement § 4.1.3.1) (the members of the creditors council are Sberbank of Russia, Knighthead Capital Management LLC, Zagrebacka Banka d.d., KRAS prehrambena industrija d.d., and Toni Raic). Additionally, Sberbank *voted in favor* of the Settlement Agreement. (Croatian Court Order Approving the Settlement Agreement at 301-07.)

> relation only to a particular individual debtor. In my judgment, the respondent's objection here is without foundation.

(ECF Doc. # 21 at 78 ¶ 54.)

Additionally, the English court concluded that (1) the Croatian Extraordinary Administration Law is a law relating to insolvency for the purposes of CBIR, (2) it is a proceeding under the control or supervision of a court, (3) it is a collective proceeding, (4) it is a law for the purposes of reorganization or liquidation within the meaning of the CBIR and (5) it is not manifestly contrary to English public policy. (*Id.* at 78–98.) In reaching this final public policy conclusion, the court noted that the principal of *pari passu* can be overridden in appropriate cases under English law. (*Id.* at 98 ¶ 131.) The High Court of England and Wales' decision is further discussed below in relation to the *Gibbs* rule and the possible effects of that rule on future proceedings in England. The appeal is to be heard by the Court of Appeal, and the stay will remain in effect while the English proceedings are ongoing.

6. Switzerland

The Court of the Canton of Zug in Switzerland granted recognition of the Croatian Proceeding in a decision issued on February 2, 2018. (ECF Doc. # 21 at 113.) There has been no appeal of this decision; it is final and binding.

7. European Union

On July 4, 2018, the European Parliament added the Recast Insolvency Regulation (EU) 2015/848 to the European Union's Acquis Communautaire the Law on Extraordinary Administration Proceeding for Companies of Systemic Importance for the Republic of Croatia. (Recast Insolvency Regulation, "EU Regulation," ECF Doc. # 21 Appendix D at 161–225.) The EU insolvency regulation was designed to regulate insolvencies. This adoption of the EA Law

ostensibly gave the Croatian Proceeding automatic recognition as an insolvency proceeding, entitled to recognition across all European Union member states. (*Id.* at 217.)

II. DISCUSSION

A. EA Law

On April 7, 2017, Croatia published Official Gazette No. 31/17, the *Law on Extraordinary Administration Proceeding in Companies of Systemic Importance in the Republic of Croatia*. ("Certified Translation from Croatian Language of the Law on Extraordinary Administration Proceeding in Companies of Systemic Importance for the Republic of Croatia," ECF Doc. # 4 Exhibit B at 46–59.) Part 1, article 1, chapter 1 of the EA Law explains:

> This Law is passed for the purpose of protection of sustainability of operations of the companies of systemic importance for the Republic of Croatia which with its operations individually or together with its controlled or affiliated companies affect the entire economic, social, and financial stability of the Republic of Croatia.

(*Id.* at 46.) The Croatian law was passed to try to prevent a wider economic fallout in Croatia and surrounding global markets through restructuring companies of systemic importance to Croatia. In effect, the new law is somewhat reminiscent of the efforts globally to deal with problems of "too big to fail." The Croatian Law appears to be unique in dealing with systemically important *companies* as opposed to systemically important *financial institutions.*

Article 21 of the EA Law provides that either a debtor of systemic importance or such a debtor's creditors, with the debtor's permission, may file an extraordinary proceeding. (*Id.* at 50.) The petition to commence the proceeding is submitted to the Croatian Court, which must then inform the Croatian Government within the same day that a petition has been filed. (*Id.* at 51.) After a petition has been filed, the debtor is estopped from disposing of any assets until the petition is either approved or denied, except for those dispositions necessary for debtor to

maintain its ordinary course of business operations. (*Id.*) The Croatian Court issues the final order that commences the extraordinary proceeding, and upon the court's order commencing a proceeding, notice is posted in the relevant Croatian Court districts, on the public books or records of the debtor and on the Croatian Court's web pages. (*Id.* at 52.) After the commencement of a proceeding under the EA Law, all relevant parties, further detailed below, have fifteen months (twelve months' time is allotted automatically, and the option of an additional three months' time is granted upon request approved by the Croatian Court) to craft a single settlement agreement to resolve all claims against the debtor. (*Id.* at 57.)

The EA Law lists two requirements for a debtor to be considered a company of systemic importance that may file an action under the EA Law. (*Id.* at 46.) Article 4, paragraph 2 provides that in the calendar year preceding the filing of the petition, the debtor, alone or with its controlled or affiliated companies, must (1) employ more than 5,000 employees on average for the year and (2) have balance sheet liabilities of at least the equivalent of HRK 7,500,000,000. (*Id.*) In these calculations determining whether a debtor is of systemic importance to Croatia, article 5, paragraph 2 specifies that affiliated and controlled companies are companies in which the debtor holds at least a 25% ownership interest, have a principal place of business in The Republic of Croatia and exist and operate under Croatian law. (*Id.* at 47.) The requisite amount of debt and employees along with identification of the debtor and its related entities must be proven by the party who files the petition for the extraordinary proceeding (either the debtor or a creditor of the debtor). (*Id.* at 51.)

Article 6 of the EA Law provides that the Croatian Court shall have exclusive jurisdiction in an EA proceeding. (*Id.*) Article 7 further provides that once the EA proceeding has been instituted, there will be a stay of any liquidation or bankruptcy proceedings, as defined under

Croatian law, against the debtor. (*Id.*) To the extent that the EA law is silent regarding procedure, article 8 provides that procedural rules from Croatian bankruptcy proceedings will apply. (*Id.*) Article 10 authorizes the Croatian Court to take any actions or pass any decisions that are not expressly conferred on another entity as the responsibility of that other entity under Croatian Law. (*Id.*)

An extraordinary commissioner ("Extraordinary Commissioner") is appointed by the Croatian Court upon the proposal of the Government of the Republic of Croatia who will represent the debtor solely and independently. (*Id.*) The Extraordinary Commissioner is subject to the provisions of the Croatian Bankruptcy Act's rules governing a bankruptcy receiver in instances where no provision of the EA Law governs directly. (*Id*. at 48.) Together with deputies who may assist him, upon the proposal of the Croatian government and appointment by the Croatian Court, the Extraordinary Commissioner may make decisions regarding the debtor's property but may not make decisions regarding the debtor's property without prior approval of a creditors' committee if the value of the property exceeds HRK 3,500,000. (*Id.*) The commissioner may also bring legal actions on behalf of the debtor and, with approval of a creditors' committee, may assume new debt on behalf of the debtor when necessary to maintain debtor's operations. (*Id*. at 55.) Additionally, at any time, upon the proposal of the Croatian government, the Croatian Court may remove the Extraordinary Commissioner and appoint a new one. (*Id*. at 48.)

The EA Law requires the Extraordinary Commissioner to submit monthly reports regarding the debtor's financial status and the status of the EA proceedings to the central authority of the government administration responsible for economic operations in Croatia (the "Croatian Ministry") for every month between his appointment and the approval of a settlement

agreement under the EA Law. (*Id.*) Additionally, the Extraordinary Commissioner is tasked with electing a restructuring advisor, auditors, legal advisors and other specialized advisors—all of whom must be given prior approval by the Croatian Ministry prior to appointment. (*Id.*)

Article 16 establishes an advisory body ("Advisory Body") that, upon request of the Croatian Ministry or the Croatian Court, will provide opinions regarding the propriety of the Extraordinary Commissioner's decisions under Croatian Law. (*Id.* at 49.) The Advisory Body has five members: one member serves as a representative of the employees of the debtor and may be an employee of the debtor; the other four members must be knowledgeable in business and law, of good reputation and not have been employed by the debtor or any of its affiliates within the ten years leading up to the filing of an EA proceeding. (*Id.*)

In addition to the Advisory Body, EA Law article 18 requires the establishment of a creditors' committee with up to nine members who will serve as representatives of the debtor's creditors. (*Id.*) The Extraordinary Commissioner recommends, and the Croatian Court approves the members of the creditors' committee, who must be categorized according to their legal position and may be subcategorized according to their economic interests in the debtor. (*Id.*) Article 30 provides that each category of creditors is then entitled to designate one member to serve as the category's representative on the creditors' committee. (*Id.* at 53.) The creditors' committee has rights to receive information regarding the debtor and to participate in the preparation and approval of the settlement agreement in conjunction with the Extraordinary Commissioner. (*Id.* at 49–50.) Additionally, article 31 explains that an interim creditors' council ("ICC") will take the role of the permanent creditors' council in the interim until the official committee is established. The ICC assumes and performs all functions of the creditors' council until the official creditors' council is established. (*Id.* at 53–4.)

Articles 32 through 36 provide a procedure for the public listing of claims against debtor and contesting claims. (*Id*. at 54.) The Extraordinary Commissioner creates a table of filed claims, a table of preferential claims and a table of rights to separate satisfaction. (*Id.*) Along with these tables, the Extraordinary Commissioner must clearly indicate whether he contests any of the claims listed in the tables. (*Id.*) The tables of claims and the commissioner's stance on each claim are published on the Croatian Court's website. (*Id.*) If a creditor does not commence a civil proceeding within eight days after publication of the table of claims, the right to contest the claim is deemed waived. (*Id*.) Once a final order is made, a claim, the claim's payment rank and the claim's category of creditors are all considered effective as to both the debtor and all the debtor's other creditors. (*Id.*)

Part VI of the EA Law includes provisions for the negotiation, acceptance by creditors and approval by the court of a settlement agreement. (*Id.* at 56–8.) The settlement agreement envisioned and negotiated under the EA Law is essentially the same as what is usually referred to as a plan of reorganization in other restructuring contexts. Within the prescribed twelve-month (and optional additional three month) period, the Extraordinary Commissioner and creditors' committee must create a single settlement agreement. (*Id.* at 57.) After a settlement agreement is created, it is published on the Croatian Court's website; three days after publication, all creditors are deemed to have notice of the agreement. (*Id*.) Within fifteen days after publication of the settlement agreement, the creditors vote upon the settlement agreement at a hearing. (*Id.*)

Article 43, paragraph 14 describes the voting outcome necessary to pass the settlement agreement. It states:

> The settlement agreement, or plan of reorganization, shall be deemed adopted if a simple majority of all creditors voted for it and if in each category of the sum of claims of creditors who voted for the settlement agreement exceeds the sum of claims of the creditors who voted against the

> acceptance of the settlement agreement. Exceptionally, it shall be deemed that the creditors accepted the settlement agreement if the total sum of claims of the creditors who voted for the settlement agreement amounts to at least two thirds of the total claims.

(*Id.*)

Thus, there are two methods of approving a settlement agreement. (*See id*.) The settlement agreement is approved either if (1) more than half of *all creditors by number* (including non-voting creditors) vote in favor of the Settlement Agreement *and* more than half of all creditors in each class[10] *by value of claims* vote in favor of the Settlement Agreement or (2) two-thirds of *all voting creditors by claim amount* vote in favor of the Settlement Agreement. (*Id.*) In other words, even if the first method of approving the Settlement Agreement cannot be achieved, the Settlement Agreement can still be approved if the sum of *all claims who vote in favor* of the agreement is at least two-thirds of the total amount of *all outstanding claims*. (*Id.*) Article 43, paragraph 18 provides that once the settlement agreement is passed in accordance with paragraph 14, all creditors, even those who do not vote, shall be bound by the agreement. (*Id.* at 58.) Therefore, it does not matter whether a creditor has appeared or voted on the settlement; if the settlement receives the requisite votes, it can be approved and has binding effect upon all creditors. (*See Id.*) These portions of the EA Law governing approval of the settlement agreement therefore create a similar effect to Bankruptcy Code § 1141(d)(1)(A) which provides, in part, that confirmation of a plan "discharges the debtor from any debt that arose

[10] Section 15 of the Settlement Agreement explains "[c]reditors have been classified into classes on the basis of claim type, meaning a single creditor with several types of claims may be represented in multiple classes. Such classification shall be used for the purposes of voting on this Settlement Plan pursuant to Art. 43 EA Act. The classification of Creditors per the above Court resolution is as follows: small suppliers, in which class Creditors whose claims do not exceed HRK 100,00 are classified; large suppliers, in which class Creditors whose claims exceed HRK 100,00 are classified; Noteholders, in which class Creditors who are holders of notes issued by the Debtor are classified; unsecured creditors, in which class Creditors whose claims are not secured by a separate satisfaction right are classified; and secured creditors, in which class Creditors whose claims are secured by a separate satisfaction right are classified." (Settlement Agreement § 15.)

before the date of such confirmation . . . whether or not . . . a proof of claim based on such debt is filed or deemed filed . . . ." *See* 11 U.S.C. § 1141(d)(1)(A).

B. Model Law

In 1997, the United Nations Commission on International Trade Law ("UNCITRAL") promulgated the Model Law on Cross-Border Insolvency (the "Model Law"). Chapter 15 of the Bankruptcy Code, which is based upon the Model Law, was adopted by Congress in 2005. Before 2005, former section 304 of the Bankruptcy Code provided the statutory framework for dealing with ancillary cases filed in the U.S. relating to foreign insolvency proceedings. Many of the principles—particularly comity—that were applied in ancillary proceedings under section 304 were carried forward and apply today in Chapter 15 cases. *See In re Atlas Shipping A/*S, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) ("Nevertheless, many of the principles underlying § 304 remain in effect under chapter 15. Significantly, chapter 15 specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief. This is evidenced by the pervasiveness with which comity appears in chapter 15's provisions. For example, § 1509 specifically requires that if the court grants recognition under § 1517, it 'shall grant comity or cooperation to the foreign representative.' 11 U.S.C. § 1509(b)(3). In addition, § 1507 also explicitly directs the court to consider comity in granting additional assistance to the trustee.").

The Model Law is often described as an attempt to create modified universalism, which essentially entails allowing courts outside of debtors' home countries to open and maintain secondary cases supplemental to the main proceedings. *See, e.g.*, Ian G. Williams & Adrian J. Walters, *Modified Universalism in Our Time? A Look at Two Recent Cases in the U.S. and U.K.*, 37-JUL Am. Bankr. Inst. J. 24 (2018). The U.S. has a long tradition of recognizing foreign

restructuring proceedings. For example, the Supreme Court's 1883 decision in *Gebhard* approved the recognition of a Canadian scheme of arrangement. *Canada Southern Railway Co. v. Gebhard,* 109 U.S. 527 (1883). In *Gebhard*, Chief Justice Waite explained that "the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."[11] *Id.* at 548. *See also Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713–14 (2d Cir. 1987); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 458 (2d Cir. 1985).

As the Second Circuit explained in *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*:

> We have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding. "Since '[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding,' American courts regularly defer to such actions." *Finanz AG,* 192 F.3d at 246 (*quoting Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.,* 825 F.2d 709, 713–14 (2d Cir.1987)); *Allstate Life Ins. Co.,* 994 F.2d at 999. In such cases, deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and (consistent with the principles of Lord Mansfield's holding) do not contravene the laws or public policy of the United States.

412 F. 3d 418, 424 (2d Cir. 2005).

While *Altos Hornos* was decided based on section 304, before Chapter 15 became effective in the U.S., the same principles are enshrined in Chapter 15. *See Atlas Shipping*, 404 B.R. at 738.

---

[11] The Court's decision in *Gebhard* was reached over a strong dissent by Justice Harlan which relied heavily on English case law and commentaries by Joseph Story, James Kent and others that, consistent with the *Gibbs* rule, would not permit a discharge of contractual obligations other than under the law of the place of contracting. *Id.* at 546–47. Justice Harlan was particularly troubled that the discharge in *Gebhard* was based on a legislative act, with no judicial hearing subject to due process requirements, *id.* at 544, which is not an issue in this case because the loan modification here was approved by a creditor vote followed by court approval following notice and a hearing.

C. Comity in Chapter 15

Under the prior section 304 and the current Chapter 15, American courts have recognized the need to extend comity to foreign bankruptcy proceedings. The 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. "The Second Circuit has frequently underscored the importance of judicial deference to foreign bankruptcy proceedings." *In re Int'l Banking Corp. B.S.C.*, 439 B.R. 614, 624 (Bankr. S.D.N.Y. 2010) (citing *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999); *Maxwell*, 93 F.3d at 1048; *Allstate Life Ins. Co. v. Linter Grp. Ltd*., 994 F.2d 996, 999 (2d Cir. 1993); *Cunard*, 773 F.2d at 458).

The issue here is whether this Court, in the exercise of comity, should recognize and enforce the Settlement Agreement approved by the Croatian Court following creditor approval. There is nothing exceptional in the Croatian Court's exercise of jurisdiction over the Croatian Foreign Debtors' assets and creditors' claims in the insolvency proceeding.

In section II.A., the Court has described the provisions of the EA Law in considerable detail. In substance and effect, the EA Law tracks closely to the structure of the U.S. Bankruptcy Code and many other foreign insolvency laws. Creditors' rights to meaningful participation in insolvency proceedings is required and creditor approval of a settlement agreement is also required. As explained in section II.D., below, the record establishes that the EA Proceeding was procedurally fair.

While enterprise group aspects of the EA Law are novel, these Chapter 15 cases dealing with nine entities that have their centers of main interest ("COMI") in Croatia do not push the boundaries of cross-border insolvency law. Therefore, recognition and enforcement of the

Settlement Agreement with respect to the Foreign Debtors safely fall within established principles.[12] As such, is there any basis to decline to recognize and enforce the results?

The Supreme Court concluded in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an *in rem* proceeding. A single court should resolve all claims to property of the debtor, which necessarily requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an *in rem* proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors' rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its prepetition claim. Upon confirmation of a Chapter 11 plan, section 1141(d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan. A successful reorganization would not be possible if creditors could simply ignore the bankruptcy proceeding and then seek to recover on their prior claims. Therefore, the *in rem* classification of a bankruptcy proceeding is key—*in rem* jurisdiction gives the court the authority to administer all the debtor's assets and resolve the rights of all creditors to all the debtor's property, and these are crucial steps in a successful restructuring. There is no reason that these same principles should not apply when considering recognition of the Croatian Proceeding, with the same consequences for a confirmed settlement agreement—namely, the discharge and modification of prepetition claims like the effect of section 1141(d)(1)(A). (*See* Settlement Agreement § 16.1.2.)

Federal courts generally extend comity when the foreign court had proper jurisdiction and

[12] It is noteworthy that no objections were filed to recognition and enforcement of the Settlement Agreement within the territorial jurisdiction of the United States.

enforcement does not prejudice the rights of United States citizens or violate domestic public policy. *See also Cunard S.S. Co. Ltd.,* 733 F.2d at 457. "Comity takes into account the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law." *In re Artimm, S.r.L.,* 335 B.R. 149, 161 (Bankr. C.D. Cal. 2005) (citing *Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.)*, 93 F.3d 1036, 1048 (2d Cir. 1996)).

From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the *Gibbs* rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fail considering the amount of prepetition debt governed by English law.[13] That would be unfortunate, indeed.

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

While recognition of the foreign proceeding turns on the objective criteria under section 1517, "relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity." *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008) (citing §§ 1507, 1521 and 1525). Once a case is recognized as a foreign main proceeding, as has already occurred here, Chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity. *See generally* Allan L. Gropper, *Current Devs. in Int'l Insolvency Law: A United States Perspective*, 15 J. BANKR. L. & PRAC. 2, Art. 3, at 3–5 (2006) (hereinafter "Gropper").

The court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief. *See In re Cozumel Caribe S.A. de C.V.*, 482 B.R. at 114–15 (concluding that a central tenet of Chapter 15 is the importance of comity in cross-border insolvency proceedings); *Atlas Shipping*, 404 B.R. at 738; *see also In re Rede Energia S.A.*, 515 B.R. 69, 93 (Bankr. S.D.N.Y. 2014) (holding that a request for relief by a foreign representative (1) to enforce a foreign reorganization plan and confirmation decision even where the relief provided in the plan conflicts or is inconsistent with the relief available in a Chapter 11 plan, and (2) to enjoin acts in the U.S. in contravention of the plan and decision is relief of a type that courts have previously granted under section 304).

In addition to providing deference to foreign judgements, comity may also allow a U.S. court "to decline to exercise jurisdiction in favor of a pending foreign proceeding," where "the foreign tribunal has taken jurisdiction but not yet issued a judgement." William S. Dodge, *Int'l Comity in Am. Law*, 115 COLUM. L. REV. 2071, 2106 (2015). As between deferring to a foreign judgement or to a foreign pending proceeding, "[w]hat changes is the time at which the question [whether to defer to a foreign tribunal's resolution of a dispute] is asked." *Id.* Courts have

generally recognized their ability to decline to exercise jurisdiction in deference to a case already being adjudicated abroad. *See, e.g.*, *Mujica v. AirScan Inc.,* 771 F.3d 580, 599 (5th Cir. 2014) ("[A]djudicatory comity involves . . . the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction." (citation and quotation marks omitted)); *In re Arcapita Bank B.S.C.(c),* 575 B.R. 229, 238 (S.D.N.Y. 2007) ("[C]omity among the courts or adjudicative comity may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." (citations and quotation marks omitted)); *In re Ionica PLC*, 241 B.R. 829, 841 (Bankr. S.D.N.Y. 1999) (dismissing ancillary proceeding filed under former section 304 because of pending insolvency proceeding in the U.K.).

In other words, this case presents a unique challenge in the exercise of comity under Chapter 15, because the international litigation surrounding the Croatian Proceeding and Settlement Agreement that this Court is asked to recognize and enforce could be seen as complicating this Court's own comity analysis by requiring the Court to consider all of the other countries' decisions in addition to the analysis of whether to extend comity to the Croatian Proceeding and resulting Settlement Agreement on their own merit. However, the Court does not ultimately need to perform the broader analysis of comity with respect to every nation involved, because the Court's decision to recognize and enforce the Settlement Agreement is effective within the territorial jurisdiction of the United States. As such, if a foreign creditor has a claim governed by English law that is modified by the Settlement Agreement and wants to challenge the Croatian modification of that claim, the creditor may still challenge enforcement of the claim in the English courts.

D. Recognition of the Croatian Proceeding and Settlement Agreement in the United States

As previously stated, on September 21, 2018, the Court entered an order recognizing the Croatian Proceeding as a foreign main proceeding. (ECF Doc. # 30.) The analysis supporting that conclusion will not be repeated here. The effects of the decision to recognize the Croatian Proceeding as a foreign main proceeding merit some discussion.

1. Automatic effects of Chapter 15 Foreign Main Proceeding Recognition

Upon a court's determination that a proceeding constitutes a foreign main proceeding as described above, section 1520 of the Bankruptcy Code provides that certain relief commences immediately, while section 1521 provides additional relief that may be granted at the court's discretion. *Compare* 11 U.S.C. § 1520(a) ("Upon recognition of a foreign proceeding that is a foreign main proceeding- (1) sections 361 and 362 apply with respect to . . . property of the debtor that is within the territorial jurisdiction of the United States . . ."), *with* 11 U.S.C. § 1521(a) ("Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purposes of this chapter . . . *the court may* . . . grant *any appropriate relief* . . . ." (emphasis added)).

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

Additionally, once section 1520(a) applies, sections 363, 549 and 552 apply with respect to any transfers of a debtor's interest in property within the United States. 11 U.S.C. §1520(a)(2). These provisions allow a foreign representative to operate the debtor's business in the United States by exercising the rights and powers of a trustee under sections 363 and 552.

2. Discretionary Relief including Recognition of a Plan and Third-Party Releases

The grant of additional, discretionary relief under Chapter 15 is largely dependent upon principles of comity discussed above. *See Atlas Shipping*, 404 B.R. at 738 ("While recognition of the foreign proceeding turns on the objective criteria under § 1517, 'relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity'" (quoting *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008)). Once a case is recognized as a foreign main proceeding, Chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity. *See generally* Gropper, at 3–5.

Whether a foreign proceeding is held to be main or non-main, section 1521(a) outlines the discretionary relief that a court may order upon recognition of a foreign proceeding. 11 U.S.C. § 1521(a); *see Atlas Shipping*, 404 B.R. at 738 ("The discretion that is granted is 'exceedingly broad' since a court may grant 'any appropriate relief' that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors."). That said, section 1522(a) only allows courts to provide additional discretionary relief under section 1519 or 1521 if the interests of creditors are sufficiently protected. The list of forms of discretionary relief provided under section 1521 are considered illustrative, as opposed to exclusive. 11 U.S.C. 1521 (the list of discretionary relief options begins with the word 'including,' indicating that discretionary relief includes, but is not limited to, the following listed items).

The Court's discretionary relief under section 1521 of the Code may either allow the foreign representative to merely administer the debtor's assets in the United States, but require that those assets remain here, or may allow the foreign representative to remove the debtor's assets from the United States. 11 U.S.C. §§ 1521(a)(5) and 1521(b); *see, e.g.*, *Atlas Shipping*, 404 B.R. at 740. Section 1521(a)(5) entrusts to the foreign representative the "administration or realization" of the debtor's assets within the United States. 11 U.S.C. § 1521(a)(5). This is part of the relief the Foreign Representative requested in the present case. It is not to be confused with the optional relief provided by section 1521(b), which allows the Court to "entrust the distribution" of the debtor's assets within the United States to the foreign representative. 11 U.S.C. § 1521(b). This alternative provision allows the debtor's assets to exit the United States for *distribution*. *See Atlas Shipping*, 404 B.R. at 740. The Foreign Representative here did not seek relief under section 1521(b).

Finally, section 1507 also deals with additional discretionary relief, which may include recognition and enforcement of a plan reached in a foreign proceeding. As this Court explained in *Atlas Shipping*:

> In addition to § 1521's provisions regarding 'any appropriate relief,' § 1507(b) provides that a court, [i]n determining whether to provide additional assistance ... shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—
> (1) just treatment of all holders of claims against or interests in the debtor's property;
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

404 B.R. at 740 (internal citations omitted).

"Pursuant to section 1507, the court is authorized to grant any 'additional assistance' available under the Bankruptcy Code or under 'other laws of the United States,' provided that such assistance is consistent with the principles of comity and satisfies the fairness considerations set forth in section 1507(b)." *Rede Energia*, 515 B.R. at 90. As with section 1521, relief under section 1507 may include recognition and enforcement of a plan approved by a foreign court. *Id.* at 94–5.

Thus, the principal question in determining whether to recognize and enforce the Settlement Agreement's terms under Chapter 15 ultimately boils down to a question of the appropriateness of granting comity to the foreign court approval of the Settlement Agreement. In *Metcalfe & Mansfield*, 421 B.R. 685, 688 (Bankr. S.D.N.Y. 2010), this Court considered recognition of a Canadian plan of reorganization, and specifically questioned whether it would be appropriate to extend comity to the Canadian plan if it contained provisions, such as third-party releases, that may not be allowed in plenary United States bankruptcy proceedings under Chapter 11. Even though the Court noted that it was not clear that the third-party releases contained in the Canadian plan would be permitted under U.S. law, the Court found that the proper inquiry was whether the Canadian plan's provisions should nevertheless be enforced under Chapter 15. *Id.* at 696. This Court explained, "Chapter 15 specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief." *Id*. Therefore, even though Chapter 15 contains the explicit public policy exception in section 1506, which provides, "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the policy of the U.S.," the *Metcalfe* decision explained that even if the law in the U.S. may have provided differing results,

this alone did not prevent a recognition of the Canadian plan under broader principals of comity. *See* 11 U.S.C. § 1506; *see also Metcalfe & Mansfield*, 421 B.R. at 697.

What factors, then, should determine whether a U.S. Court should extend comity to a foreign main proceeding's plan of reorganization? The *Metcalfe & Mansfield* decision noted several factors, including whether the foreign proceeding provided a full and fair opportunity for creditors to be heard consistent with due process, and whether the plan was approved by the debtor's creditors and the foreign court. *See Metcalfe & Mansfield*, 421 B.R. at 698–99.

Courts should also look to circumstances in which U.S. courts have refused to recognize foreign plans of reorganization to further understand when the denial of comity is appropriate. As already discussed, the Fifth Circuit affirmed the bankruptcy court's refusal to recognize a plan of reorganization approved by a Mexican court due to considerations of comity. *See Vitro,* 701 F.3d at 1039. The plan in *Vitro*, like the plan in *Metcalfe & Mansfield*, discharged obligations of creditors as well as of third-party guarantors. The Court of Appeals decision affirming the bankruptcy court focused on the fact that the plan in *Vitro* was only approved with "insider" votes. As a result, the Court of Appeals concluded that the bankruptcy court did not abuse its discretion in refusing to grant comity and enforce the Mexican plan.

This Court's recent decision in *Avanti*, 582 B.R. at 617–18, recognized and enforced a scheme of arrangement, including a release of third-party guarantees, that was approved by creditors and by the High Court of England and Wales. After reviewing *Metcalfe & Mansfield* and *Vitro*, the Court upheld the scheme of arrangement, noting that "Avanti's Scheme Creditors had a full and fair opportunity to vote on, and be heard in connection with, the Scheme." *Avanti*, 582 B.R. at 618. The *Avanti* decision also referred to seminal Supreme Court jurisprudence

dealing with when a U.S. court should recognize and enforce a foreign judgment under principles of comity. *Id.* at 616. Quoting *Hilton v. Guyot*, the Court stated:

> The Supreme Court has held that a foreign judgment should not be challenged in the US if the foreign forum provides: "[A] full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it [is] sitting . . . ".

Id. (quoting *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1985).

The *Avanti* opinion provides a helpful summary of cases in which courts have enforced third-party releases in foreign proceedings under sections 1507 and 1521. *Avanti*, 582 B.R. at 617; *see also In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (recognizing and enforcing scheme of arrangement that released affiliate guarantees); *In re Towergate Fin. plc*, Case No. 15–10509–SMB (Bankr. S.D.N.Y. Mar. 27, 2015) [ECF Doc. # 16]; *In re New World Res. N.V.*, Case No. 14–12226–SMB (Bankr. S.D.N.Y. Sept. 9, 2014) [ECF Doc. # 20]; *In re Sino–Forest Corp.*, 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (enforcing foreign order containing third-party releases); *In re Magyar Telecom B.V.*, Case No. 13–13508–SHL, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013) [ECF Doc. # 26]; *Metcalfe & Mansfield*, 421 B.R. at 696 ("[P]rinciples of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.").

Finally, the decision-making calculus for determining whether to grant comity to a foreign court's action may be honed by the list of non-exclusive factors used by the Second

Circuit to analyze whether foreign proceedings are procedurally fair. In analyzing procedural fairness, the Second Circuit has looked at the following factors:

> (1) Whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the rights to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to potential claimants; (5) whether there are provisions for creditors meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.

Finanz AG Zurich, 192 F.3d at 249.

With respect to the Croatian Proceeding, the record reflects that the Foreign Debtors' creditors received proper notice of the Croatian Proceeding and of these Chapter 15 cases. The record also reflects that the substance and procedures set forth in the EA Law comport with broadly recognized principles for insolvency laws. Moreover, the creditor distributions approved in the Settlement Agreement closely follow the waterfall provisions of the U.S. Bankruptcy Code. Additionally, as discussed above, over two-thirds of non-insider creditors voted to approve the Settlement Agreement, avoiding the taint of the insider votes that prevented recognition and enforcement in the *Vitro* case.

Additionally, the standards for due process set forth in the Second Circuit's nonexclusive list of factors for procedural fairness in *Finanz AG Zurich* were satisfied by the Croatian Proceeding. As outlined in the EA Law, creditors have been grouped into five classes and participated in the drafting and approval of the Settlement Agreement, which provides for payout where creditors of the same class are treated equally, satisfying the first *Finanz* factor.[14] The

[14] The Court has already indicated that the percentage recovery to the holders of English Law Governed Loans and New York Law Governed Notes is projected to be 50.8 percent. The Loans and Notes are both unsecured.

Foreign Representative acts as a fiduciary and is overseen by the Croatian Court throughout this process, which is consistent with the second *Finanz* factor of procedural fairness. After the Settlement Agreement was approved by a majority of creditors and approved by the Croatian court on July 6, 2018, approximately 92 complaints were filed against confirmation, showing that creditors have the right to submit denied or contested claims for further adjudication, consistent with the third *Finanz* factor for procedural fairness. According to Agrokor's official website, the company responded to all 92 complaints in one submission to the Commercial Court on September 4, 2018. The issue is still pending before the Croatian Court; enforcement of the Settlement Agreement will not commence in Croatia until the Court issues its final order. Thus, creditors who opposed the Settlement Agreement have been able to seek further adjudication in the Croatian Court system.

Satisfying the fourth *Finanz* factors, the EA Law required published notification to creditors on the Court's website. Satisfying the fifth *Finanz* factor, the EA Law provides for creditors meetings, which were held. Indeed, the Temporary Creditor's Council continues to meet and was informed of the complaints as well as Agrokor's responses to the complaints at the most recent meeting. Agrokor held its 22nd creditor meeting on September 13, 2018. Representatives of all five creditor groups attended the meeting, including Sberbank as a representative of the unsecured creditors, and Knighthead Capital Management, LLC as the representative of the bond holders' creditor group. *Finanz* factors seven and eight—regarding the creation of a centralized distribution and the creation of an automatic stay—are both provided for by the EA Law.

Finally, no objections to the recognition of the Settlement Agreement have been brought before this Court. All evidence before the Court demonstrates that creditors received due

process and will be better off under the Settlement Agreement than they would be in a liquidation. The Foreign Representative affirms that the "Croatian proceedings . . . will allow the [Foreign] Debtors to restructure in the most efficient manner without jeopardizing creditors' rights." (ECF Doc. # 5 ¶ 40.) The affirmation of a Croatian legal representative who practices complex commercial litigation in Croatia, provides that "[p]ursuant to the Settlement Agreement, the creditors will receive a better outcome in respect of their claims than they would in a Croatian bankruptcy or liquidation process." (ECF Doc. # 6 ¶ 9.) Thus, the essential contours of a foreign proceeding that should be granted comity in the U.S. are present. As such, the Settlement Agreement should be recognized in full within the territorial jurisdiction of the United States, including the provisions modifying the English law governed debt and the New York law governed debt. Courts in other jurisdictions will make their own, independent decisions whether to recognize and enforce the Settlement Agreement.

E. The Gibbs Rule

Because Chapter 15's principal criterion for recognizing foreign proceedings and recognizing and enforcing a reorganization plan is a comity analysis, it is appropriate for this Court to consider the effects of a decision to extend comity to one nation if doing so could be seen as a refusal to extend comity to the laws of another—particularly where a majority of the debt to be modified is governed by the law of the latter nation. In these circumstances, a complete comity analysis requires at least consideration of, even if not ultimately lending deference to, English law.

The *Gibbs* rule remains the governing law in England despite its seeming incongruence with the principle of modified universalism espoused by the Model Law and a broad consensus of international insolvency practitioners and jurists. *See, e.g.*, Kannan Ramesh, *The Gibbs*

Principle: A Tether on the Feet of Good Forum Shopping, 29 Sing. Acad. L.J. 42, 43 (2017) (noting that modified universalism is the theoretical core of the Model Law and is increasingly recognized by an international consensus as the way cross-border insolvencies should be dealt with moving forward). The essence of modified universalism is that "bankruptcy proceedings . . . should be unitary and universal, recognized internationally and effective in respect of all the bankrupt's assets." *Id.* The essence of the *Gibbs* rule, on the other hand, is territorialism.

In *Gibbs*, Lord Esher questions, "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?"[15] 25 QDB at 406. Throughout the *Gibbs* opinion, Lord Esher characterizes the recognition of a foreign insolvency proceeding as an issue of contract law between a single debtor and creditor. *Id.* If the contract was made in England and meant to be performed in England, Lord Esher reasoned that a breach of contract should be determined by the laws in England, not discharged by a French insolvency proceeding. *Id.* at 404. Thus, *Gibbs* characterizes the recognition of foreign insolvency proceedings as a contractual issue to be settled in the territory with the governing contract.

Despite the clear territorial slant of the *Gibbs* rule, it was recently followed by the English High Court. In a 2018 decision, Justice Hildyard began his opinion by noting the tension between the *Gibbs* rule and the principle of modified universalism in the CBIR. *Bakshiyeva v. Sberbank of Russia, et al.* [2018] EWHC 59 (Ch). The *Bakshiyeva* court was asked to recognize and enforce proceedings in Azerbaijan that sought to restructure Azerbaijan's largest bank.

[15] Lord Esher's question may be compared with Supreme Court Justice Waite's commentary seven years earlier in the *Canada Southern Ry. v. Gebhard* case. 109 U.S. 527 (1883). In that opinion, Justice Waite says, "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government . . . . It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere." *Id.* at 537-38.

Bakshiyeva, the foreign representative for the Azerbaijan proceeding, sought a permanent stay imposed in England so that English creditors would have to participate in the centralized, Azerbaijan proceedings. Two of the bank's creditors, who held English law governed debt instruments and had not participated in any way in the foreign proceeding, invoked the *Gibbs* rule. Justice Hildyard agreed with the creditors, finding that the CBIR did not allow a foreign court to change or discharge the substantive rights of creditors conferred by English law. The decision reaffirmed the priority of the common law *Gibbs* rule over the more recently adopted CBIR.[16] In addition to governing English cross-border insolvency law for the past century, *Gibbs* has been influential and accepted in other Commonwealth countries including Canada and Australia. *See* Ian F. Fletcher, *Insolvency in Private Int'l Law*, Oxford Private International Law Series at 130 (2d ed, 2005).

Agrokor's counsel argued that although the *Gibbs* rule remains in force in England, an exception to the *Gibbs* rule applies in *Agrokor* to creditors holding English law governed debt because they voted in favor of the Settlement Agreement or otherwise submitted to the jurisdiction of the Croatian court. *Rubin v. Eurofinance SA*, a decision by the Supreme Court of England, was cited as providing the relevant exception to the *Gibbs* rule—when a creditor submits to the jurisdiction of a foreign court, either by submitting its claims in the foreign insolvency proceeding or otherwise agreeing to be bound thereby, then the creditor will be bound in that proceeding and *Gibbs* will no longer apply. *See Rubin v. Eurofinance SA* (2012) UKSC 46 at ¶ 157–67 (Eng.) (holding that creditors who filed proofs of debt and participated in a creditors' meeting, but did not file an appearance, had nonetheless submitted to the jurisdiction

[16] Interestingly, one of the two creditors in the *Bakshiyeva* case, Sberbank, happens to be the largest pre-petition lender of English Law Governed Loans to Agrokor d.d. in the current Croatian Proceeding. In contrast to its position in *Bakshiyeva*, in which it did not participate in any way in the foreign proceedings, Sberbank was a member of the five member Interim Creditors Committee and voted in favor of the Croatian Settlement Agreement.

of an Australian court and were bound by that Australian proceeding). Agrokor's counsel asserted:

> Here, the Gibbs Rule does not govern the English Law Governed Loans compromised by the Settlement Agreement because all holders of the Agrokor Group's English Law Governed Loans submitted their claims in full in the Croatian Proceedings and, as such, the holders submitted to the jurisdiction of the Croatian courts.

(Brief in Further Support ¶ 48.)

While counsel argued that all holders of English Law Governed Loans submitted their claims in the EA Proceeding, no evidence was presented to support that contention, and the vote tally in the EA Proceeding shows that not all creditors voted on the Settlement Agreement. The appropriate time and place for the Foreign Debtors to raise their argument will be in any further proceedings in the English court.

While the English court has yet to decide whether to recognize and enforce the Settlement Agreement, the English court discussed *Gibbs* before holding that the Croatian Proceeding should be recognized as a foreign main proceeding in England, concluding that the proceeding did not manifestly violate English public policy. (English Decision ¶ 131.) The court did not reach the issue of whether the *Gibbs* rule applies and bars recognition and enforcement of the Settlement Agreement. The decision whether to recognize and enforce the Settlement Agreement is likely to implicate a more demanding analysis under *Gibbs*.

The fact that England applies the *Gibbs* rule and refuses to recognize a discharge or modification of English law debt approved by a court outside of England is not, in this Court's view, a basis for this Court to decline to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States. On this issue, the Court agrees with Justice Kannan Ramesh of the Supreme Court of Singapore in his opinion in *Pacific Andes Resources*

Development Ltd, [2016] SGHC 210. Justice Ramesh explains that, in his view, the parties to a contractual relationship governed by the law of a jurisdiction adhering to the *Gibbs* rule should be attributed with the expectation that their claims might be discharged in proceedings in a jurisdiction where the debtor has an established connection based on residence or ties of business. *Pacific Andes*, SGHC 210 at ¶ 48. This view, of course, contrasts with *Gibbs*, where the court did not think that it was fair to attribute any expectation of or consent to the jurisdiction of French bankruptcy law to the English merchant who contracted with the French company that was domiciled in Paris. Justice Ramesh's view also differs from the more recent *Rubin* decision, in which Lord Collins declares it "wholly unrealistic" that "a person who sells goods to a foreign company accepts the risk of the insolvency legislation of the place of incorporation" without providing further explanation on the point.[17] *Rubin* UKSC 46 at ¶ 116 (Eng.).

In *Pacific Andes*, Justice Ramesh discusses several academic criticisms of the *Gibbs* rule's continued application in global bankruptcy proceedings. One of the lengthier excerpts is the criticism provided by Look Chan Ho, author of *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell 2016). Look Chan Ho criticizes the notion that insolvency proceedings should be characterized as contractual issues. As mentioned above, the original *Gibbs* opinion discussed the idea that parties to a contract should be able to choose the law that would govern their interactions, even in the potentially unexpected situation of a bankruptcy proceeding. The fact that the *Gibbs* rule is premised on a predominately contractual analysis is reinforced by the *Rubin* exception to the rule, which says that if a party, who otherwise would not be bound to a foreign proceeding, nonetheless chooses to consent to the foreign forum's

[17] Lord Collins' view about what is "unrealistic" obviously differs markedly from the view of the Chief Justice Waites in *Gebhard*, decided in 1883, that everyone who deals with a foreign corporation impliedly subjects himself to foreign law, including a discharge from liability. 109 U.S. at 537–38.

jurisdiction, the rule will no longer apply. Thus, the *Gibbs* rule centers around the idea of a party's contractual or consensual choice to be bound to a certain forum's rules.

A theoretical and practical issue with applying such a contractual analysis in the context of insolvency proceedings, as Look Chan Ho and others argue, is that bankruptcy discharges by their very nature imply diverging from the terms of most of the debtor's prepetition contracts. The primary disputes in a bankruptcy are ordinarily not about the rights of a single creditor against the debtor; insolvency proceedings are collective proceedings in which the rights of *all* creditors are determined for a slice of a pie that is not big enough to repay all creditors in full. A fundamental tenet of the U.S. bankruptcy system, also applied under the new Croatian law and most other modern insolvency laws, is that creditors of the same class are entitled to equality of distribution. Allowing creditors with claims governed by English law to recover a greater percentage of their claims than creditors with claims governed, for example, by New York law, would violate the fundamental principle of equality of distribution. As already discussed, the Settlement Agreement provides for equality of distribution between the holders of the English law governed and New York law governed debt.

Additionally, as Look Chan Ho notes, framing the issue of which law should govern a creditor's rights in a bankruptcy as a solely contractual issue between two parties overlooks orthodox English classification of bankruptcy as an *in rem* proceeding.[18] The *Gibbs* rule's contractual analysis seems to be based on the contractual parties' *expectations*; but if parties'

[18] Though Look Chan Ho refers to an orthodox classification of bankruptcy proceedings as *in rem* proceedings, the *Rubin* court definitively stated that bankruptcy proceedings were neither in rem nor in personam. *Rubin* UKSC 46 at ¶ 43 ("if the judgement had to be classified as in personam or in rem the appeal would have to be allowed, but bankruptcy proceedings did not fall into either category . . . ."). As discussed above, the U.S. Supreme Court in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. at 447, concluded that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an *in rem* proceeding.

expectations created the rule, is it realistic for creditors to multinational corporations to expect that, in the context of an insolvency proceeding, their contractual bargain will ultimately prevail?

As Justice Ramesh argues, a fundamental problem with the use of the *Gibbs* rule in international insolvency cases is that it mischaracterizes the discharge of debt as a contractual issue, rather than as a bankruptcy or insolvency law issue.[19] Kannan Ramesh, *The Gibbs Principle: A Tether on the Feet of Good Forum Shopping*, 29 Sing. Acad. L.J. at 49. A discharge of debts in an insolvency proceeding almost invariably involves some form of cram-down, or modification of creditors' prepetition claims, where a majority of creditors will outweigh a minority of dissenting creditors. *Id.* As justice Ramesh explains, "bankruptcy is undergirded by the philosophy that policy is given primacy *over contractual rights*." *Id.* (emphasis added). Thus, the basic rationale espoused by Lord Esher in *Gibbs*—that parties consensual, contractual decisions should determine the choice of law of all future legal interactions—is inappropriate when applied in the context of insolvency or bankruptcy proceedings, which inherently involve a societal choice to allow collective proceedings to discharge previously existing contractual obligations. The Court agrees with Justice Ramesh that a creditor's autonomy is relevant in the context of an insolvency proceeding only to the extent that it does not impede the underlying public policy that governs a collective insolvency or bankruptcy proceeding.[20] *Id.* at 50.

---

[19] This criticism of the *Gibbs* rule is relevant in all cases dealing with the foreign recognition and enforcement of judgments in insolvency proceedings. The Croatian Proceeding is certainly an insolvency proceeding and Agrokor is, most certainly, insolvent. A separate question, unnecessary for the Court to reach in this case, is whether the *Gibbs* rule should be applied when considering whether to recognize and enforce a foreign scheme of arrangement that modifies English law debt. Statutory authority for schemes of arrangement typically arise from companies' laws rather than insolvency laws. *Gibbs'* reasoning that contract law should be applied in determining whether to recognize and enforce a scheme of arrangement that modifies English law debt may have more force. But this Opinion only deals with application of the *Gibbs* rule in an insolvency proceeding.

[20] Where a contract selects English law, choice of law principles will most likely mean that determining the amount a breach of contract claim should be determined under English law. Choice of law principles should not dictate that English law applies in determining whether a claim can be discharged or modified in a foreign insolvency proceeding.

Professor Ian F. Fletcher, a distinguished professor in England, argues that "[t]he Gibbs doctrine belongs to an age of Anglocentric reasoning which should be consigned to history." *Insolvency in Private International Law*, OXFORD PRIVATE INTERNATIONAL LAW SERIES 130 (Oxford University Press, 2d Ed, 2005). In addition to *Gibbs*' failure to create a system that allows for the centralized, collective restructuring of debt, Fletcher finds the rule troubling because English law only narrowly recognizes the effects of foreign discharges in England but asserts that a discharge resulting from an English proceeding has a universal effect, irrespective of the governing law. *Id.* at 129, 209–10 (describing the *Gibbs* rule's effect on English law as "a form of systemic schizophrenia when contemplating the effects of foreign insolvency proceedings on obligations to which the debtor was a party"). England, of course, is free to continue to adhere to the *Gibbs* rule, but that does not mean that a U.S. bankruptcy court must follow the rule in deciding whether to recognize and enforce the decision of a court of another jurisdiction. U.S. Bankruptcy courts have long permitted foreign bankruptcy proceedings to bind U.S. creditors even where the debtor entered into a contract governed by New York law and agreed to a New York forum selection clause. For instance, in *Altos Hornos*, 412 F.3d at 429, the court considered whether contracting parties choice of New York as the forum for all contract disputes was enough to override the preference of extending comity to foreign bankruptcy proceedings. Though the New York forum clause in that case provided a broad grant of exclusive authority to New York courts,[21] the Court of Appeals nevertheless concluded that the Mexican court where the insolvency proceeding was pending should be the court to resolve the contract dispute that affected the resolution of the Mexican insolvency proceeding. *Id.* at

[21] The forum selection clause stated that the foreign borrower agreed that the loan would be governed by New York law, agreed to submit any dispute to a New York court and agreed to "irrevocably waive to the fullest extent permitted by applicable law, any claim that any action or proceeding . . . should be dismissed or stayed by reason . . . of any action or proceeding commenced by [debtor] relating in any way to this Agreement . . . ." 412 F.3d at 428.

429. As the court explained, "*regardless of the parties' pre-litigation agreement*, once a party declares bankruptcy in a foreign state and a foreign court asserts jurisdiction over the distribution of assets, U.S. courts may defer to the foreign bankruptcy proceeding on international comity grounds." *Id*. (emphasis added); *see also Canada Southern Railway Co. v. Gebhard,* 109 U.S. at 537–38 (where Chief Justice Waite explained that "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government [and] anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere").

In sum, though the concept of comity is broad and may require overlapping considerations of the rights of several parties and nations, the Court believes it is appropriate to extend comity within the territorial jurisdiction of the United States to the Croatian Settlement Agreement if it becomes final, even with respect to the modification or discharge of English law governed debt.

III. CONCLUSION

For the reasons explained above, the Court concludes that the Settlement Agreement should be recognized and enforced with respect to the nine Foreign Debtors within the territorial jurisdiction of the United States, if the approval of the Croatian Court becomes final. When the approval of the Settlement Agreement becomes final, counsel for the Foreign Representative shall submit a proposed order consistent with this Opinion.

Dated: October 24, 2018
New York, New York

Martin Glenn

MARTIN GLENN
United States Bankruptcy Judge

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (IN OFFICIAL LIQUIDATION),[1] *et al.*, Debtors in Foreign Proceedings.	Chapter 15 Case No. 16-12925 (SCC) (Jointly Administered)

MEMORANDUM DECISION ON MOTION OF THE FOREIGN REPRESENTATIVES OF PLATINUM PARTNERS VENTURE ARBITRAGE FUND (INTERNATIONAL) LIMITED FOR AN ORDER COMPELLING COHNREZNICK LLP TO COMPLY WITH A SUBPOENA FOR PRODUCTION OF DOCUMENTS

[1] The last four digits of the United States Tax Identification Number, or similar foreign identification number, as applicable, follow in parentheses: Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (1954); Platinum Partners Value Arbitrage Fund (International) Ltd. (in Official Liquidation) (2356); and Platinum Partners Value Arbitrage Intermediate Fund Ltd. (in Official Liquidation) (9530).

A P P E A R A N C E S:

LEWIS BAACH KAUFMANN MIDDLEMISS PLLC
1899 Pennsylvania Ave., NW, Suite 600
Washington, DC 20006
By: Jack B. Gordon, Esq.

Counsel for the Liquidators of Platinum
Partners Value Arbitrage Fund (International) Limited (in Official Liquidation)

HOLLAND & KNIGHT LLP
31 West 52nd Street
New York, NY 10019
By: Warren E. Gluck, Esq.

Counsel for the Liquidators of the Platinum
Partners Value Arbitrage Fund L.P. (in Official Liquidation)

STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038
By: David M. Cheifetz, Esq.

Counsel for CohnReznick LLP

TABLE OF CONTENTS

I. BACKGROUND 2

A. The Platinum Funds 2

B. Procedural History 3

C. The Funds' Relationship with CohnReznick 5

II. APPLICABLE LAW 7

A. Chapter 15 of the Bankruptcy Code 7

B. Other Provisions of the Bankruptcy Code and Rules Pertaining to Discovery 9

III. DISCUSSION 11

A. Chapter 15 of the Bankruptcy Code Authorizes the Court to Grant the Relief Sought in the Motion 11

1. There Are No Grounds to Deny the Motion on the Basis of Comity 13

a. CohnReznick Has Not Demonstrated That the Discovery Sought in the Subpoena Is Impermissible under Cayman Law. 13

b. Principles of Comity Support Granting the Motion. 18

2. CohnReznick's Additional Arguments Are Unavailing. 21

B. The Arbitration Provisions of the Engagement Letter Are Not Binding Because There is No "Dispute, Controversy, or Claim" at Issue 23

IV. CONCLUSION 28

SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

Before the Court is the motion (the "Motion") of Margot MacInnis and Nilani Perera (the "International Fund Liquidators"), the foreign representatives of Platinum Partners Venture Arbitrage Fund (International) Limited (in Official Liquidation) (the "International Fund"), for an order pursuant to 11 U.S.C. §§ 105(a), 542(e), and 1521(a) and Rule 2004 of the Federal Rules of Bankruptcy Procedure, directing CohnReznick LLP ("CohnReznick") to comply with a subpoena to produce documents served on August 31, 2017 (the "Subpoena"). Martin Nicholas John Trott and Christopher Barnett Kennedy (the "Master Fund Liquidators," and together with the International Fund Liquidators, the "Liquidators"), the duly appointed joint official liquidators and foreign representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (the "Master Fund") filed a Joinder to the Motion (the "Joinder"). CohnReznick filed a Memorandum of Law in Opposition to the Motion (the "Objection").

The International Fund Liquidators bring the Motion in order to obtain records concerning the International Fund, the Master Fund, and Platinum Partners Value Arbitrage Intermediate Fund Ltd. (the "Intermediate Fund" and collectively with the International Fund and the Master Fund, the "Funds") that are within the possession of CohnReznick, which provided audit services to the Funds for calendar years 2014 and 2015. CohnReznick objects to the Motion and argues that it need not comply with the Subpoena on the grounds that (i) the Subpoena seeks documents that the Liquidators would be unable to obtain under applicable Cayman law and (ii) the Subpoena impermissibly seeks "pre-suit discovery" concerning potential claims that would fall within the scope of the arbitration provisions in the engagement

letters between CohnReznick and the Funds. Alternatively, if the Motion were granted, CohnReznick argues that the Subpoena is overly broad and should be narrowed substantially.

For the reasons set forth below, the Court will grant the Motion and require CohnReznick to comply with the Subpoena.

I. BACKGROUND

A. The Platinum Funds

The Master Fund, a multi-strategy hedge fund that invests and trades in U.S. and non-U.S. financial instruments and other funds, assets, and holding companies, is a Cayman Islands exempted limited partnership. The Master Fund was established in or about 2003. By 2012, most of its assets were highly illiquid and it was unable to honor numerous redemption requests from its investors in a timely manner. In August 2016, following its failure to honor numerous such requests, the Master Fund and its offshore feeder fund, the International Fund, were placed into liquidation by order of the Grand Court of the Cayman Islands (the "Grand Court").[2]

The relationships between the Funds are as follows. The Intermediate Fund, an exempted limited liability company incorporated in the Cayman Islands and a limited partner in the Master Fund, was to invest all of its investable capital in the Master Fund. The International Fund, an exempted limited company under the laws of the Cayman Islands, was to invest all of its capital in the Intermediate Fund. The International Fund offered participating shares to prospective investors; its stated investment objective was to achieve superior capital appreciation through its indirect investment in the Master Fund. As such, the financial position of the International Fund

[2] Each of the Funds is in liquidation pursuant to orders of the Grand Court (cause nos. FSD 131 of 2016 (AJJ) ("Master Fund Liquidation"), 118 of 2016 (AJJ) ("International Fund Liquidation,"), and FSD 30 of 2017 (AJJ) (the "Intermediate Fund Liquidation" and collectively with the Master Fund Liquidation and the International Fund Liquidation, the "Cayman Proceedings").

was dependent upon the performance of the Master Fund and, in turn, the value of the assets in which the Master Fund held interests.[3]

Prior to the appointment of the Liquidators, the Funds were managed by Platinum Management (NY) LLC ("Platinum Management"), which is headquartered in New York. Platinum Management administered the Funds' operations and was responsible for managing, trading, investing, and allocating the Funds' assets. Platinum Management maintained records, correspondence, and other information pertaining to the Funds' operations and investments.

On December 14, 2016, shortly after the initiation of the Master Fund Liquidation and the International Fund Liquidation, a federal grand jury in the United States District Court for the Eastern District of New York indicted certain senior executives of Platinum Management on charges of conspiracy, securities fraud, investment advisor fraud, and wire fraud in connection with the operation of the Funds. *See United States v. Nordlicht, et al.*, Cr. No. 16-640 (E.D.N.Y. Dec. 14, 2016). Five days later, the Securities and Exchange Commission (the "SEC") filed a civil complaint against Platinum Management and the indicted individuals seeking various forms of relief in connection with the alleged "multi-pronged fraudulent scheme." *See Sec. & Exch. Comm'n v. Platinum Mgmt. (NY) LLC, et. al.*, Civ. No. 16-06848 (E.D.N.Y. Dec. 19, 2016) (the "SEC Action"). According to the complaint filed in the SEC Action, Mark Nordlicht and David Levy, the co-chief investment officers of Platinum Management, have asserted their Fifth Amendment rights against self-incrimination when questioned by the Litigation Trustee for Black Elk (a Master Fund investment) concerning Platinum related matters.[4]

[3] *See* Kennedy Declaration in Support of Ch. 15 Petitions for Recognition as Foreign Main Proceedings [ECF No. 2] ¶ 17.

[4] Compl. ¶¶ 182–85, SEC Action.

B. Procedural History

On October 18, 2016, Christopher Barnett Kennedy and Matthew James Wright,[5] in their capacity as duly appointed joint liquidators, filed petitions in this Court for the recognition of the Master Fund Liquidation and the International Fund Liquidation in the Cayman Islands as foreign main proceedings under chapter 15 of title 11 of the United States Code (the "Bankruptcy Code"). Pursuant to the Order Directing Joint Administration of Debtors' Chapter 15 Cases entered by this Court on October 25, 2016, the chapter 15 cases of the Master Fund and the International Fund were consolidated for procedural purposes. There were no objections filed to the request for recognition. On November 22, 2016, this Court entered an order (the "Recognition Order") recognizing the Master Fund Liquidation and the International Fund Liquidation as foreign main proceedings under chapter 15 of the Bankruptcy Code.

The Liquidators are officers of the Grand Court who are obligated under Cayman law to "collect, realise, and distribute" the Funds' assets, and they are empowered to investigate the "promotion, business, dealings and affairs" of the Funds, including the causes of their failure.[6] In furtherance of this objective, the Recognition Order expressly authorizes the Liquidators to "examine witnesses, take evidence, and seek the production of documents within the territorial jurisdiction of the United States concerning the assets, affairs, rights, obligations or liabilities of the Funds, the Funds affiliates and the Funds' subsidiaries," including "upon written request,

---

[5] Messrs. Christopher Barnett Kennedy and Matthew James Wright were originally appointed as the joint official liquidators of the Master Fund and the International Fund. In September 2017, Mr. Wright resigned and Mr. Martin Nicholas John Trott replaced him as the joint official liquidator of the Master Fund.

As a result of the Grand Court's determination on October 23, 2016 that the Master Fund and the International Fund should not have the same official liquidators, the Grand Court appointed Margot MacInnis and Nilani Perara as the joint official liquidators of the International Fund. The International Fund Liquidators are also joint official liquidators of the Intermediate Fund.

[6] *See* Motion ¶ 3 (citing Declaration of Stephen Leontsinis in Support of Chapter 15 Petitions ¶¶ 37, 40 (citing Sections 102 and 110 of the Companies Law of the Cayman Islands)).

obtaining turnover of any and all documents . . . that are property of, concern or were made or issued on behalf of the Funds . . . ."[7]

In August 2017, the International Fund Liquidators, in their capacity as the joint official liquidators of the Intermediate Fund, filed a chapter 15 petition in this Court with respect to the Intermediate Fund Liquidation.[8] On September 7, 2017, this Court entered the Order Directing Joint Administration of Debtors' Chapter 15 Cases and, on October 12, 2017, this Court entered an order recognizing the Intermediate Fund Liquidation.

C. The Funds' Relationship with CohnReznick

CohnReznick is a limited liability partnership engaged in the provision of accounting, assurance, tax, and business advisory services. The Funds engaged CohnReznick to provide audit services to the Funds for calendar years 2014 and 2015, the two years preceding the collapse of the Master Fund and the initiation of the Cayman Proceedings. The engagement letters between each Fund and CohnReznick (the "Engagement Letters") contain an arbitration clause which states, in relevant part, that:

> Any dispute, controversy, or claim arising out of or relating to the services or the performance or breach of the Agreements (including disputes regarding the validity or enforceability of this Agreement) or in any prior services or agreements between the parties shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("IICPR") Rules for Non-Administered Arbitrations . . . Such arbitration shall be binding and final. In agreeing to arbitration, the parties acknowledge that in the event of any dispute (including a dispute over fees) the parties are giving up the right to have the dispute decided in a court of law before a judge or jury and instead the parties are accepting the use of arbitration for resolution.[9]

The Engagement Letters are governed by New York law.

---

7 Recognition Order ¶ 7.
8 Case No. 17-12269, ECF No. 1.
9 General Terms and Conditions, "Dispute Resolution," Cheifetz Declaration at Exs. 1-4.

CohnReznick issued audit opinions on the Funds' financial statements for the year 2014, but it terminated its engagement with the Funds prior to completing an audit or issuing an audit opinion for the Funds' financial statements for the year 2015.

To assist in their investigation of the Funds, the International Fund Liquidators asked CohnReznick to make available its records concerning the Funds. The Master Fund Liquidators separately made an informal request for documents from CohnReznick. In response, CohnReznick produced copies of original documents that it maintained were the property of the Funds, but it did not provide other documents in its possession concerning the Funds, such as its audit work papers, engagement documents, communications, representations, invoices, and other relevant documents within its audit file.

Accordingly, on August 31, 2017, the International Fund Liquidators served the Subpoena upon CohnReznick, seeking, among other things, "[a]ll documents and communications concerning [CohnReznick's] engagement to perform and/or [its] performance of auditing, accounting, or other services for, on behalf of, or in relation to any Fund" and "[a]ll documents concerning the assets, liabilities, and other financial affairs of [any] Fund, whether provided by the Fund or obtained from other sources."[10] The Master Fund Liquidators did not file a separate subpoena; rather, the cover letter to the Subpoena indicated that the Master Fund Liquidators consented to the issuance of the Subpoena by the International Fund Liquidators.

On October 2, 2017, CohnReznick served written objections to the Subpoena upon the International Fund Liquidators. The parties were unable to resolve the objections consensually. On December 14, 2017, counsel to the International Fund Liquidators filed a pre-motion letter with this Court, requesting a conference and, if necessary, leave to file a motion to compel

[10] Motion at Ex. 3 (Kennedy Declaration) at Ex. 1(Subpoena) at Annex A at pp. 6-7.

CohnReznick to comply with the Subpoena (the "Gordon Letter"). On January 2, 2018, counsel to CohnReznick filed a letter in response to the Gordon Letter, expressing CohnReznick's objection to any further production under the Subpoena. After a brief conference with the Court, the parties agreed on a briefing schedule for a motion to compel.

On January 25, 2018, the International Fund Liquidators filed the Motion, together with the Declaration of Christopher Barnett Kennedy (the "Kennedy Declaration") and the Declaration of Jack Gordon in support of the Motion; the Master Fund Liquidators filed the Joinder, together with the Declaration of Warren E. Gluck in Support of the Joinder (the "Gluck Declaration"). On February 16, 2018, CohnReznick filed the Objection, together with the Declaration of David M. Cheifetz (the "Cheifetz Declaration") and the Declaration of Rachael Reynolds (the "Reynolds Declaration") in support of the Objection. On March 2, 2018, (i) the International Fund Liquidators filed a Reply Memorandum of Law in Support of the Motion (the "Reply") and the Declaration of Mark A. Russell in Support of the Motion (the "Russell Declaration") and (ii) the Master Fund Liquidator filed a Reply in Support of the Motion (the "Master Fund Reply"). Oral argument on the Motion was held on April 5, 2018.

II. APPLICABLE LAW

A. Chapter 15 of the Bankruptcy Code

By commencing an ancillary case under chapter 15 and obtaining recognition of a foreign main proceeding, a foreign representative receives a "[r]ight of direct access" to courts in the United States, subject to any limitations that the court may impose consistent with the policy of chapter 15. 11 U.S.C. § 1509.[11] Section 1521(a) of the Bankruptcy Code provides that, upon recognition of a foreign main proceeding, a bankruptcy court may, "at the request of a foreign

[11] Specifically, once recognition is granted pursuant to section 1517 of the Bankruptcy Code, the foreign representative has the capacity to sue and be sued in a court in the United States. 11 U.S.C. § 1509(b)(1).

representative, grant any appropriate relief" . . . "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a). Such relief includes "the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;" and "granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." 11 U.S.C. §§ 1521(a)(4) and (a)(7).

However, the court's power to grant relief under section 1521 is not without restriction; section 1522(a) specifically states that relief under section 1519 or section 1521 may be granted "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a). "The idea underlying [§ 1522] 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." *In re Int'l Banking Corp. B.S.C.*, 439 B.R. 614, 626 (Bankr. S.D.N.Y. 2010) (citing GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY ¶ 161). Indeed, the plain text of section 1521 suggests that the court should exercise discretion and grant relief only when it is necessary and appropriate. *See In re SPhinX Ltd., et al.,* No. 06-11760 (RDD) (*Order Denying Ex Parte Motion of the Foreign Representatives for . . . an Order Compelling the Production of Documents and Examination of Witnesses Pursuant to § 1521 of the Bankruptcy Code and Rule 2004 of the Federal Rules of Bankruptcy Procedure, dated May 14, 2007 (Ex. A, Tr. 6:23-7:1)*) (Cheifetz Declaration at Ex. 10).

Comity plays a significant role in cross-border insolvency proceedings. *In re Cozumel Caribe S.A. de C.V.*, 482 B.R. 96, 114-15 (Bankr. S.D.N.Y. 2012). "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will,

upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895). If recognition is granted, section 1507 of the Bankruptcy Code grants the bankruptcy court authority to "provide additional assistance to a foreign representative under this title or under other laws of the United States" provided that such assistance is "consistent with the principles of comity" and satisfies the fairness considerations set forth in subsection (b) thereof. 11 U.S.C. § 1507(a) and (b). Thus, chapter 15 provides courts with broad, flexible, and pragmatic rules to fashion relief that is "largely discretionary and turns on subjective factors that embody principals of comity." *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008).

B. Other Provisions of the Bankruptcy Code and Rules Pertaining to Discovery

Foreign representatives in chapter 15 cases seeking court-ordered discovery at times seek relief pursuant to section 542(e) of the Bankruptcy Code and/or Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), which are either directly applicable to chapter 15 cases or, in the alternative, delineate relief which can be granted by the court pursuant to section 1521(a)(4) or section 1521(a)(7).

Section 542(e) of the Bankruptcy Code provides, in pertinent part, that "[s]ubject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee." 11 U.S.C. § 542(e). Courts have held that a foreign representative

may seek disclosure pursuant to section 542(e). *See In re AJW Offshore Ltd.,* 488 B.R. 551, 564 (Bankr. E.D.N.Y. 2013).

Bankruptcy Rule 2004 authorizes a party in interest, such as a foreign representative, to subpoena documents relating "to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate . . . ." Fed. R. Bankr. P. 2004(a), 2004(b). Relief sought pursuant to Bankruptcy Rule 2004 may also be available pursuant to sections 1507, 1521(a)(4) or 1521(a)(7). "'[O]ne of the main purposes of chapter 15 is to assist a foreign representative in the administration of the foreign estate," and Rule 2004 proceedings are one of the mechanisms by which bankruptcy courts provide such assistance." *Krys v. Paul, Weiss, Rifkind, Wharton & Garrison, LLP (In re China Med. Techs., Inc.)*, 539 B.R. 643, 649 (citing *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 471 B.R. 342, 347 (Bankr. S.D.N.Y. 2012)); *see also In re AJW Offshore Ltd.*, 488 B.R. at 564 (permitting discovery by a chapter 15 foreign representative under Rule 2004); *In re Pro-Fit International Ltd.*, 391 B.R. 850, 860 (Bankr. C.D. Cal. 2008) (discovery under section 1521(a)(4) includes "the examination of witnesses pursuant to Rule 2004 and the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.").

The language of Rule 2004 is permissive "and in the proper context the Court may authorize the examination of third parties that possess knowledge of the debtor's acts, conduct, liabilities or financial condition which relate to the administration of the bankruptcy estate." *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) (citations omitted). However, a court's discretion is not unfettered. Courts have imposed limits on the use of Rule 2004 examinations; for instance, "once an adversary proceeding or contested matter is commenced, discovery should be pursued under the rules of [such adversary proceeding] and not by Rule

2004." *Id.* (citations omitted). This so-called "pending proceeding rule" reflects a concern that parties to a litigation could circumvent an adversary's rights by using Rule 2004 rather than obtaining discovery through the rules applicable to such other adversary proceeding. *See In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 471 B.R. at 347; *In re Glitnir banki hf.*, No. 08-14757 (SMB), 2011 WL 3652764, at *4 (Bankr. S.D.N.Y. Aug. 19, 2011). However, those matters and entities that are not affected by an adversary proceeding should not be able to avoid examination under Rule 2004, even if it is likely that the entity seeking discovery will eventually sue the target. *Id.* at *4 n.11, *5 n.12 (citations omitted).

III. DISCUSSION

A. Chapter 15 of the Bankruptcy Code Authorizes the Court to Grant the Relief Sought in the Motion

The Liquidators argue that the documents subpoenaed from CohnReznick are both relevant and necessary to their ongoing investigation of the Funds' affairs because, as the Funds' outside auditor, CohnReznick has a unique set of documents and analyses concerning the Funds' assets, liabilities, and financial affairs which would assist the Liquidators' investigation and understanding of the Funds' affairs for the two years immediately prior to the Funds' liquidations.[12] As such, the relevance of the documents the Liquidators seek goes well beyond any claim that the Liquidators might ultimately pursue against CohnReznick.[13] In addition, the Liquidators argue that, because former executives of the Funds have asserted their Fifth Amendment rights, the Liquidators will be unable to obtain information about the conduct, assets, or financial condition of the Funds from such individuals and instead must depend almost entirely on third-party discovery for such information.[14]

---

12 Reply at 1-2; Joinder ¶ 41.
13 Reply at 1.
14 Motion ¶ 26.

The Liquidators assert that the documents they have requested under the Subpoena plainly concern "information concerning the debtor's assets, affairs, rights, obligations or liabilities" within the meaning of section 1521(a)(4) of the Bankruptcy Code, and pursuant to (i) paragraph 7 of the Recognition Order, (ii) section 1521(a)(4), and (iii) this Court's holding in *Millennium Global* and other relevant precedent, this Court is expressly authorized to grant the Liquidators the relief sought in the Motion.[15] "By its terms, this provision enables a [f]oreign [r]epresentative to take broad discovery concerning the property and affairs of a debtor." *In re Millennium Global*, 471 B.R. at 346. The Liquidators support their assertion that such relief under section 1521(a)(4) is routinely granted in chapter 15 cases with numerous examples.[16] Further, they argue that the relief sought in the Motion also falls within the Court's powers to grant relief pursuant to section 1521(a)(7) of the Bankruptcy Code and Bankruptcy Rule 2004.

CohnReznick does not dispute the significance of the documents the Liquidators seek or the Liquidators' authority to obtain documents pursuant to the terms of the Recognition Order. Instead, it asserts that the Subpoena is not "necessary" or "appropriate," pointing to the plain language in section 1521(a) which states that "appropriate relief" may be granted "where necessary to effectuate the purpose of [chapter 15]."[17] It argues that the Motion is inappropriate because the purpose of chapter 15 is to aid not only the debtor but all interested entities, and by providing the Liquidators with "an open door" to obtain all of CohnReznick's work papers not otherwise discoverable under Cayman law, its interests, as well as the interests of comity and

---

15 *See generally* Motion ¶¶ 30-41.

16 *See e.g.*, Gluck Declaration, Exs. C-E (attaching orders permitting foreign representative to seek discovery in *In re Transfield ER Cape Ltd. (BVI)*, No. 10-16270 (MG) (Bankr. S.D.N.Y. Jan. 13, 2011); *In re Saad Invs. Fin. Co. (No. 5) Ltd.*, No. 09-13985 (KG) (Bankr. D. Del. August 14, 2014); *In re ICP Strategic Credit Income Fund Ltd.*, et al., No. 13-12116 (REG) (Bankr. S.D.N.Y. November 14, 2013); and *In re The International Banking Corporation B.S.C. (c)*, No. 09-17318 (SMB) (Bankr. S.D.N.Y. January 15, 2010 and December 30, 2015)).

17 11 U.S.C. § 1521(a).

parity, are not being protected.[18] Specifically, CohnReznick asserts that foreign representatives may not avail themselves of broader discovery rights than they allegedly would otherwise enjoy under the laws of their home forum. Simply put, CohnReznick asserts that Cayman law would not permit the Liquidators to obtain CohnReznick's work papers, and that therefore such relief should not be granted by this Court. CohnReznick also opposes the Motion on the grounds that the requested relief is unnecessary because (i) the Liquidators have not attempted to obtain discovery first in the Caymans and (ii) CohnReznick has already turned over a substantial number of documents.[19] CohnReznick urges the Court to exercise some degree of discretion in exercising its powers under section 1521(a).

For the reasons discussed below, the Court finds that the relief sought in the Motion is necessary and appropriate under section 1521(a) of the Bankruptcy Code.

1. There Are No Grounds to Deny the Motion on the Basis of Comity

a. CohnReznick Has Not Demonstrated That the Discovery Sought in the Subpoena Is Impermissible Under Cayman Law

CohnReznick argues that the Court should deny the Motion because the Liquidators would not be permitted to obtain in the Cayman Islands the discovery sought in the Subpoena. As a result, CohnReznick posits that allowing the Liquidators to bypass Cayman law would be a "perversion of the comity concerns that underlie chapter 15 and would just invite forum shopping."[20] In support of its argument, CohnReznick cites to the Reynolds Declaration, in which Ms. Reynolds states that, under Cayman law, insolvency representatives may not obtain audit work papers or materials that are not the debtor's property.[21]

---

18 Objection at 8.
19 *See generally* Objection at 5-13.
20 Objection at 6.
21 *See* Objection at 6 ("As more fully set forth in the accompanying declaration of Rachael Reynolds . . . , under Cayman law, insolvency representatives may not obtain audit workpapers or materials that are not the debtor's property." (citing to Reynolds Declaration ¶¶ 13-28)).

The Liquidators believe that this Court need not even address the issue of what a Cayman court would say about the discoverability of the subpoenaed documents. Indeed, in oral argument, counsel for the Master Fund Liquidator argued quite emphatically that the question is irrelevant to this Court's chapter 15 analysis. While that may indeed be so, nonetheless, the Court will examine the question of Cayman law. Specifically, the Liquidators criticize CohnReznick's interpretation of Cayman law, arguing that CohnReznick has failed to introduce any evidence that the Cayman courts have affirmatively prohibited the discovery of evidence of the type sought here. At best, they say, the Reynolds Declaration supports the conclusion that Cayman law on this issue is, as the Liquidators characterize it, "unsettled."[22] The Court agrees.

The Reynolds Declaration describes the relief which may be available under section 138 of the Companies Law of the Cayman Islands (2016 Revision) (the "Companies Law"). Section 138 states that a Cayman court may require any person that "has in his possession any property or documents to which the company appears to be entitled" to "deliver such property or documents to the official liquidator."[23] Reynolds states that the Liquidators "may . . . try to rely" upon section 138(1)."[24] Ms. Reynolds concedes, however, that there is little judicial guidance from Cayman courts as to whether "audit working papers" constitute "property or documents to which the company appears to be entitled" as such term is used in section 138(1). Ms. Reynolds states that liquidators in the Cayman Islands currently cite to one case, *China Milk Products Group Limited (In Liquidation)*,[25] in support of applications seeking production of audit work

---

22 *See* Reply at n.2 (citing Russell Declaration ¶ 11).
23 Reynolds Declaration ¶ 21.
24 *See id.* ¶¶ 20-21.
25 *See* Reynolds Declaration at Ex. 3 (*China Milk Products Group Limited (In Liquidation)* (FSD 83 of 2011 (AJJ), 20 May 2015).

papers that allegedly contain information belonging to the debtor; however, the *China Milk* decision does not squarely support CohnReznick's position here.

In *China Milk*, the Cayman liquidators sought assistance from the Grand Court in obtaining discovery of audit work papers from the auditors who had previously been engaged by China Milk, the company in liquidation. While the parties had agreed that the audit work papers at issue were property of the auditors, the auditors acknowledged that information about the assets, liabilities, and transactions of China Milk could not be regarded as *exclusively* belonging to the auditor simply because the documents containing such information formed part of the audit work papers. The Grand Court permitted certain discovery sought by the China Milk liquidators, reasoning that

> the official liquidators are not seeking to obtain information about audit programs and procedures in respect of which [the auditors] claim a proprietary interest. They are seeking information about China Milk's own assets and liabilities and, . . . it is not disputed that [the auditor's] audit working papers and files are likely to include copies of documents and information extracted from China Milk's books and records.[26]

The Grand Court concluded that the liquidators were entitled to obtain audit work papers and files pursuant to section 138 of the Companies Law if such documents were found to contain information from the company's own books and records.[27] The court also noted that Hong Kong law, which governed the engagement letter[28] between the debtor and the auditor, permitted such discovery.

Relying on the Reynolds Declaration, CohnReznick argues that, under Cayman law, insolvency representatives may not obtain audit work papers or materials that are not the debtor's

---

[26] *Id.* ¶ 16.
[27] *Id.* ¶ 20.
[28] As previously noted, the CohnReznick Engagement Letters are governed by New York law, not Cayman law, a fact which CohnReznick elects to ignore in its arguments and observations concerning Cayman law.

property.[29] The Reynolds Declaration makes clear, however, that Cayman courts "have not yet given any further guidance on precisely what will constitute 'documents containing information belonging to a company', which may be obtained under section 138, notwithstanding that the documents themselves form part of the 'audit working papers.'"[30] Accordingly, because the Cayman courts have not clearly defined what portions of audit work papers constitute a debtor's property, any assertion that audit working papers are the sole property of an auditor under Cayman law and cannot be produced to a company's liquidator for that reason is simply unsupported.

Additionally, although the Reynolds Declaration recognizes the Grand Court's ultimate holding in *China Milk,* Ms. Reynolds states that subsequent applications by liquidators for production of information pursuant to Cayman law (which have relied on the decision in *China Milk*) have proven unsuccessful.[31] While that may be true, she cites no authority to support such assertion and, more importantly, concedes that these applications have all been unsuccessful on other grounds.[32] CohnReznick also has not attempted to distinguish the facts in *China Milk* from the instant case by demonstrating that its audit work papers do not contain any information extracted from the Funds' books and records, which they undoubtedly do.

The Liquidators, in contrast, maintain that the Cayman courts have not yet fully addressed whether, in light of certain case law, audit work papers are available to liquidators pursuant to section 138 of the Companies Law, at least where the question of entitlement is governed by Cayman law.[33] In the Russell Declaration, submitted by the International Fund

---

29 Objection at 6 (citing to Reynolds Declaration ¶¶ 13-28).
30 Reynolds Declaration ¶ 25.
31 *See id.* ¶¶ 24-25.
32 *Id.* ¶ 25.
33 *See* Reply at 4 n.2; Russell Declaration ¶¶ 11, 13.

Liquidators in support of the Reply, Mr. Russell states that this question is unsettled under Cayman law. Mr. Russell cites to *Singularis Holdings Ltd. v. PricewaterhouseCoopers, [2014] UKPC 36* (*"Singularis"*), a decision in which the Judicial Committee of the Privy Council denied an attempt by liquidators in a Cayman insolvency proceeding to obtain documents from the debtor's former auditor by way of a Bermuda recognition proceeding but nonetheless expressed doubt about whether information acquired in serving as a company's auditor would belong exclusively to such auditor simply because the auditor recorded such information in working papers which constitute its property.[34] Although in *Singularis* the Privy Council did not directly address the issue of whether audit working papers constitute "information belonging to a company," it nonetheless stated that

> [the liquidators] have accepted before the Board that the information which they seek belongs to [its auditors] and was therefore properly excluded from the order made by the Grand Court of the Cayman Islands. Whether this was correct was not therefore a point argued before the Board. Nonetheless, the Board would not wish to part with this case without expressing their doubts about whether information which PwC acquired solely in their capacity as the company's auditors can be regarded as belonging exclusively to them simply because the documents in which they recorded that information are their working papers and as such their property.[35]

After considering the evidence presented by the parties on the issue of whether audit work papers sought by liquidators are discoverable under the Companies Law – namely, the decision of the Grand Court in *China Milk*, the dictum of the Privy Council in *Singularis*, and the statements by the declarants here that there are no additional decisions by Cayman courts on the issue – the Court finds that it has not been provided with evidence sufficient to enable it to conclude that Cayman law prohibits the discovery sought in the Subpoena. Accordingly, the argument that comity prohibits granting the Motion fails.

---

[34] *See* Russell Declaration ¶ 13 (citing *Singularis* ¶ 30).

[35] *See* Reynolds Declaration at Ex. 9 (*Singularis Holdings Ltd. v. PricewaterhouseCoopers, [2014] UKPC 36* ¶ 30).

b. Principles of Comity Support Granting the Motion

Even assuming *arguendo* that the discovery of audit work papers in connection with the orderly wind-up of a company was clearly prohibited under Cayman law, which it is not, the scope of discovery available in the foreign jurisdiction is not a valid basis upon which this Court, in the exercise of its discretion, must limit relief available to the Liquidators pursuant to the Bankruptcy Code and Rules. Foreign law does not preclude the availability of additional relief under chapter 15, particularly when granting such relief does not run contrary to the public policy of the foreign jurisdiction. Although the boundaries of the international comity doctrine have been described as "amorphous" and "fuzzy,"[36] it is well-established that comity does not require that the relief available in the United States be identical to the relief sought in the foreign bankruptcy proceeding; it is sufficient if the result is comparable and that the foreign laws are not repugnant to our laws and policies.[37] As the Supreme Court has aptly noted, "[a] foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions—reasons that do not necessarily signal objection to aid from United States federal courts."[38]

---

[36] *See In re Nat'l Bank of Anguilla (Private Banking Tr.) Ltd.*, 580 B.R. 64, 92 (Bankr. S.D.N.Y. 2018) (citing *JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 423 (2d Cir. 2005)).

[37] *See In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1044 (5th Cir. 2012) (collecting cases); *In re Rede Energia S.A.*, 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014); *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010).

[38] *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241, 261 (2004). CohnReznick relies heavily on the guidance of the Supreme Court in *Intel*, in which the Court stated that, in determining whether a discovery order should be granted pursuant to 28 U.S.C. § 1782, a district court should consider whether the discovery request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Intel,* 542 U.S. at 264-65. While foreign discovery laws should be considered for comity concerns, they are not determinative of whether discovery should be permitted under U.S. law. Indeed, the Supreme Court specifically stated that "[b]eyond shielding material safeguarded by an applicable privilege, however, nothing in the text of § 1782 limits a district court's production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there." *Id.* at 260. The primary question is whether a foreign government would be offended by the assistance provided by the U.S. court. *Id.* at 261.

Although the Liquidators inconsistently reject and embrace the applicability of section 1782 in their pleadings, *see* Motion ¶ 42; Gordon Letter at 2, the Court accepts CohnReznick's arguments that section 1782 is analogous to seeking discovery assistance under section 1521 and that courts routinely read the discovery provisions of section 1521 (or former section 304) in concert with section 1782. *See* Objection at 10 (citing *In re Barnet*, 737

The Liquidators submit that CohnReznick has "fail[ed] to introduce any evidence, let alone 'authoritative proof,' that Cayman would be actively hostile to evidence obtained from an auditor under U.S. law, much less that Cayman has affirmatively prohibited such discovery."[39] In support of this assertion, the Liquidators present unrebutted evidence that, far from being hostile to Cayman litigants seeking evidence under U.S. law, Cayman courts are in fact receptive to evidence obtained through U.S. discovery procedures, even if such evidence may not be discoverable under Cayman law. In *Lyxor Asset Management S.A. v. Phoenix Meridian Equity Limited*, the Cayman Islands Court of Appeal explicitly dismissed the notion that a plaintiff should be confined to the ordinary process of discovery permitted in the Grand Court where such right was conferred under a U.S. statute, 28 U.S.C. § 1782.[40] In addressing Lyxor's argument that [the Cayman litigant] should have been enjoined from seeking discovery from a non-party under U.S. law because it could have obtained the same information pursuant to Cayman law, the *Lyxor* court stated that

> [t]hat submission may or may not be well-founded but it misses the point. . . . The right to take pre-trial deposition testimony . . . is a right conferred by U.S. law—it is not a right conferred by, or to be withheld under, Cayman law. The relevant question is not whether [the Cayman litigant] could achieve a similar result in the Cayman Islands but whether (if it could) it is acting oppressively or abusively in seeking to rely on the right which it enjoys under U.S. law. [The Cayman litigant] has taken the view that its interests are best served by seeking to obtain the information which it needs by taking oral depositions in New York . . . rather than by proceeding by way of further and better particulars and interrogatories in the Grand Court . . . . It cannot be said that, in making that choice, it is acting oppressively or unconscionably or that its choice amounts to an abuse of the process of the Cayman Courts.[41]

F.3d 238, 251 (2d Cir. 2013) (explaining that, in light of section 1782, Congress "may have intended to limit the relief provided by chapter 15"); *In re Hughes*, 281 B.R. 224, 230 (Bankr. S.D.N.Y. 2002) (noting that "when determining the scope of discovery permissible in a 304 proceeding, section 304 should be read together with [§ 1782]"); *Hopewell*, 258 B.R. at 586 (noting that "§ 1782 provides a further reason not to distort § 304 and use it as a discovery tool in aid of arbitration")).

[39] Reply at 5.

[40] *See* Russell Declaration at Ex. 1 (*Lyxor Asset Management S.A. v. Phoenix Meridian Equity Limited*, 2009 CILR 553).

[41] *Id.* ¶¶ 57-58.

So too here. The decision in *Lyxor* demonstrates that Cayman courts take a permissive, and indeed, solicitous, view of a Cayman litigant's efforts to utilize U.S. discovery procedures when possible, so long as such litigant is not acting oppressively or abusing the process of the Cayman courts. Indeed, it is worth noting that this Court and others in the United States routinely preside over Cayman-based chapter 15 cases in which these courts have occasion to observe the active contributions of Cayman jurists and practitioners to the development of international insolvency law and practice and their dedication to principles of comity.

Because Cayman law neither prohibits nor is hostile to the discovery sought here under U.S. law, principles of comity decisively weigh in favor of granting the Motion. The Liquidators argue persuasively that CohnReznick's interpretation of comity would reduce the role of this Court to that of "an avatar" for the foreign court presiding over the foreign main proceeding.[42] Further, requiring this Court to ensure compliance with foreign law prior to granting relief sought pursuant to chapter 15 would require the Court to engage in a full-blown analysis of foreign law each and every time a foreign representative seeks additional relief in the United States, which may result in differing interpretations of U.S. law depending on where the foreign main proceeding was pending.[43] As the Liquidators correctly assert, this interpretation is contrary to the intent of the Model Law on which chapter 15 is based.[44]

---

[42] *See* Master Fund Reply ¶ 8.

[43] S*ee id.* ¶ 5. Citing *In re Condor Ins. Ltd.*, 601 F.3d 319, 326-27 (5th Cir. 2010), CohnReznick asserts that assistance under chapter 15 "is not supposed to enlarge [a foreign representative's] powers" beyond the powers available in her home jurisdiction. Objection at 6. In *Condor*, the Fifth Circuit permitted a foreign representative to bring an avoidance action under the law of St. Kitts and Nevis, noting that, while section 1521(a)(7) of the Bankruptcy Code explicitly prohibits a foreign representative from bringing an avoidance action under chapter 5, section 1521 is silent regarding avoidance proceedings that apply foreign law. *Id.* at 324. The Liquidators correctly point out that, while *Condor* holds that a U.S. court may grant relief available under foreign avoidance law, the decision did not opine on the inverse; *i.e.*, the *Condor* court did not hold that relief under chapter 15 is *limited* to the relief available under the law of the liquidator's home forum. *See* Reply at 6 n.5. Moreover, section 1521 is not silent as to the relief sought here. *See* Master Fund Reply ¶ 17.

[44] S*ee* Master Fund Reply ¶ 5.

The Court is unpersuaded by CohnReznick's reliance on the decision in *Singularis* for the proposition that a U.S. court should not be able to compel the disclosure of documents which would not have been obtainable under Cayman law. In *Singularis*, as previously discussed, the Judicial Committee of the Privy Council found that the Bermuda court had no jurisdiction under common law to compel the disclosure of documents from the debtor's auditor, PwC, because such documents would not have been obtainable under the law of the Cayman Islands pursuant to where the winding-up was being carried out.[45] However, as CohnReznick admits, *Singularis*, which was an appeal from the Court of Appeal of Bermuda, is only authoritative and not technically binding on Cayman courts or on this Court.[46] Moreover, even assuming that *Singularis* were applicable here, its facts are distinguishable from the facts of this case, and the Court has serious reservations about its rationale. In *Singularis*, the Privy Council determined that Bermuda's law with respect to discovery pertained only to a Bermuda wind-up proceeding, and Singularis was a Cayman company in a Cayman liquidation proceeding. Further, finding that the Bermuda court had (i) no power to wind up a non-Bermudan registered company and (ii) no jurisdiction to conduct an ancillary liquidation, the Privy Council concluded that the Bermuda court had no statutory jurisdiction and instead, turned to the court's authority under common law. Here, in stark contrast, section 1521 specifically provides this Court with the authority to order the discovery sought by the Liquidators.

For all of the foregoing reasons, the Court concludes that application of section 1521 of the Bankruptcy Code to grant the Motion does not offend widely accepted notions comity.

2. CohnReznick's Additional Arguments Are Unavailing

CohnReznick advances a number of additional arguments, all of which are unavailing.

---

45 *See* Reynolds Declaration ¶¶ 33-36.
46 *See* Reynolds Declaration ¶ 35.

First, CohnReznick also argues that the Subpoena is inappropriate because the Liquidators have not attempted to seek discovery in the Caymans from CohnReznick Cayman, which has access to the same working documents.[47] In support of its assertion, CohnReznick cites to *In re Bd. of Dirs. of Hopewell*, 258 B.R. 580, 586 (Bankr. S.D.N.Y. 2001) in which this court denied a motion for discovery under former section 304 (the predecessor to chapter 15) in part because the foreign representative had not sought the assistance of the foreign court.[48] *Hopewell* is factually distinguishable from this case; in denying the motion therein, the court found that "[t]he relief Hopewell seeks is particularly inappropriate as it involves an arbitration, which is supposed to take place with a minimum of court supervision and interference . . ."[49] As there is no pending arbitration or proceeding in this case (as discussed *infra*), *Hopewell* is inapposite and does not support CohnReznick's position.

In fact, CohnReznick readily acknowledges that there is no absolute rule that the Liquidators must exhaust their rights in the Cayman Islands before seeking relief in this Court.[50] The Court agrees and declines to impose such a requirement on the Liquidators. Moreover, the Court observes that this argument is inconsistent with CohnReznick's comity argument. CohnReznick cannot, on the one hand, object to discovery under U.S. laws by arguing that the Liquidators should have first sought discovery in the Caymans, and on the other hand, argue that such relief would not be permissible under Cayman law.

CohnReznick further contends that the Subpoena is unnecessary since it has already turned over a thousand electronic files amounting to nearly one gigabyte of information and the

---

47 *See* Objection at 5-6.
48 *See* Objection at 7-8, 9.
49 *Hopewell*, 258 B.R. at 585.
50 *See* Objection at 7.

Liquidators have made no showing or suggestion that they are missing any records.[51] CohnReznick's arguments are unconvincing for a number of reasons. First, CohnReznick does not cite to any statute or legal authority that suggests that a foreign representative must demonstrate that it is missing any records before seeking discovery of such information. It also defies logic that the Liquidators would trouble themselves to the lengths they already have in order to seek documents already in their possession. Indeed, the purpose of discovery is to determine what information about the debtor is missing or known. As the Debtors' auditor, CohnReznick is uniquely situated to provide information about the Funds' financial affairs in the years leading up to the Funds' liquidation; this is not the type of "broad fishing expedition" denied by the court in *SPhinX Ltd.* And, as discussed *infra*, CohnReznick has made no showing that the Liquidators' discovery requests are unduly burdensome, particularly since CohnReznick only served as auditor for the Funds for two years. Accordingly, the Court finds it irrelevant that CohnReznick has already surrendered a number of documents to the Liquidators and declines to place any additional burden on the Liquidators to demonstrate missing records from such delivered documents.

B. The Arbitration Provisions of the Engagement Letter Are Not Binding Because There Is No "Dispute, Controversy, or Claim" at Issue

CohnReznick argues that the Funds are precluded from seeking pre-litigation discovery pursuant to the Bankruptcy Code or Bankruptcy Rule 2004 because the parties are contractually bound by the arbitration clause in the Engagement Letters, which broadly applies to "[a]ny dispute, controversy, or claim" arising out of or related to the rendering of CohnReznick's

[51] *See* Objection at 8.

services and such clause requires that such dispute, controversy, or claim be finally resolved by arbitration and not by a court of law.[52]

CohnReznick argues that the language in the relevant arbitration clauses is broad enough to encompass the discovery disputes between the Liquidators and CohnReznick, as such disputes can be considered a "dispute, controversy, or claim arising out of or related to the services or the performance or breach of [the Engagement Letters]."[53] CohnReznick maintains that "questions about the existence of such disputes, controversies, or claims must be decided 'with a healthy regard for the federal policy favoring arbitration.'"[54] Moreover, if the Court permits the Liquidators to conduct pre-suit discovery, and the Liquidators ultimately commence arbitration proceedings against CohnReznick, CohnReznick asserts that it will have lost its bargained-for right to have all disputes – including discovery disputes – decided and finally resolved by arbitration. Additionally, CohnReznick alleges that the "true purpose" of the Liquidators' discovery requests is to search for "something CohnReznick did wrong to support a claim against it," including but not limited to breach of contract and/or negligence claims, and such non-core state law claims would be covered by the arbitration clauses in the Engagement Letters.[55] For these reasons, CohnReznick submits that this Court should preclude any discovery that relates to the investigation of potential pre-petition state law claims against CohnReznick because the Court must give effect to the relevant arbitration clauses in the Engagement Letters.[56]

In further support of its argument, CohnReznick relies on *In re Daisytek, Inc.*, 323 B.R. 180 (N.D. Tex. 2005), in which the United States District Court for the Northern District of

---

52 *See* General Terms and Conditions, "Dispute Resolution," Cheifetz Declaration at Exs. 1-4.
53 *See* Objection at 17 (citing Cheifetz Declaration).
54 *See* Objection at 17 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).
55 Objection at 18.
56 *See id.* at 16-17.

Texas considered on appeal whether a pre-insolvency arbitration agreement superseded bankruptcy-related discovery sought by a creditors' trust during the pendency of a bankruptcy case for the purpose of investigating potential claims. In *Daisytek*, the creditors' trust sought to conduct a Rule 2004 examination of the debtors' former accountants, and, like CohnReznick, the accountants argued that the arbitration clauses under the relevant engagement letters prevented the trust from seeking court-ordered discovery.[57] The court held that the discovery fell within the bounds of the arbitration clause if the potential claims arising from the discovery would be subject to arbitration.[58] Vacating the Bankruptcy Court's order authorizing the Rule 2004 examination,[59] the court stated that "[t]he proper focus is on the underlying nature of the proceedings that could flow from the information obtained through the Rule 2004 examination,"[60] and remanded the matter to the Bankruptcy Court, directing it to determine the extent to which the proceedings the trust intended to initiate derived exclusively from the provisions of the Bankruptcy Code. The court held that "[i]f the court determines that a proceeding does not derive exclusively from the Code, the court has no choice but to abstain and allow the parties to arbitrate the matter."[61] If, however, the Bankruptcy Court determined that such proceeding derived exclusively from the Code, the Bankruptcy Court would have discretion to refuse to enforce the applicable arbitration agreement if arbitration would conflict with the purposes of the Code.[62] CohnReznick submits that the holding in *Daisytek* supports its argument that, because the Liquidators seek discovery in order investigate potential pre-petition state law

---

57 323 B.R. at 185-86.

58 *Id.* at 186 (citing *In re Nat'l Gypsum Co*., 118 F.3d 1056, 1067 (5th Cir. 1997) ("[W]e believe that nonenforcement of an otherwise applicable arbitration provision turns on the underlying nature of the proceeding, i.e., whether the proceeding derives exclusively from the provisions of the Bankruptcy Code and, if so, whether arbitration of the proceeding would conflict with the purposes of the Code.")).

59 *Id*. at 188.

60 *Id.* at 187.

61 *Id.* at 186-87 (citations omitted).

62 *Id.* at 187 (citations omitted).

claims against CohnReznick, such proceedings are non-core, state law claims that fall under the arbitration clauses in the Engagement Letters.

The Liquidators submit that the arbitration provisions under the Engagement Letters are irrelevant because the Liquidators have not asserted any claim against CohnReznick at this time; they are merely seeking information "essential to an investigation of the company's affairs and the identification of assets for the benefit of creditors."[63] They argue that, in the absence of a pending proceeding, CohnReznick has no contractual right to limit the relief available to the Liquidators under the Bankruptcy Code.[64] In fact, they emphasize that, were the Motion to be denied on the basis that the relevant arbitration clauses govern the instant discovery dispute, this would eviscerate the pending proceeding rule and undermine the fundamental purposes of section 1521(a)(4) and Bankruptcy Rule 2004. As counsel stated at the hearing on the Motion, chapter 15 proceedings cannot be held hostage by an arbitration clause when there is no dispute pending.

The Court agrees. One of the significant objectives of chapter 15 is to provide judicial assistance to foreign representatives in gathering information which will enable them to comply with their duties. It would be at cross purposes with this objective, in the context of a foreign representative's application seeking discovery pursuant to section 1521, to interpret an arbitration clause so broadly that it eliminates this right.

Inasmuch as CohnReznick relies on the holding in *Daisytek* in support of its position, the Court concludes that the holding in *Daisytek* does not dictate a different result. Here, the relief

---

63 Motion ¶ 8.

64 *See* Reply at 8-11. The Liquidators also argue that the decision in *Daisytek* was wrongly decided and point to three subsequent decisions that have rejected its finding. *See* Reply at 11-14 (citing *In re Millennium Lab Holdings II, LLC*, 562 B.R. 614, 631 (Bankr. D. Del. 2016); *In re Friedman's, Inc.*, 356 B.R. 779, 783 (Bankr. S.D. Ga. 2005); *In re New Century TRS Holdings, Inc.* 407 B.R. 558, 571 (Bankr. D. Del. 2009)).

sought under Motion derives exclusively from the provisions of the Bankruptcy Code. The discovery sought by the Liquidators from CohnReznick clearly falls within the scope of relief set forth in sections 542(e), 1521(a)(4), and 1521(a)(7) of the Bankruptcy Code and Bankruptcy Rule 2004. Although the holding in *Daisytek* can be interpreted broadly, the court's decision was predicated on the fact that the Bankruptcy Court did not consider the underlying nature of the proceedings in its decision to overrule the auditor's objection of Rule 2004 examination.[65] Here, the Court has considered the underlying nature of the proceedings before it, and it concludes that the Liquidators' discovery requests are derived from the Bankruptcy Code and Rules, and, accordingly, this Court has discretion to decline to apply the arbitration clauses at this time.

The instant discovery dispute is neither a pending proceeding nor a "dispute, claim, or controversy" that falls within the parameters of the arbitration clauses in the Engagement Letters.[66] The Liquidators have continuously stated that their main purpose in issuing the Subpoena was to obtain information from CohnReznick about the Funds. It is well recognized that the information and knowledge which an auditor is likely to have regarding a debtor for which the auditor worked is essential to the investigation of such debtor's financial affairs.[67] Here, as argued by counsel for the Master Fund Liquidators at oral argument on the Motion, the notion that the Liquidators, who must manage the affairs of the Funds whose assets were largely

---

65 *Daisytek*, 323 B.R. at 188.

66 As explicitly stated by the court in *Daisytek*, a "proceeding" is more than a discovery device, "it is a procedural mechanism that enables one to obtain some form of remedy or other relief." *Id.* at 187. Furthermore, the "pending proceeding rule" does not bar relief for potential litigation. *See In re Glitnir*, 2011 WL 3652764, at *5 & n.12 ("That the Foreign Representative may eventually litigate with the same defendants, here or in Iceland, does not call for a different conclusion. In analogous circumstances, a bankruptcy trustee is free to use Rule 2004 to obtain evidence against a target even though it is likely that the trustee will eventually sue the target.").

67 *See In re Hughes*, 281 B.R. at 229 ("The issues concerning the insolvency of [the debtor], and when [the debtor] became insolvent requires the Joint Liquidators to understand as much as possible about the financial affairs of [the debtor]. The information and knowledge which the [auditor's] employees are likely to have is essential to this investigation.").

U.S.-based and held by U.S. subsidiaries, do not have the power to seek relief under U.S. law, cannot be countenanced. Moreover, the need for discovery in this case is particularly acute given the anticipated lack of cooperation by the Funds' executives and the alleged criminal fraud with respect to the Funds.

Accordingly, the Court determines that the arbitration clauses under the Engagement Letters do not limit the relief available to the Liquidators under the Bankruptcy Code and Rules with respect to the Subpoena.

IV. CONCLUSION

For all of the foregoing reasons, the Motion is granted. Any other arguments made and not specifically addressed in this Decision, including but not limited to the argument that the Subpoena is overly broad and should be narrowed, are hereby overruled.

IT IS SO ORDERED.

Dated: April 17, 2018
New York, New York

/s/ Shelley C. Chapman
HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

HCMP 134/2018
[2019] HKCFI 174

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

---

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

R E A S O N S F O R D E C I S I O N

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]

[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]

---

[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

---

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

---

[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

---

[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

---

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

由此

CACV 207/2005 AND CACV 210/2005

CACV 207/2005

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 207 OF 2005

(ON APPEAL FROM HCCW NO. 1139 OF 2004)

IN THE MATTER of LEGEND INTERNATIONAL RESORTS LIMITED

and

IN THE MATTER of the Companies Ordinance, Cap. 32

CACV 210/2005

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 210 OF 2005

(ON APPEAL FROM HCCW NO. 1139 OF 2004)

IN THE MATTER of LEGEND INTERNATIONAL RESORTS LIMITED

and

IN THE MATTER of the Companies Ordinance, Cap. 32

由此

Before: Hon Rogers VP and Le Pichon JA in Court
Date of Hearing: 7-9 February 2006
Date of Handing Down Judgment: 1 March 2006

J U D G M E N T

Hon Rogers VP:

1. This is an appeal from a judgment of Kwan J given on 6 June 2005. The judge had before her two applications. The first was an application on the part of the petitioning creditor, Morgan Stanley Emerging Markets Inc. ("the petitioner") for the appointment of the provisional liquidators of Legend International Resorts Ltd ("the Company"). The second application was a summons issued by the Company to strike out the winding-up petition on the grounds that it disclosed no reasonable cause of action, it was scandalous, frivolous or vexatious or an abuse of the process of the court.

2. The judge dismissed the application to strike out the petition but refused the appointment of provisional liquidators. At the conclusion of the hearing of this appeal, judgment was reserved which we now give.

Background

3. The Company is a Hong Kong company with nominal capital of HK$120 million and a paid-up capital of HK$115,954,000. Almost 60% of the shares of the Company are held by Metroplex Berhad ("Metroplex"), a Malaysian company which is listed on the Kuala Lumpur stock exchange. 40% of the Companies' shares are held by Sinophil Corporation, which is incorporated in the Philippines and listed on the Philippine Stock Exchange. Metroplex holds 22% of Sinophil. As recorded in the judgment steps are being put in train for Metroplex to take over the shareholding held by Sinophil.

由此

4. The Company's business consists of the operation of a casino in Subic Bay in the Philippines. The premises are leased from the Subic Bay Municipal Authority ("SBMA"). According to the audited accounts of the Company, the Company has made losses in each of the last six years commencing with the year ended 31 January 2000. Those losses have been in excess, and in some years greatly in excess, of HK$100 million per year.

5. The operation of the casino in Subic Bay is under a licence from the Philippine Amusement and Gaming Corporation ("Pagcor"). It is the Company's position that it holds an exclusive licence to operate such a casino.

6. In July 1997 the Company entered into a Facility Agreement. The Société Générale Asia (Singapore) Ltd was the coordinating arranger and agent of what was in effect a syndicated loan. There were a number of financial institutions that were the lenders. The Facility Agreement provided for a revolving credit facility of up to an aggregated principal amount of US$33 million. A year later, in July 1998, the Company defaulted on the repayment of advances under the Facility Agreement and in respect of the interest which had accrued and other outstanding amounts. Naturally, this constituted an event of default under the terms of the Facility Agreement. In December 1999 Société Générale Asia served a written demand for payment within ten days of the total amount then owing, which was US$26,375,450.93. This was, but one symptom of the financial difficulties into which the Company and Metroplex had fallen.

7. In December 2000 Metroplex had sought assistance from the Corporate Debt Restructuring Committee in Malaysia but, eventually, that route had proved to be unfruitful. As set out in the judgment below Metroplex endeavoured to solve its financial difficulties by seeking an order for a scheme of arrangement. In the course of the applications in Malaysia to restructure

由此

Metroplex draft scheme documents in respect of the Company were exhibited as part of that endeavour. That endeavour also seems to have proved unfruitful and the majority of the creditors did not support the proposed scheme. One matter which emerged from the scheme documents was that Metroplex owed the Company some US$151,708,107.

8. The petitioning creditor is a Delaware company incorporated under the provisions of the General Corporations Law of Delaware. It would seem that its business comprises of, or includes in a major respect, the acquisition of distressed debt in the secondary debt market. Although the law of Delaware does not prevent it from lending money for its corporate purposes, section 126 of the General Corporations Law of Delaware provides that:

> "Banking power denied.
>
> (a) No corporation organized under this chapter shall possess the power of issuing bills, notes, or other evidences of debt for circulation as money, or the power of carrying on the business of receiving deposits of money.
>
> (b) Corporations organized under this chapter to buy, sell and otherwise dealing notes, open accounts and other similar evidences of debt, or to loan money and take notes, open accounts and other similar evidences of debt as collateral security therefore, shall not be deemed to be engaging in the business of banking."

9. The petitioner has filed specific evidence that it does make loans and buy and sell loans and, as such, contends that it is indeed a financial institution conducting what is commonly referred to as investment banking.

10. As part of its ordinary business the petitioner had, prior to the presentation of the petition, acquired the debt previously owed to Keppel Bank of Singapore Ltd which was part of the syndicated loan referred to above.

11. This petition was presented on 3 November 2004. Two days later the Company filed a petition in the local court in the Philippines for corporate

由此

rehabilitation, that has been referred to as the Rehab Petition. The Rehab Plan annexed to the Rehab Petition closely followed the draft scheme document which had been exhibited to affidavits in Malaysia. As part of the proposal for reconstruction, it dealt with the debt owed by the Company to Metroplex and the debt owed as part of the syndicated loan. It did not deal with either of the debts which were owed to SBMA or Pagcor. The allegation is that the Company owes SBMA an amount which is equivalent to more than the US$13 million and Pagcor an amount which is equivalent to more than US$4 million.

12. When the petition was presented, the petitioner sought the appointment of provisional liquidators. The application for the appointment of provisional liquidators was expressed to be in conjunction with an application in Malaysia for appointment of provisional liquidators in respect of Metroplex. In relation to those proceedings it need only be said that the petitioner had presented a petition to wind up Metroplex but that petition has not been pursued.

13. The basis upon which the application for the appointment of provisional liquidators was made was that they should be empowered to explore a restructuring scheme for the Company. It was said that although the business of the Company was such that there was scope for producing value to the creditors it was not in the best interests of the creditors that the restructuring process should remain in the hands of the then current management. Although it was suggested that the amount which the Company's casino derived as revenue based on the number of seats at the gaming tables and slot machines was considerably less than might be expected and also that there had been dealings with other companies all of which could be the subject of investigations by the provisional liquidators, it was not overtly suggested or said

由此

that the assets of the Company were in jeopardy. Certainly that was not the basis on which the application for appointment was made.

The hearing of the applications in the court below

14. On the hearing of the applications in the court below the Company sought to strike out the petition on the basis that the petitioner was not a creditor of the Company since it was not entitled to take an assignment of the loans under the syndicated loan. The point which was raised was that the petitioner did not come within the meaning of an "Eligible Transferee" as used in the Facility Agreement and defined in Clause 1.01 thereof. The judge dismissed that contention and held that the petitioner did have locus to present a winding-up petition.

15. The second basis for seeking to strike out the petition was that it was said that the presentation of the winding-up petition was an abuse of the process because the petitioner's predominant purpose was to be able to obtain control of the Company's administration. It was also said that the petition had been presented not to achieve a winding-up but in order to have provisional liquidators appointed with a view to proferring a scheme of arrangement. The judge was not satisfied that there had been any abuse of the winding-up procedure, remarking that the petition should only be struck out in plain and obvious cases.

16. With regard to the appointment of provisional liquidators the judge observed that she did not consider that the protection of assets basis for the appointment of provisional liquidators had been made out. Indeed, it would appear that the application for the appointment of provisional liquidators had initially been put, not upon the basis that there was a requirement for the protection of the assets which might be in jeopardy but that the provisional

由此

liquidators should be appointed for the purpose of exploring, formulating and pursuing a corporate rescue. In this respect, although the judge said at paragraph 92 that the court had jurisdiction to appoint provisional liquidators to explore, formulate and pursue a corporate rescue, she went on to hold that the circumstances did not warrant such an application at that time, although the judge clearly left open the possibility of a further application being made at a later time.

This appeal

17. On this appeal Mr Barlow, who appeared on behalf of the Company, argued that the petition should be struck out for the same reasons as he had argued in the court below. At the hearing, this court indicated that it did not consider that the petition should be struck out albeit no order was made immediately.

18. The argument that the petitioner was incompetent to present a creditor's winding-up petition was on the basis that it could not take a valid assignment of the rights of a lender under the Facility Agreement. The point at issue was whether the petitioner could bring itself within the definition of "Eligible Transferee". In the Facility Agreement that was defined as meaning "any bank, deposit taking company or other financial institution, wherever incorporated, duly authorised to carry on its business and to participate in the Facility".

19. The substance of the point was that the Facility Agreement was a "revolving credit" facility. The Company was entitled to request the making of an advance during the period of the agreement and even if money were repaid the Company was entitled to request further advances. It was thus said that the identity of any lender was of significance because the lender had to be

由此

in a position whereby it could provide the various loan amounts as and when required. The argument thus ran that the definition of Eligible Transferee had to be read in the context of the Transferee being in the nature of a bank.

20. In this regard reliance was placed by Mr Barlow on the decision of Steel J in *The Argo Fund Limited v Essar Steel Ltd* [2004] EWHC 128. However that was a decision on a summary judgment application where, of course, the court had to be satisfied that there was no viable argument. That case had been tried later by Aikens J. His decision is reported in [2005] EWHC 600. In my view, considerable care has to be taken in considering the judgment in relation to the present case. Whereas "Transferee" was defined in the relevant agreement as meaning a bank or other financial institution and Aikens J held after a trial that the plaintiff in that case did constitute a financial institution, it must still be borne in mind that he did so in the context of the particular contract which he was considering. His reasoning turned upon the fact that financial institution in the terms of that contract meant an entity which was capable of lending money. In doing so he rejected the argument that in that case the requirement was that the principle activity of the transferee had to be the provision of finance in the primary lending market.

21. In my view, the assistance to be derived from the reasoning in that case as regards this case is the importance of considering the terms of the particular contract and the significance of the provision. It was emphasised that the definition in the present contract was that the Transferee should be a bank, deposit taking company or other financial institution and it was said that the words financial institution should be restricted to an entity which was similar to a bank or deposit taking company. In my view, the words financial institution still should be given their ordinary meaning. There is no apparent reason emerging from a consideration of the Facility Agreement why the financial institution involved should be restricted to a bank or deposit taking

由此

company. It would have to be an entity which was capable of lending money of the appropriate amount. Over and above that I see no warrant for restricting the term Eligible Transferee any further.

22. On the evidence filed in this case, it is clear that the petitioner does lend money in the ordinary course of its business and although it is primarily involved with buying distressed debt in the secondary debt market, it is capable of and does lend money. The fact that it is not entitled under the laws of the state of its incorporation, namely Delaware, to conduct banking business, does not prevent it from lending money and on the basis of the evidence and arguments that have been presented to-date, I have no doubt that the petitioner does come within the definition of Eligible Transferee.

23. This court was made fully aware that some two months, or slightly more, after the presentation of the petition the Company issued proceedings in the Commercial Court in London seeking a declaration that there had been no effective transfer by way of novation of the debt to the petitioner. In doing so, the Company relied upon the fact that the facility agreement was to be governed by and construed in accordance with the laws of England although under Clause 23.02 of the Facility Agreement the parties irrevocably submitted to the non-exclusive jurisdiction of the courts of Hong Kong and England. The commencement of those proceedings could hardly be suggested to lead to an acceleration of the resolution of the challenge to the ability of the petitioner to present the petition. Rather, the commencement of those proceedings and the refusal of the petitioner to accept service of those proceedings without formal orders, has, if anything, led to yet further prolongation of the litigation of the disputes between the parties.

24. With regard to the case presented on the basis that the petition was an abuse of process, it would seem that there are arguments which could be

由此

made. The ultimate question must nevertheless be as to whether the petitioner indeed seeks a winding-up order. The fact that a petitioner might be content with a reconstruction of the Company or some other arrangement does not mean that, if all else fails, the petitioner will not seek a winding-up order. If it were the intention of the petitioner never to seek a winding-up order then the matter of abuse would be of significance. It would seem, however, that if a petitioner chooses not pursue to seek a winding-up order when the time comes, the ultimate outcome would be that the petition would be dismissed with costs against the petitioner. The net effect is similar, therefore, to that if the petition is struck out at an early stage. The major difference is one of timing.

The appointment of provisional liquidators

25. The power to appoint liquidators is contained in section 192 of the Companies Ordinance Cap. 32. That provides:

> "For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators, provisionally or otherwise, in accordance with sections 193 and 194."

26. Section 193 relates to the appointment and powers of provisional liquidators and section 194(1) relates to the appointment of liquidators but where a winding-up order is made. Section 193(1) provides that the court can appoint a liquidator provisionally at any time after the presentation of a petition and subsection (2) provides that the appointment may be made at any time before the making of a winding-up order. Subsection (3) gives the court power to limit or restrict the powers of the provisional liquidator in the order appointing him. That, no doubt, is a reference to the powers of the liquidator which are dealt with generally in section 199. Those powers are specifically made subject to section 193(3). Generally speaking the powers under section 199 are directed to an orderly winding-up of the Company and the

由此

eventual dissolution of the business. There is a power given under section 199(1)(b) for the liquidator to carry on the business of the Company, but even then there is a specific limitation that that may only be done in so far as it may be necessary for the beneficial winding-up the Company.
Section 199(1)(e) provides that the liquidator may compromise or make an arrangement with creditors or persons claiming to be paid as creditors and taken together with the provisions of section 166 it is clear that the liquidator is given power to apply to the court for a scheme of arrangement.

27. Traditionally the primary object of appointing a provisional liquidator has been regarded as the need to maintain the status quo and to prevent anybody from obtaining priority over other creditors. The appointment was not only provisional but contingent. The appointment was made where it was clearly shown that the Company was insolvent, either by admission by the Company itself or upon other evidence. The purpose of the appointment was to protect the assets of the Company and hence some danger to the assets, not limited to malfeasance, had to be shown.

28. Recently there has developed a practice in England that provisional liquidators could be appointed in respect of insurance companies even if it could not be shown that there was jeopardy to the assets. The reason for the development of that practice lay in the fact that the insurance policies themselves might have otherwise lapsed. Whilst holders of insurance policies might not be creditors, they were in a position when they might become creditors.

29. In Hong Kong Madam Justice Yuen in the case of *Re Keview Technology (BVI) Limited* [2002] 2 HKLRD 290 extended the powers of the provisional liquidators in order to enable a corporate rescue to be explored. It is important to note, however, that the provisional liquidators had been

由此

appointed, in the first place, because there was a threat of disruption of the factory and seizure of stock by unpaid employees and other creditors. There is thus no doubt that the traditional basis for the appointment of provisional liquidators had been made out. The judge said in paragraph 19:

> "It might be thought paradoxical to extend powers to provisional liquidators to attempt to save the company, when they were appointed upon the presentation of a petition to wind it up. However, the Court retains a discretion whether to order a company to be wound-up, and so long as the Petitioner did have *locus* to present the petition and intends to seek a winding-up order if the rescue attempt should fail, I do not see any jurisprudential objection to empowering provisional liquidators to proceed along rescue lines at least in a case such as the present."

30. In doing so the judge observed that it was not the role of the court to legislate and the court could only operate within the existing framework of the law. That approach was adopted by this court in the case of *Re Luen Cheong Tai International Holdings Ltd* judgment 23 January 2003. In that case at first instance the judge had observed at paragraph 29:

> "In *Keview*, it was held by Yuen J (as she then was) that there is no jurisprudential objection in extending the powers of provisional liquidators appointed under section 193 of Cap. 32 to carry out a corporate rescue role. It seems to me a logical extension of *Keview* that if provisional liquidators may be empowered by the court to facilitate a restructuring proposal, this recognised function of the provisional liquidators could provide the rationale for appointing them in the first place."

31. It was in that context that this court whilst dismissing the appeal felt it necessary to say in paragraph 12:

> "The judge below referred to decisions in which similar orders had been made in circumstances where administration orders were not available. In particular, the judge referred to the decision in *Re Keview Technology (BVI) Limited* [2002] 2 HKLRD 290 where the application had the support of 100% of the company's outside creditors. In that case Yuen J (as she then was) held (at paragraph 19) that there was no jurisprudential objection to extending the powers of provisional liquidators in order to enable a corporate rescue to take place provided that a winding up order would be sought should the rescue attempt fail. Once it has *been established* that the grounds for the appointment of

由此

> provisional liquidators exist on the basis that it is likely that a winding up order would be made *and that circumstances exist which justify the making of the appointment on the basis of the protection of assets*, the fact that the applicant for the appointment wishes that the provisional liquidators be granted powers to facilitate a restructuring of the company can be no bar to the appointment and is not intrinsically objectionable. Whether such powers should be granted and the scope of those powers including any restrictions would depend on the particular circumstances such as the support of the creditors." (*emphasis added*)

32. In the meantime, it appears that before the appeal in the *Re Luen Cheong Tai International Holdings Ltd* had been heard, other courts at first instance had, at least indicated, that appointment of provisional liquidators could be made on the basis that that a corporate rescue should be explored without reference to the question as to whether the assets were in jeopardy. This ultimately led to the bald statement in paragraph 92 of the judgment below which was as follows:

> "I hold that it is within the jurisdiction of the court to appoint provisional liquidators to explore, formulate and pursue a corporate rescue."

33. In my view, the court should not attempt to extend the statutory law albeit for expediency. The appointment of provisional liquidators is a statutory power given to the court. It is not a common law power which can be extended, as in the case of the development of the law in relation to *Mareva* injunctions and *Anton Piller* orders. As Madam Justice Yuen observed in the *Keview* case it is not the function of the court to legislate. In the Report on Corporate Rescue and Insolvent Trading by the Law Reform Commission of Hong Kong published in October 1996, recommendation was made for the introduction of a law which would enable corporate rescues to take place far more conveniently than at present. Even now, nearly 10 years later, no such law has been enacted. It is not appropriate for this court to examine the reasons why no such law has been introduced. The fact of the non-introduction is, nevertheless, indicative that it is not a straight forward

由此

matter in respect of which there are no differences of views as to its desirability or what the provisions of any such law should be.

34. The rationale of corporate rescues is that, if successful, there is almost certainly likely to be a better return to creditors and also shareholders than if the particular company went into liquidation. Overseas, there have been a number of successful corporate rescues but there have been an equal or perhaps greater number when rescue has failed. In Hong Kong, there have also been some very high profile successful corporate rescues. Nevertheless, whether a law should be introduced remains a matter of policy for the administration and the legislature. Amongst other things, any such law has to cater for the rights of secured creditors, in respect of both fixed and floating charges; it normally has to cater for the need for there to be further borrowing, in practice thus necessitating giving the lenders in respect of any new loans what has been called super priority. The position of directors also needs to be catered for. Major difficulties can arise in respect of insolvent trading and the liability of the relevant person(s), namely, for example the provisional supervisor has to be limited. Some of the relevant matters dealt with in the Report and in overseas corporate rescue legislation are matters of policy. Not least amongst these are the rights of the employees and the effect introduction of a corporate rescue regime would have on their rights both under contract and under other legislation.

35. The law on the appointment of provisional liquidators at present is contained in section 192 and the following sections and it is clear on the wording of those sections that the appointment of a provisional liquidator must be for the purposes of the winding-up. Provided that those purposes exist there is no objection to extra powers being given to the provisional liquidator(s), for example those that would enable the presentation of an application under section 166. There is, nevertheless, a significant difference between the

由此

appointment of provisional liquidators on the basis that the Company is insolvent and that the assets are in jeopardy and the appointment of the provisional liquidators solely for the purpose of enabling a corporate rescue to take place. The difference, may, in most cases, be merely a matter of emphasis, but in the final analysis the difference exists.

36. Another way of putting the same point is that a scheme of arrangement may well be a viable alternative to winding-up. If it proves to be so, the winding-up will cease and the scheme will take effect. The power of the court under section 192 is to appoint a liquidator or liquidators for the purposes of the winding-up not for the purposes of avoiding the winding-up. Whatever benefits may be said to arise and however convenient it may be said to be for the court to be able to appoint provisional liquidators for other purposes it seems to me that primary purpose of appointing provisional liquidators must always be the purposes of the winding-up. Restructuring a company is an alternative to a winding-up.

37. I would only make one further observation in this respect that is in relation to the case of *SFC v. Mandarin Resources Corporation Ltd.* This case is reported on appeal at [1997] HKLRD 405. It is suggested in the written submissions of the petitioner that that case is authority for the proposition that provisional liquidators may be appointed to investigate the affairs of a company. Having re-read my own decision at first instance and that of the Court of Appeal I find it difficult to understand how it can be suggested that the appointment of provisional liquidators in that case was other than to protect the assets which were shown to be likely to be in real jeopardy.

38. In the judgment below in this case, the judge came to the conclusion, as already observed, that the protection of assets basis for the appointment of provisional liquidators had not been made out. She did so on

由此

the basis that there had been appointed a rehabilitation receiver in the Philippines who, every three months, was required to report to the court there on the general condition of the Company. In the context of the situation which existed at the date of the hearing of the application before the judge below, it appeared that the Rehab proceedings were not merely on going but were potentially viable. Furthermore the court was presented with a situation where none of the other creditors had supported the application for the appointment of provisional liquidators. On this appeal evidence was admitted as to what had taken place since the hearing in the court below. Amongst other matters it now appears that all the debts comprised under the loans of the Facility Agreement are now either owed to the petitioner or Avenue Asia Special Situations Fund III, L. P. ("Avenue Asia"). The fact that Avenue Asia might be taking over some of those loans apparently became known to the judge after the hearing in the court below and before the written decision was handed down. Nevertheless, at that stage there had been no confirmation that the transfer had taken place.

39. The appeal was presented primarily on the ground that it was necessary to appoint provisional liquidators for the purpose of entering into discussions with relevant parties, particularly the petitioner and Avenue Asia and the other remaining creditor under the Facility Agreement, Ta Chong Bank Limited, Taiwan, to explore the feasibility of restructuring Company pursuant to a scheme of arrangement under section 166. It may be noted that it was only after counsel had been questioned by the court as to whether the petitioner's case was that provisional liquidators were necessary for the purpose of preservation of assets that Mr Crystal QC, who appeared on behalf of the petitioner, began to argue a case on that point in his reply speech.

40. When asked as to the exact terms of the order which was sought, Mr Crystal later produced a proposed draft order. The first order was limited

由此

to the provisional liquidators taking possession of the assets and property of the Company in Hong Kong. It may be noted that it has not been shown that there are any other assets in Hong Kong other than the statutory books and records, assuming those are here.

41. In addition to calling an informal meeting of creditors and formulating a scheme, the draft order also included giving power to the provisional liquidators to take such steps as they may be advised in the Philippines whether in the court or with the Rehab Receiver but only after further leave from the court had been obtained.

42. On the basis of the matter as it was before the judge I do not consider that there are grounds for disturbing her decision. The judge came to the conclusion that the assets of the Company were not in jeopardy and although it was considered that there was power in the court to appoint provisional liquidators simply for the purpose of pursuing a corporate rescue, the judge considered it was not then appropriate particularly in the light of the proceedings than being undertaken in the Philippines.

43. On the basis of the evidence before the judge and the circumstances that existed at the time, I do not consider that it can be said that the judge fell into error. In those circumstances this court must be extremely wary of interfering. The judge was exercising her discretion. Unless there are grounds for holding that the discretion was exercised wrongly, this court cannot interfere simply because it might have exercised the discretion another way. Moreover, if circumstances have changed since the hearing below, that may be grounds for the making of a new application to the judge but not for allowing an appeal. As already noted, however, the judge specifically had in mind that the circumstances might change and that then there might be grounds for appointing provisional liquidators.

由此

44. This court was informed that the matter would be referred back to the judge within two weeks of the judgment of this court. It appears to me that it is far more suitable for the judge to be able to reconsider the matter than for this court to do so, even if it were open to this court to interfere with the exercise of the judge's discretion whether to appoint provisional liquidators.

45. In the first place it seems to me that this court would be asked to act on a different factual basis to that which the judge addressed. To that extent Mr Barlow's point that this court was being asked to exercise first instance jurisdiction has validity. It is particularly undesirable for this court to be asked to appoint provisional liquidators in a situation where it is clearly envisaged that there will have to be substantial monitoring of the role of the liquidators. This is all the more so where the appointment of the provisional liquidators is very much a matter of discretion based upon the court's assessment of what is achievable and what is not. Part of the reason for seeking the appointment of provisional liquidators is that it will give the provisional liquidators status to apply to the courts in the Philippines and to deal with the Rehab Receiver. No evidence has yet been given that those ends would be accomplished even if provisional liquidators were appointed.

46. If a new application were to be made to the judge, there would appear to be grounds for suggesting that there have been material changes in the circumstances. In particular, it would appear that the proposed rehabilitation plan presented on 4 November 2004 was now no longer viable. The proposed plan appears to have envisaged two schemes of arrangement. They are expressed to have been under section 166A of the Ordinance but that was probably a mistake for section 166. Nevertheless, Mr Barlow argued that the reduction of capital could be effected under section 58 of the Ordinance and that approval of creditors was not required and creditors could not have opposed under the terms of section 59. That may be correct but the proposed reduction

由此

in what was termed the Scheme B whereby the creditors under the Facility Agreement would have their loans restructured in a major way would no longer appear to be viable.

47. On the assumption of the applicability of the rules relating to the proposed Rehab Plan, which both parties appeared on this appeal to accept as being the relevant rules, any modification of the proposed Rehab Plan had to be submitted to the court not later than one year after the date of the initial hearing. That date has passed and, indeed, the 18-month period, which appears to be non-extendable, for approving of disapproving the rehabilitation plan is fast approaching in May.

48. The Company appears still to be running at a loss, despite the optimistic view of the Rehab Receiver that, if the bulk of the expenses of the Company are ignored, there may have been a surplus over the last six months. What is perhaps particularly relevant is that the audited accounts which have been obtained in respect of the last two years have been so heavily qualified by the accountants that they could scarcely be said to be worth the paper they are written on. That is so even taking into account that they show that the Company was running at a loss. Once it is appreciated that the Company is running the casino on a day-to-day basis there are, probably, grounds for suggesting that some creditors may be being preferred to others. There, thus, may well be legitimate grounds for arguing that the assets of the Company are in jeopardy.

49. Even if it were established that the assets of the Company were in jeopardy it would be necessary for the court to consider whether the appointment of provisional liquidators would serve any useful purpose. From the point of view of the protection of assets the difficulty arises that there is a Rehab Receiver in place still in the Philippines and it is no by no means clear as

由此

to what effective steps can be taken by provisional liquidators in respect of those assets. To-date neither the Rehab Receiver nor the court in the Philippines has acknowledged the rights of the petitioner. It may well be that even after this judgment, they may not be prepared to deal with the petitioner, or anybody appointed on the petitioner's application, unless and until the matter has been resolved in the Commercial Court. In this context, it is also relevant that the order sought in this court did not encompass giving the provisional liquidators any power or authority over the assets of the Company, other than the normal assets, namely, the books and records of the Company.

50. If the appointment of provisional liquidators cannot be shown to be likely to achieve any beneficial effect as regards the preservation of the assets of the Company the purpose of appointing provisional liquidators becomes problematic.

51. I would also add that it is by no means clear as to what scheme could be proposed by provisional liquidators. Without the cooperation of Metroplex, the financial creditors, namely, primarily the petitioner and Avenue Asia, would appear unlikely to be able to propose any plan which could save the Company. In those circumstances it may well be that the only viable course is for the petitioner to press for a winding up. Indeed, it would appear to be rather surprising that the petition has been allowed to linger for so long. There is no doubt as to the insolvency. On the face of the evidence which is now before the court, the petitioner's locus appears clear. It is by no means apparent as to what evidence in that respect the Company can now adduce. In my view, as in all other cases of winding up petitions, the court should take control of the proceedings and not permit adjournments and delays unless strictly necessary.

由此

Hon Le Pichon JA:

52. I agree.

Hon Rogers VP:

53. The appeals are therefore dismissed with an order *nisi* of costs in favour of the respondents to the respective appeals.

(Anthony Rogers)
Vice-President

(Doreen Le Pichon)
Justice of Appeal

Mr Michael Crystal QC & Mr Charles Manzoni, instructed by Messrs White & Case, for the Petitioner/Appellant in CACV 207/2005

Mr Barrie Barlow & Mr William Wong, instructed by Messrs Richards Butler, for the Company/Appellant in CACV 210/2005

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]

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS **2**

PARTIES 2

BACKGROUND TO THE DISPUTE 3

THE PARTIES' CASES **4**

THE LEGAL FRAMEWORK 4

SUMMARY OF THE APPLICANTS' CASE 5

SUMMARY OF THE INTERVENER'S CASE 7

MY DECISION **8**

ISSUE 1: WHETHER THE US PROCEEDINGS ARE A "FOREIGN PROCEEDING" UNDER THE SINGAPORE MODEL LAW **8**

ISSUE 2: ZETTA JET SINGAPORE'S COMI **9**

THE INTERPRETATIVE APPROACH TO BE ADOPTED 10

RELEVANT DATE FOR DETERMINING THE COMI 15

The English (and European) position *15*

The Australian position *17*

The US position *18*

The 1997 and 2013 Guides *19*

The preferred approach *20*

FACTORS TO BE CONSIDERED IN DETERMINING COMI 23

The English and European approach *23*

The Australian approach *25*

The US approach....26

The Singaporean approach....26

CONSIDERATION OF FACTORS IN THE PRESENT APPLICATION....30

Location from which control and direction was administered....31

Location of clients....32

Location of creditors....33

Location of employees....33

Location of operations....34

Dealings with third parties....35

The governing law....36

Location that the foreign representative was operating from....36

THE FINAL ASSESSMENT....37

ISSUE 3: WHETHER THE PUBLIC POLICY EXCEPTION APPLIES....38

THE ALLEGEDLY CONTINUING BREACH....40

THE GENERAL INTERESTS OF CREDITORS....42

ORDERS MADE....43

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

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").

---

[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]

---

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]

---

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

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

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.

---

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.

---

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.

---

[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

---

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

---

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.

---

[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

---

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:

---

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.

---

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, Jerrie Tan Qiu Lin and Kyle Gabriel Peters (Straits Law Practice LLC) for the Intervener.

Case 17-2992, Document 1312, 02/25/2019, 2503980, Page1 of 40

17-2992(L)
In re Picard

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2018

(Argued: November 16, 2018 | Decided: February 25, 2019)

Docket Nos. 17-2992(L),
17-2995, 17-2996, 17-2999, 17-3003, 17-3004, 17-3005, 17-3006, 17-3007, 17-3008, 17-3009, 17-3010, 17-3011, 17-3012, 17-3013, 17-3014, 17-3016, 17-3018, 17-3019, 17-3020, 17-3021, 17-3023, 17-3024, 17-3025, 17-3026, 17-3029, 17-3032, 17-3033, 17-3034, 17-3035, 17-3038, 17-3039, 17-3040, 17-3041, 17-3042, 17-3043, 17-3044, 17-3047, 17-3050, 17-3054, 17-3057, 17-3058, 17-3059, 17-3060, 17-3062, 17-3064, 17-3065, 17-3066, 17-3067, 17-3068, 17-3069, 17-3070, 17-3071, 17-3072, 17-3073, 17-3074, 17-3075, 17-3076, 17-3077, 17-3078, 17-3080, 17-3083, 17-3084, 17-3086, 17-3087, 17-3088, 17-3091, 17-3100, 17-3101, 17-3102, 17-3106, 17-3109, 17-3112, 17-3113, 17-3115, 17-3117, 17-3122, 17-3126, 17-3129, 17-3132, 17-3134, 17-3136, 17-3139, 17-3140, 17-3141, 17-3143, 17-3144, 17-3862.

IN RE: IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC

Before:

JACOBS, POOLER, AND WESLEY, *Circuit Judges*.

These eighty-eight consolidated appeals come from dozens of related orders of the United States Bankruptcy Court for the Southern District of New York (Bernstein, *J.*). Plaintiff-Appellant Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC ("Madoff Securities"), alleges that Madoff Securities transferred property to foreign entities that subsequently transferred it to other foreign entities, including the hundreds of Appellees. The

CERTIFIED COPY ISSUED ON 02/25/2019

Trustee contends that Madoff Securities' transfers are avoidable (meaning "voidable") as fraudulent under § 548(a)(1)(A) of the Bankruptcy Code. He thereby seeks to recover the property from the Appellees using § 550(a)(2) of the Bankruptcy Code. These actions were dismissed on the grounds that the presumption against extraterritoriality and international comity principles limit the scope of § 550(a)(2) such that the trustee of a domestic debtor cannot use it to recover property that the debtor transferred to a foreign entity that subsequently transferred it to another foreign entity. We disagree and hold that neither doctrine bars recovery in these actions. Accordingly, we **VACATE** the judgments of the bankruptcy court and **REMAND** for further proceedings.

ROY T. ENGLERT, JR., Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, Washington, D.C. (David J. Sheehan, Seanna R. Brown, Torello H. Calvani, Catherine E. Woltering, Baker & Hostetler LLP, New York, NY, *for Plaintiff-Appellant Irving H. Picard*; Howard L. Simon, Windels Marx Lane & Mittendorf, LLP, New York, NY; Matthew B. Lunn, Young Conaway Stargatt & Taylor, LLP, New York, NY, *Special Counsel for the Trustee, on the brief*), *for Plaintiff-Appellant*.

JOSEPHINE WANG, General Counsel (Kevin H. Bell, Senior Associate General Counsel for Dispute Resolution, Nathanael S. Kelley, Associate General Counsel, *on the brief*), Securities Investor Protection Corporation, Washington, D.C., *for Intervenor Securities Investor Protection Corporation*.

FRANKLIN B. VELIE, Sullivan & Worcester LLP, New York, NY; THOMAS J. MOLONEY, Cleary Gottlieb Steen & Hamilton LLP, New York, NY (Diarra M. Guthrie, Samuel P. Hershey, Cleary Gottlieb Steen & Hamilton LLP, New York, NY; Timothy P. Harkness, David Y. Livshiz, Jill K. Serpa, Freshfields Bruckhaus Deringer US LLP, New York, NY; Marshall R. King, Gibson, Dunn & Crutcher LLP, New York, NY; Jonathan G. Kortmansky, Mitchell C. Stein, Sullivan & Worcester LLP, New York, NY, *on the brief*), *for Defendants-*

Appellees HSBC Holdings plc, et al., *UBS AG*, et al., *First Peninsula Trustees Limited*, et al., *and BA Worldwide Fund Management Limited*.

Eugene R. Licker, Ballard Spahr LLP, New York, NY, *for Defendants-Appellees Lighthouse Investment Partners, LLC, Lighthouse Supercash Fund Limited, and Lighthouse Diversified Fund Limited*.

Dean A. Ziehl (Harry D. Hochman, Alan J. Kornfeld, *on the brief*), Pachulski Stang Ziehl & Jones LLP, New York, NY, *for Amicus Curiae National Association of Bankruptcy Trustees, in support of Plaintiff-Appellant*.

Roger P. Sugarman, Kegler, Brown Hill + Ritter, Columbus, OH, *for Amici Curiae Professors of Conflict of Laws, in support of Plaintiff-Appellant*.

Andrea Dobin (Henry M. Karwowski, *on the brief*), Trenk, DiPasquale, Della Fera & Sodono, P.C., West Orange, NJ, *for Amici Curiae Bankruptcy Law Professors, in support of Appeal and Reversal*.

David Molton, Brown Rudnick LLP, New York, NY, *for Amicus Curiae Kenneth Krys, as Liquidator and Foreign Representative of Fairfield Sentry Limited, Fairfield Sigma Limited, and Fairfield Lambda Limited, in support of Plaintiff-Appellant and partial reversal*.

Daniel M. Sullivan (Matthew Gurgel, Benjamin F. Heidlage, *on the brief*), Holwell Shuster & Goldberg LLP, New York, NY, *for Amici Curiae Brian Child, Christopher Hill, Nilani Perera, Martin Trott, and Andrew Willins, in support of Defendants-Appellees*.

George T. Conway III (Emil A. Kleinhaus, Joseph C. Celentino, *on the brief*), Wachtell, Lipton, Rosen & Katz, New York, NY, *for Amicus Curiae Securities Industry and Financial Markets Association, in support of Defendants-Appellees*.

Richard A. Kirby, FisherBroyles, LLP, Washington, D.C. (Carole Neville, Dentons, New York, NY; Richard Levy, Pryor Cashman LLP, New York, NY, *on the brief*), *for Amici Curiae Lanx BM Investments, LLC,* et al., *in support of Defendants-Appellees.*

WESLEY, *Circuit Judge*:

These eighty-eight consolidated appeals arise from the ongoing fallout of Bernard Madoff's Ponzi scheme. As alleged, Bernard L. Madoff Investment Securities LLC ("Madoff Securities") fraudulently transferred billions of dollars to foreign investors, including the feeder funds at issue here. These feeder funds, the initial transferees of that property, subsequently transferred it to other foreign investors, a group that includes the hundreds of Appellees. Irving H. Picard, the Appellant and Trustee for the Liquidation of Madoff Securities, alleges these transfers are fraudulent, and thus avoidable (meaning "voidable"), under § 548(a)(1)(A) of the Bankruptcy Code. Invoking § 550(a)(2) of the Bankruptcy Code, the Trustee sued the Appellees to recover the property. The question before us is whether, where a trustee seeks to avoid an initial property transfer under § 548(a)(1)(A), either the presumption against extraterritoriality or international comity principles limit the reach of § 550(a)(2) such that the trustee cannot use it

to recover property from a foreign subsequent transferee that received the property from a foreign initial transferee.

Following an order of the United States District Court for the Southern District of New York (Rakoff, *J.*),[1] the United States Bankruptcy Court for the Southern District of New York (Bernstein, *J.*)[2] dismissed the Trustee's actions, holding in each that either the presumption against extraterritoriality or international comity principles prevent the Trustee from using § 550(a)(2) to recover this property. We disagree and hold that neither doctrine bars recovery in these actions. Accordingly, we vacate the judgments below and remand to the bankruptcy court for further proceedings.

BACKGROUND

Bernard Madoff orchestrated the largest Ponzi scheme in history through Madoff Securities, his New York investment firm. He enticed investors to buy into alleged investment funds by promising returns that seemed, and were, too good to be true. Rather than invest the money, Madoff commingled it in a checking

[1] *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC* (*SIPC I*), 513 B.R. 222 (S.D.N.Y.), *supplemented by* 12-MC-115, 2014 WL 3778155 (S.D.N.Y. July 28, 2014).

[2] *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC* (*SIPC II*), AP 08-01789 (SMB), 2016 WL 6900689 (Bankr. S.D.N.Y. Nov. 22, 2016).

account he held with JPMorgan Chase in New York. *See, e.g.*, *In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 59–60 (2d Cir. 2013). When investors wanted to withdraw their funds, Madoff sent them checks from this account. *Id.* at 73. In effect, Madoff paid his investors using money he received from other investors. In 2008, his fraudulent enterprise collapsed.

On December 15, 2008, the Securities Investment Protection Corporation, acting pursuant to the Securities Investor Protection Act of 1978 ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.*, petitioned the United States District Court for the Southern District of New York for a protective order placing Madoff Securities into liquidation. *See, e.g.*, *In re Bernard L. Madoff Inv. Sec. LLC*, 740 F.3d 81, 84 (2d Cir. 2014). As we previously explained:

> SIPA establishes procedures for the expeditious and orderly liquidation of failed broker-dealers, and provides special protections to their customers. A trustee's primary duty under SIPA is to liquidate the broker-dealer and, in so doing, satisfy claims made by or on behalf of the broker-dealer's customers for cash balances. In a SIPA liquidation, a fund of "customer property" is established—consisting of cash and securities held by the broker-dealer for the account of a customer, or proceeds therefrom, 15 U.S.C. § 78*lll*(4)—for priority distribution exclusively among customers, *id.* § 78fff–2(c)(1). The Trustee allocates the customer property so that customers "share ratably in such customer property . . . to the extent of their respective net equities." *Id.* § 78fff–2(c)(1)(B).

Id. at 85 (alteration in original) (citation omitted). The Southern District court issued the protective order, appointed Picard as Trustee, and referred the case to the United States Bankruptcy Court for the Southern District of New York. *Id.* at 84–85 (citing Order, *SEC v. Bernard L. Madoff and Bernard L. Madoff Inv. Sec. LLC*, 08-10791 (LLS) (S.D.N.Y. Dec. 15, 2008), ECF No. 4).

Some debtors, such as Madoff Securities, complicate a SIPA trustee's task by unlawfully transferring customer property prior to the formation of a liquidation estate. To ensure that these transfers do not prevent a trustee from ratably distributing customer property, SIPA authorizes trustees to "recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of [the Bankruptcy Code]." 15 U.S.C. § 78fff–2(c)(3).

The Bankruptcy Code, in turn, provides various means for trustees to avoid a debtor's transfers and, to the extent that a transfer is avoided, to recover the transferred property. *See* 11 U.S.C. §§ 541 *et seq.* Section 550(a)(1) allows trustees to recover property from the debtor's initial transferee. And § 550(a)(2) permits a trustee to recover property from any subsequent transferee.

Many of Madoff Securities' direct investors were "feeder funds." A feeder fund is an entity that pools money from numerous investors and then places it into a "master fund" on their behalf. A master fund—what Madoff Securities advertised its funds to be—pools investments from multiple feeder funds and then invests the money.

Three foreign feeder fund networks that invested with Madoff Securities are relevant to many of these appeals:

- Fairfield Greenwich Group is a network of funds operating in New York whose funds are organized in the British Virgin Islands ("BVI"), where Fairfield is in liquidation. In those proceedings, the bankruptcy court found, liquidators other than Picard have "brought substantially the same claims [that Picard brings here] against substantially the same group of defendants to recover substantially the same transfers [that Picard seeks to recover]." *SIPC II*, 2016 WL 6900689, at *13.

- The Kingate Funds is a network of funds organized in the BVI. Kingate is currently in liquidation proceedings in the BVI and Bermuda. Liquidators in those nations have brought substantially the same claims Picard brings here "against substantially the same defendants to recover substantially the same transfers" with "limited success." *Id.* at *14.

- The Harley International (Cayman) Limited Funds network is located in the Cayman Islands, where it is currently in liquidation. Picard pursued some relief in those proceedings in 2010.

Many of these feeder funds placed all or substantially all of their assets into Madoff Securities' investment vehicles. Fairfield, for example, invested 95% of its funds with Madoff Securities.

When a feeder fund investor wants to withdraw her money, she effectively needs to recover it from the master fund. The investor initiates a withdrawal by informing the feeder fund, which itself makes a withdrawal request from the master fund. The master fund then transfers the money to the feeder fund (the initial transfer), which subsequently transfers the money to its investor (the subsequent transfer).

Because Madoff Securities did not invest the money it received from the feeder funds, the invested funds accrued no actual gains, despite representations to the contrary by Madoff Securities personnel. When a feeder fund's investor initiated a withdrawal, Madoff Securities transferred commingled investor money from its JPMorgan Chase account in New York to the feeder fund, which subsequently transferred the money to its investor.

The hundreds of Appellees are foreign subsequent transferees that invested in foreign feeder funds. In the bankruptcy court below, the Trustee sued the Appellees under § 550(a)(2) of the Bankruptcy Code to recover property the Appellees allegedly received from Madoff Securities via foreign feeder funds.[3] The Trustee contended that Madoff Securities' initial transfers to the feeder funds were avoidable as fraudulent under § 548(a)(1)(A) of the Bankruptcy Code.

The United States District Court for the Southern District of New York, Judge Rakoff, withdrew the reference to the bankruptcy court to determine whether § 550(a)(2) allows the Trustee to recover this property. In a July 2014 decision, the court held on two grounds that the Trustee could not proceed with these actions. First, it held that the presumption against extraterritoriality limits the scope of § 550(a)(2), such that a trustee may not use it to recover property that one foreign entity received from another foreign entity. Second, and alternatively, the court held that international comity principles limit the scope of § 550(a)(2) on these facts. The district court did not dismiss any of the Trustee's complaints but

[3] The Appellees contest whether the money the feeder funds sent them came entirely from Madoff Securities. For the purpose of these appeals, however, the Appellees assume that the Trustee could trace the money back to Madoff Securities. We make the same assumption.

instead remanded to the bankruptcy court for further proceedings consistent with its opinion.

On remand, and following further factual development, the United States Bankruptcy Court for the Southern District of New York, Judge Bernstein, applied the district court's reasoning and dismissed the Trustee's claims against the Appellees.

First, the court dismissed the claims against the Appellees that invested with Fairfield, Kingate, and Harley on international comity grounds. The court found that the United States "has no interest in regulating the relationship between [these funds] and their investors or the liquidation of [these funds] and the payment of their investors' claims." *SIPC II*, 2016 WL 6900689, at *14. It also found that the foreign nations where those entities are in liquidation "[have] a greater interest [than the United States] in regulating the activities that gave rise to the Trustee's subsequent transfer claims, particularly the validity or invalidity of payments by [the funds] to [their] investors and service providers." *Id.* at *16; *see also id.* at *14.

Second, the bankruptcy court dismissed the recovery claims against the remaining Appellees under the presumption against extraterritoriality. Interpreting our precedent and the district court's opinion, the bankruptcy court

concluded that the factors relevant to determining whether the transactions were extraterritorial were the locations from which the transfers were made and sent and the location or residence of the initial and subsequent transferee. The court dismissed the Trustee's claims because he had not alleged facts sufficient to support a domestic nexus under these criteria.[4]

The Trustee appealed the orders dismissing the recovery actions. We consolidated those appeals and now resolve them under the following principles.

DISCUSSION

We begin by unpacking the statutory scheme relevant to these appeals.

"SIPA serves dual purposes: to protect investors, and to protect the securities market as a whole." *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 235 (2d Cir. 2011). To achieve these purposes, SIPA allows courts to appoint trustees, such as Picard, and endow them with certain authority over liquidation estates. This authority includes the power to "allocate customer property of the

[4] The court also found that some feeder funds had no connection to their country of organization, were managed and operated in the United States, and made their subsequent transfers from New York. It denied the motions to dismiss the actions involving their subsequent transfers and granted the Trustee leave to amend so he could show whether those transactions were domestic.

debtor," 15 U.S.C. § 78fff–2(c)(1), which SIPA defines as "cash and securities . . . at any time received, acquired, or held by or for the account of a debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted," *id.* § 78*lll*(4).

"Whenever customer property is not sufficient to pay in full the claims [against the debtor], the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the [Bankruptcy Code]." *Id.* § 78fff–2(c)(3).

The Trustee alleges Madoff Securities' initial transfers to the feeder funds are avoidable as fraudulent under § 548(a)(1)(A) of the Bankruptcy Code. That section provides:

> The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . . made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted . . . .

11 U.S.C. § 548(a)(1)(A).

Only once a transfer is avoided may a trustee recover the underlying property. Section 550(a), the recovery provision, states:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from . . . (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or . . . (2) any immediate or mediate transferee of such initial transferee.

Id. § 550(a).[5] Relevant here is § 550(a)(2), as the Trustee seeks to recover property from subsequent transferees.

I. The Presumption Against Extraterritoriality

The presumption against extraterritoriality is a canon of statutory construction. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016). It provides that, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *Id.* This canon helps "avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *Id.* It also reflects the "commonsense notion that

[5] Section 550(b) limits a trustee's ability to recover under § 550(a)(2) from certain subsequent transferees who received property in good faith.

Congress generally legislates with domestic concerns in mind." *Id.* (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

An action may proceed if either the statute indicates its extraterritorial reach or the case involves a domestic application of the statute. The courts below found that neither criterion was satisfied and accordingly dismissed these actions.[6]

Because the reach and applicability of a statute are questions of statutory interpretation, we review a lower court's application of the presumption against extraterritoriality *de novo*. *See, e.g.*, *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006).

A. The Focus of § 550(a) in These Actions Is on the Debtor's Fraudulent Transfer of Property to the Initial Transferee.

The Supreme Court teaches that we must look to a statute's "focus" to determine whether a case involves a domestic application of that statute.

> If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the

[6] Although the Supreme Court has referred to this extraterritoriality analysis as a "two-step framework," these "steps" need not be sequential. *See id.* at 2101 & n.5. Courts generally begin by asking whether the statute indicates its extraterritorial reach, but they are free "in appropriate cases" to begin by asking whether the case involves an extraterritorial application of the statute. *Id.* at 2101 n.5. This is an appropriate case for beginning with the latter question because we hold that the transactions here were domestic, and the extraterritorial reach of a statute is of no moment when a case is truly a domestic matter.

> focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

RJR Nabisco, 136 S. Ct. at 2101. The Supreme Court recently explained how to identify a statute's focus in *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018).

WesternGeco involved § 271(f) of the Patent Act, which prohibits the export of component parts of a patented product for assembly abroad. *Id.* at 2135 (citing 35 U.S.C. § 271(f)(2)). Plaintiffs alleging infringement under § 271(f)(2) can recover damages under 35 U.S.C. § 284. *Id.* The Federal Circuit held that § 271(f) does not allow plaintiffs to recover for lost foreign sales and vacated a jury award premised on such damages. *Id.* (citing *WesternGeco LLC v. ION Geophysical Corp.*, 791 F.3d 1340, 1343 (Fed. Cir. 2015)). Reversing, the Supreme Court explained that "[t]he focus of a statute is 'the object of its solicitude,' which can include the conduct it 'seeks to regulate,' as well as the parties and interests it 'seeks to protect' or vindicate." *Id.* at 2137 (brackets omitted) (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010)). "When determining the focus of a statute, we do not analyze the provision at issue in a vacuum." *Id.* (citing *Morrison*, 561 U.S. at 267–69). Instead:

> If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions. Otherwise, it would be impossible to accurately determine whether the application of the statute in the case is a "domestic application." And determining how the statute has actually been applied is the whole point of the focus test.

Id. (citation omitted) (citing *RJR Nabisco*, 136 S. Ct. at 2101).

Applying this principle, the Court identified the "overriding purpose" of the damages provision, § 284, as a remedy for infringement, because it asks how much a plaintiff is due because of infringement. *See id.* (quoting *General Motors Corp. v. Detox Corp.*, 461 U.S. 648, 655 (1983)). But because there is more than one way to infringe, the focus of § 284 depends on "the type of infringement that occurred." *See id.* In *WesternGeco*, that meant turning to § 271(f)(2), which the Court found focuses on domestic conduct because it regulates "the domestic act of 'suppl[ying] in or from the United States.'" *Id.* at 2137–38 (brackets in original) (quoting 35 U.S.C. § 271(f)(2)).

Thus, the Court held that "the focus of § 284, in a case involving infringement under § 271(f)(2), is on the act of exporting components from the United States," which is "domestic infringement." *Id.* at 2138. It rejected an argument that the statute focuses on damages, even though it authorizes them,

because "what a statute authorizes is not necessarily its focus." *Id.* Instead, the Court found that damages are "merely the means by which the statute achieves its end of remedying infringements." *Id.*

WesternGeco helps resolve two issues relevant to these cases: (1) whether we should look to the pertinent avoidance provision (here, § 548(a)(1)(A)) in determining the focus of § 550(a), and (2) the focus of § 550(a) in these actions.

1. We Must Look to § 548(a)(1)(A) to Determine the Focus of § 550(a) in These Cases Because the Provisions Work "In Tandem."

No one disputes that, in an action where a trustee seeks to recover property under § 550(a), we must at a minimum look to that section. The dispute is whether we must additionally look to the avoidance provision that enables a trustee's recovery. Section 550(a) applies only "to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title." 11 U.S.C. § 550(a). In other words, a trustee cannot use § 550(a) to recover property unless the trustee has first avoided a transfer under one of these provisions.

Like the infringement and damages provisions of the Patent Act, the Bankruptcy Code's avoidance and recovery provisions work "in tandem." *See WesternGeco*, 138 S. Ct. at 2137. In any given case, "it would be impossible to

accurately determine" the focus of § 550(a) without asking *why* a trustee can use it—*i.e.*, the purpose of the avoidance provision that enables the recovery action. *See id.* ("[D]etermining how the statute has actually been applied is the whole point of the focus test."). Just as the focus of § 284 of the Patent Act depends on the infringement provision that enables a plaintiff to seek damages, the focus of § 550(a) of the Bankruptcy Code depends on the avoidance provision that enables a trustee to recover property.

Thus, to determine § 550(a)'s focus in a given action, a court must also look to the relevant avoidance provision.

2. When Working In Tandem with § 548(a)(1)(A), § 550(a) Regulates a Debtor's Fraudulent Transfer of Property, and It Therefore Focuses on the Debtor's Initial Transfer.

The focus of a statute is the conduct it seeks to regulate, as well as the parties whose interests it seeks to protect. *See id.* The district court found that § 550(a) focuses on "the property transferred" and "the fact of its transfer." *SIPC I*, 513 B.R. at 227. On this theory, it concluded that a recovery action under § 550(a)(2) regulates the subsequent transfer of property: that from the initial transferee to the subsequent transferee.

But the harm to the estate as a result of its unlawful depletion began with the initial transfer. Section 548(a)(1)(A) allows a trustee to "avoid any transfer . . . of an interest of the debtor in property" that the debtor "made . . . with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted." 11 U.S.C. § 548(a)(1)(A). A general purpose of "the Bankruptcy Code's avoidance provisions, including 11 U.S.C. § 548, [is] protect[ing] a debtor's estate from depletion to the prejudice of the unsecured creditor." *In re Harris*, 464 F.3d 263, 273 (2d Cir. 2006) (Sotomayor, *J.*) (agreeing with *In re French*, 440 F.3d 145, 150 (4th Cir. 2006)). Thus, § 548(a)(1)(A)'s purpose is plain: it allows a trustee, for the protection of an estate and its creditors, to avoid a debtor's fraudulent, hindersome, or delay-causing property transfer that depletes the estate. *See In re French*, 440 F.3d at 150 ("[Section] 548 focuses not on the property itself, but on the fraud of transferring it.").

Section 550(a) works in tandem with § 548(a)(1)(A) by enabling a trustee to recover fraudulently transferred property. Recovery is the business end of avoidance. In that sense, § 550(a) "is a utility provision, helping execute the policy of § 548[(a)(1)(A)]" by "tracing the fraudulent transfer to its ultimate resting place

(the initial or subsequent transferee)." Edward R. Morrison, *Extraterritorial Avoidance Actions: Lessons from Madoff*, 9 Brook. J. Corp. Fin. & Com. L. 268, 273 (2014); *see also In re Ampal-Am. Israel Corp.*, 562 B.R. 601, 613 (Bankr. S.D.N.Y. 2017) (Bernstein, *J.*) (finding that when using § 550(a), "the trustee is essentially tracing property into the hands of the recipient—no different than a trustee under non-bankruptcy law").

We hold that, in recovery actions where a trustee alleges a debtor's transfers are avoidable as fraudulent under § 548(a)(1)(A), § 550(a) regulates the fraudulent transfer of property depleting the estate.[7] While § 550(a) authorizes recovery, "what a statute authorizes is not necessarily its focus." *WesternGeco*, 138 S. Ct. at 2138. When § 550(a) operates in tandem with § 548(a)(1)(A), recovery of property

[7] Section 548(a)(1)(A) allows a trustee to avoid a transfer on three grounds: that the debtor had "actual intent to [1] hinder, [2] delay, or [3] defraud any entity to which the debtor was or became . . . indebted." While this opinion concerns the third ground, we would apply the same logic in a case where a trustee sought to avoid transfers on the theory that the debtor sought to "hinder" or "delay" an entity. For example, if a trustee alleged that a debtor made a transfer intended to delay an entity, the focus of § 550(a) in that action would be on the delay-causing transfer of property that depletes the estate.

Section 550(a) may serve different purposes depending on which of the Bankruptcy Code's avoidance provisions enables recovery. We express no opinion on the focus of § 550(a) in actions involving any avoidance provision other than § 548(a)(1)(A).

is "merely the means by which the statute achieves its end of" regulating and remedying the fraudulent transfer of property. *See id.*

Thus, in actions involving both provisions, § 550(a) regulates the debtor's initial transfer. While the subsequent transfer may indirectly harm creditors by making property more difficult to recover, it is the initial transfer that fraudulently depletes the estate. Only the initial transfer involves fraudulent conduct, or any conduct, by the debtor.

The language of § 548(a)(1)(A) reflects this focus. It allows a trustee to avoid certain transfers "the debtor voluntarily or involuntarily . . . *made*." 11 U.S.C. § 548(a)(1)(A) (emphasis added). This can mean only the initial transfer, because the debtor has not *made* the subsequent transfer. Consequently, when a trustee seeks to recover subsequently transferred property under § 550(a), the only transfer that must be avoided is the debtor's initial transfer. *See Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 480 B.R. 501, 524 (Bankr. S.D.N.Y. 2012) ("[A]s a court's recovery power is generally coextensive with its avoidance power, it is logical that the relevant transfer for purposes of the presumption against extraterritoriality is only the transfer that is to be avoided, namely the initial

transfer." (quotation marks omitted)); *see also Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 501 B.R. 26, 30 (S.D.N.Y. 2013).

Two Supreme Court decisions reinforce this conclusion. In *WesternGeco*, the Court found that "the focus of § 284, in a case involving infringement under § 271(f)(2), is on the act of exporting components from the United States." 138 S. Ct. at 2138. Here, the focus of § 550(a), in a case involving fraudulent transfers avoidable under § 548(a)(1)(A), is on the debtor's act of transferring property from the United States. In *Morrison*, the Court held that § 10(b) of the Securities Exchange Act of 1934 regulates "deceptive conduct in connection with the purchase or sale of [certain] securit[ies]," meaning the statute focuses on "purchase-and-sale transactions." 561 U.S. at 266–67 (quotation marks omitted). By analogy, § 550(a) regulates a debtor's unlawful conduct—its fraudulent transfer of property. The statute thus focuses on that initial transfer, rather than the subsequent transfer made by the feeder fund.

The lower courts held, and the Appellees now argue, that the relevant Bankruptcy Code provisions regulate the *subsequent* transfer of property. Their readings erroneously overlook how § 548(a)(1)(A) shapes the focus of § 550(a) here.

The district court, for example, correctly recognized that the extraterritoriality analysis must consider "the regulatory focus of the Bankruptcy Code's *avoidance and recovery* provisions." *SIPC I*, 513 B.R. at 227 (emphasis added). And while we agree with the court's finding that § 548(a)(1)(A) "focuses on the nature of the transaction in which property is transferred," *id.*, we reject its conclusion that the appropriate "transaction" to determine the extraterritoriality question is the subsequent transfer. The only transfer § 548(a)(1)(A) is concerned with is the initial transfer, as this is the only transfer "the debtor . . . made." *See* 11 U.S.C. § 548(a)(1)(A).

The Appellees would have us ignore § 548(a)(1)(A) entirely and look only to § 550(a)(2). For the reasons stated above, we refuse to "analyze the provision at issue in a vacuum." *See WesternGeco*, 138 S. Ct. at 2137.[8]

[8] The Trustee contends that certain provisions of SIPA provide additional reasons for us to find that § 550(a) focuses on domestic conduct in these actions. Because we reach that holding without looking to SIPA, we express no opinion on whether SIPA is relevant to the focus of the Bankruptcy Code's avoidance and recovery provisions in cases where SIPA trustees seek to use them.

B. These Actions Involve Domestic Applications of the Bankruptcy Code Because § 550(a) Focuses on Regulating Domestic Conduct.

Recognizing that, in these actions, § 550(a) focuses on the debtor's initial transfer of property, we must decide whether Madoff Securities' transfers took place in the United States such that regulating them involves a domestic application of that statute. The lower courts, assuming the relevant transaction was the subsequent transfer, weighed the location of the account from which and to which the subsequent transfer was made, and the location or residence of the subsequent transferor and transferee. *See SIPC II*, 2016 WL 6900689, at *25. We decline to adopt this balancing test.

We hold that a domestic debtor's allegedly fraudulent, hindersome, or delay-causing transfer of property from the United States is domestic activity for the purposes of §§ 548(a)(1)(A) and 550(a).[9] The presumption against extraterritoriality therefore does not prohibit that debtor's trustee from recovering

[9] We recognize that our holding cites two nexuses to the United States: (1) the debtor is a domestic entity, and (2) the alleged fraud occurred when the debtor transferred property from U.S. bank accounts. We express no opinion on whether either factor standing alone would support a finding that a transfer was domestic.

such property using § 550(a), regardless of where any initial or subsequent transferee is located.

Our rule follows the Supreme Court's instruction that we look to "the conduct relevant to the statute's focus." *See, e.g.*, *RJR Nabisco*, 136 S. Ct. at 2101. The relevant conduct in these actions is the debtor's fraudulent *transfer* of property, not the transferee's *receipt* of property. When a domestic debtor commits fraud by transferring property from a U.S. bank account, the conduct that § 550(a) regulates takes place in the United States.

That resolves these cases. Madoff Securities is a domestic entity, and the Trustee alleges it fraudulently transferred property to the feeder funds from a U.S. bank account. These transfers are domestic activity. Because § 550(a) therefore regulates domestic conduct, these cases involve domestic applications of the statute.

Factoring the transferee's receipt of property into our analysis would not only misread the Bankruptcy Code's avoidance and recovery provisions, but also open a loophole. One can imagine a fraudster who, anticipating his downfall, gives his entity's property to friends and family members before a court freezes its assets. The Bankruptcy Code's avoidance and recovery provisions ordinarily

allow a trustee to claw back this property. But what would happen if the fraudster transferred the property to a foreign entity that then transferred it to another foreign entity? Under the Appellees' theory of § 550(a), that transfer would make the property recovery-proof, even if the subsequent foreign transferee then sent the property to someone located in the United States. The presumption against extraterritoriality is not "a limit upon Congress's power to legislate," but a canon of construction meant to guide our understanding of a statute's meaning. *See Morrison*, 561 U.S. at 255. We cannot imagine how it should guide us to read the Bankruptcy Code's creditor-protection provisions in this self-defeating way.

* * *

The lower courts erred by dismissing these actions under the presumption against extraterritoriality. Because we find that these cases involve a domestic application of § 550(a), we express no opinion on whether § 550(a) clearly indicates its extraterritorial application.

II. International Comity

The second issue is whether the district court erroneously dismissed these actions on international comity grounds. We apply international comity principles in two ways: "[first,] as a canon of construction, [comity] might shorten the reach

of a statute; [and] second, [comity] may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state, the so-called comity among courts." *In re Maxwell Commc'n Corp. plc by Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996). The first application is "prescriptive comity" and asks a question of statutory interpretation: should a court presume that Congress, out of respect for foreign sovereigns, limited the application of domestic law on a given set of facts? *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, *J.*, dissenting). The second application is "adjudicative comity." It asks whether, where a statute might otherwise apply, a court should nonetheless abstain from exercising jurisdiction in deference to a foreign nation's courts that might be a more appropriate forum for adjudicating the matter. *See id.*; *see also Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 93 (2d Cir. 2006).

We have previously declined to decide whether prescriptive and adjudicative comity are "distinct doctrines." *See In re Maxwell*, 93 F.3d at 1047. Although prescriptive and adjudicative comity sometimes demand similar

analysis,[10] each asks a different question and is rooted in a different legal theory. We therefore treat them as distinct doctrines, albeit related ones.[11]

This distinction reveals the appropriate standard of review for a lower court's order dismissing a case on international comity grounds. Prescriptive comity poses a question of statutory interpretation. We review those questions *de novo*.[12] *See, e.g.*, *Roach*, 440 F.3d at 56. Adjudicative comity abstention, on the other

---

[10] In particular, the existence of parallel proceedings can factor into both doctrines. *Compare In re Maxwell*, 93 F.3d at 1048, 1052 (holding, in the context of applying a prescriptive comity choice-of-law test, that the existence of parallel foreign proceedings can factor into a foreign state's interest in applying its law to a dispute), *with Royal & Sun*, 466 F.3d at 92 (explaining, as a principle of adjudicative comity, that the existence of parallel foreign proceedings is sometimes a factor weighing in favor of abstention). Thus, while this opinion focuses on prescriptive comity, we occasionally look to our adjudicative comity precedent in assessing the weight of any foreign state's interest in applying its law.

[11] Numerous courts and scholars have done the same. *See, e.g.*, *Hartford Fire Ins. Co.*, 509 U.S. at 817, 820 (Scalia, *J.*, dissenting)); *Mujica v. AirScan Inc.*, 771 F.3d 580, 598 (9th Cir. 2014) ("There are essentially two distinct doctrines [that] are often conflated under the heading international comity." (quotation marks omitted) (quoting *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 283 (S.D.N.Y. 2009)); Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. 390, 392 (2017); *see also Royal & Sun*, 466 F.3d at 92 (describing these doctrines as different) (citing Joseph Story, Commentaries on the Conflict of Laws § 38 (1834)); *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005) ("International comity, as it relates to this case, involves not the choice of law but rather the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction.").

[12] The question of whether we review prescriptive comity dismissals *de novo* or for abuse of discretion arose in *In re Maxwell*, 93 F.3d at 1051. Although this Court hinted that *de*

hand, concerns a matter of judicial discretion. We thus review adjudicative comity dismissals for abuse of discretion. *See, e.g.*, *Royal & Sun*, 466 F.3d at 92. "However, because we are reviewing a court's decision to abstain from exercising jurisdiction, our review is 'more rigorous' than that which is generally employed under the abuse-of-discretion standard." *Id.* (quoting *Hachamovitch v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998)). Thus, "[i]n review of decisions to abstain, there is little practical distinction between review for abuse of discretion and review *de novo*." *Id.* (quoting *Altos Hornos*, 412 F.3d at 422–23).[13]

---

novo review should apply, we declined to decide the issue because the parties did not dispute the appropriate standard of review. *See id.* (noting that "[b]ecause the doctrine in theory is relevant to construing a statute's reach, one might expect that [we should apply] *de novo* review"). The Appellees dispute the appropriate standard here, but their advocacy for abuse-of-discretion review relies on inapposite adjudicative comity cases. *See* Appellee Br. 27 (citing, *e.g.*, *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 182 (2d Cir. 2016) ("We hold that the district court abused its discretion by not abstaining, on international comity grounds . . . ."), *vacated on other grounds by Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865 (2018); *Altos Hornos*, 412 F.3d at 422 ("Declining to decide a question of law on the basis of international comity is a form of abstention, and we review a district court's decision to abstain on international comity grounds for abuse of discretion.")).

[13] The Appellees argue that the higher standard of review announced in *Royal & Sun* does not bind us, either because that case relied on a decision applying its rule to *Burford* abstention or because *Royal & Sun* "has been superseded" by later cases. Appellee Br. 28–29; *see also Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Both points are wrong. *Royal & Sun* itself was not a *Burford* case; it involved adjudicative comity abstention. *See* 466 F.3d at 92. And the argument that our subsequent cases not using *Royal & Sun*'s "more rigorous" language silently "superseded" that case is a nonstarter. *See, e.g.*, *Veltri v. Bldg. Serv. 32B-*

The lower courts held that comity principles require "choice-of-law analysis to determine whether the application of U.S. law would be reasonable under the circumstances, comparing the interests of the United States and the relevant foreign state." *SIPC I*, 513 B.R. at 231 (citing *In re Maxwell*, 93 F.3d at 1047–48). This is a question of prescriptive comity because it asks whether domestic law applies, rather than whether our courts should abstain from exercising jurisdiction. The bankruptcy court and both parties agree with this framing. We therefore analyze the lower courts' decisions through the lens of prescriptive comity.[14]

* * *

At the threshold, "[i]nternational comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction." *In re Maxwell*, 93 F.3d at 1049. A true conflict exists if "compliance with the regulatory

J Pension Fund, 393 F.3d 318, 327 (2d Cir. 2004) ("One panel of this Court cannot overrule a prior decision of another panel, unless there has been an intervening Supreme Court decision that casts doubt on our controlling precedent." (citation, brackets, and quotation marks omitted)).

[14] In a footnote, the Appellees separately argue that we should decline to exercise jurisdiction on adjudicative comity grounds. *See* Appellee Br. 68 n.33. "We do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review." *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993) (per curiam).

laws of both countries would be impossible." *Id.* at 1050 (citing *Hartford Fire*, 509 U.S. at 799). *In re Maxwell* held that "a conflict between two avoidance rules exists if it is impossible to distribute the debtor's assets in a manner consistent with both rules." *Id.*[15]

The record is unclear about whether issues litigated in the feeder funds' liquidation proceedings abroad would yield outcomes irreconcilable with the relief the Trustee demands in these cases.[16] While the Appellees allege that there are conflicts, we merely assume without deciding that these conflicts exist.[17]

Prescriptive comity "guides our interpretation of statutes that might otherwise be read to apply to [extraterritorial] conduct." *Id.* at 1047. The doctrine

[15] In that decision, the panel found a true conflict between English and domestic law because "the parties . . . assumed that . . . English law would dictate a different distributional outcome than would United States law." *Id.*

[16] The district court found that BVI courts had "already determined that Fairfield Sentry could not reclaim transfers made to its customers under certain common law theories" and found this conclusion in conflict with the relief the Trustee now demands. *SIPC I*, 513 B.R. at 232. The Trustee disputes this finding. We decline to decide whether this allegation establishes a true conflict between domestic and foreign law.

[17] These consolidated appeals involve hundreds of Appellees that invested with numerous feeder funds, each involved in its own dispute below. Whether domestic adjudication would conflict with foreign adjudication may turn on different facts in different cases. The parties did not adequately brief us on how we should analyze these distinctions under our comity precedent. We therefore decline to address the issue.

does not require clear evidence that a statute does not reach extraterritorial conduct. *Id.* Rather, the doctrine is "simply a rule of construction" and "has no application where Congress has indicated otherwise." *Id.*

Comity in bankruptcy proceedings is "especially important" for two reasons. *Id.* at 1048. "First, deference to foreign insolvency proceedings will, in many cases, facilitate 'equitable, orderly, and systematic' distribution of the debtor's assets." *Id.* (quoting *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 458 (2d Cir. 1985)). "Second, Congress explicitly recognized the importance of the principles of international comity in transnational insolvency situations when it revised the bankruptcy laws." *Id.* (citing 11 U.S.C. § 304 (repealed 2005)). In light of these considerations, "U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding," *Altos Hornos*, 412 F.3d at 424, because "[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding," *id.* (brackets in original) (quoting *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999)).

To enforce these principles, *In re Maxwell* announced a choice-of-law test. This test "takes into account the interests of the United States, the interests of the

foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law." *In re Maxwell*, 93 F.3d at 1048.

The United States has a compelling interest in allowing domestic estates to recover fraudulently transferred property. The prospect of recovery assures creditors and investors that they will receive their fair share of property in the event an American entity enters into bankruptcy or liquidation. Providing this safeguard is an important goal of the Bankruptcy Code's avoidance and recovery provisions. *See, e.g.*, *Universal Church v. Geltzer*, 463 F.3d 218, 224 (2d Cir. 2006) (noting that a result that would undermine § 548(a)(2)'s avoidance provision "would be absurd because it would defeat the entire purpose of allowing trustees to protect and enhance the estate by avoiding [unlawful] transfers"). These features consequently benefit the American economy by making domestic entities more attractive to creditors and investors. Protecting these individuals, and therefore protecting our securities market, are the key purposes of SIPA. *See In re Madoff Securities*, 654 F.3d at 235.

When a debtor in American courts is also in liquidation proceedings in a foreign court, the foreign state has at least some interest in adjudicating property disputes. In appropriate cases, that interest will trump our own. *See In re Maxwell*,

93 F.3d at 1052. But no such parallel proceedings exist here—the feeder funds, not Madoff Securities, are the debtors in the foreign courts.[18] And the absence of such proceedings seriously diminishes the interest of any foreign state in our resolution of the Trustee's claims.[19]

The only foreign jurisdictions potentially interested in these disputes are those where a feeder fund that served as an initial transferee is in liquidation. But these interests are not compelling. Although "U.S. courts should ordinarily decline

---

[18] We agree with Judge Batts, who employed similar reasoning in declining to dismiss class actions brought by Kingate investors against managers, consultants, administrators, and auditors associated with Kingate on adjudicative comity grounds:

> Although Defendants are correct that under Second Circuit law, foreign bankruptcy proceedings are generally given extra deference, . . . it is the [Kingate] Funds, rather than the Defendants, who are in liquidation in BVI and Bermuda. Thus, it is not clear that the normal justification for deferring to foreign bankruptcy proceedings, to allow "equitable and orderly distribution of a debtor's property," would apply under these circumstances.

In re Kingate Mgmt. Ltd. Litig., 09-5386 (DAB), 2016 WL 5339538, at *35 (S.D.N.Y. Sept. 21, 2016) (citations and footnote omitted), *affirmed*, No. 16-3450, 2018 WL 3954217 (2d Cir. Aug. 17, 2018).

[19] *In re Maxwell* itself emphasized the importance of parallel foreign proceedings to its holding. *See* 93 F.3d at 1052 ("In the present case, in which there is a parallel insolvency proceeding taking place in another country, failure to apply § 547 and § 502(d) does not free creditors from the constraints of avoidance law, nor does it severely undercut the policy of equal distribution. . . . [*But*] *a different result might be warranted were there no parallel proceeding* [*abroad*]*—and, hence, no alternative mechanism for voiding preferences* . . . ." (emphasis added)).

to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding," *Altos Hornos*, 412 F.3d at 424, the Trustee is not a creditor and his claims are not the subject of a foreign bankruptcy or liquidation proceeding, *see SIPC II*, 2016 WL 6900689, at *12 ("[T]here are no parallel foreign avoidance actions in which the Trustee seeks to recover from the Subsequent Transferees.").

Nor is the Trustee duplicating the liquidations of the feeder funds. The proceedings have different means and goals. The Trustee's task is tracing property of the estate to net winners among the feeder funds' investors. But the feeder funds' liquidations proceed under those funds' organizing documents, which are unlikely to discriminate between net winners and net losers.

Further, we defer to foreign liquidation 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." *Altos Hornos*, 412 F.3d at 424 (quoting *Finanz AG*, 192 F.3d at 246). This rationale makes sense where a creditor, unable to recover against a debtor in foreign court, attempts to do so in our courts. But in these cases, domestic law is also concerned with "equitable and orderly distribution"—of the Madoff Securities estate. Consolidating the Trustee's claims in federal court is more "equitable and orderly" than forcing him to litigate

different claims in different countries. SIPA and the Bankruptcy Code envision a unified proceeding, and we would frustrate this goal if we limited the reach of § 550(a) in these actions.

This is not to say the nations adjudicating the feeder funds' liquidations have no interest in these disputes. Those nations may wish to ensure that the feeder funds' creditors can recover as much property as possible. If the Trustee succeeds in these recovery actions, his success might frustrate the efforts of those entities' trustees to recover the same property in foreign court.

But those are not the comity concerns our precedent discusses in explaining when and why the Bankruptcy Code should give way to foreign law. Nor do we find them compelling enough to limit the reach of a federal statute that would otherwise apply here. The Bankruptcy Code gives us no reason to think Congress would have decided that trustees looking to recover property in domestic proceedings are out of luck when trustees in foreign proceedings may be interested in recovering the same property. In fact, § 550(a)(2) suggests the opposite: that by allowing trustees to recover property from even remote subsequent transferees, Congress wanted these claims resolved in the United States, rather than through piecemeal proceedings around the world.

We therefore hold that the United States' interest in applying its law to these disputes outweighs the interest of any foreign state. Prescriptive comity poses no bar to recovery when the trustee of a domestic debtor uses § 550(a) to recover property from a foreign subsequent transferee on the theory that the debtor's initial transfer of that property from within the United States is avoidable under § 548(a)(1)(A), even if the initial transferee is in liquidation in a foreign nation.

The lower courts, erroneously focusing on the subsequent transfer, found that the jurisdictions adjudicating the feeder funds' liquidations had a greater interest in resolving these disputes than the United States. The bankruptcy court, for example, concluded that "[t]he United States has no interest in regulating the relationship between the [feeder funds] and their investors or the liquidation of the [feeder funds] and the payment of their investors' claims." *SIPC II*, 2016 WL 6900689, at *14. It did so by assuming "[t]he United States' interest is purely remedial; the Bankruptcy Code allows the Trustee to follow the initial fraudulent transfer into the hands of a subsequent transferee." *Id.*

This conclusion rests on incorrect premises: that we should look only to § 550(a), assume the United States has purely remedial interests, and focus on the subsequent transfer of property. As we have explained, § 548(a)(1)(A) informs

§ 550(a)'s focus in these actions. That focus is on regulating and remedying a debtor's fraudulent transfer of property, and this means the relevant transfer is the debtor's initial transfer. The domestic nature of those transfers, and our nation's compelling interest in regulating them, tips the scales of *In re Maxwell*'s choice-of-law test in favor of domestic adjudication.

The district court found that "investors in these foreign funds had no reason to expect that U.S. law would apply to their relationships with the feeder funds." *SIPC I*, 513 B.R. at 232. But the court's premise is inaccurate. U.S. law is not regulating the investors' relationships with the feeder funds. It is regulating the debtor's property transfers to the feeder funds. Although regulating these transfers with recovery actions will affect the subsequent transferees, that consequence should not unfairly surprise them. When these investors chose to buy into feeder funds that placed all or substantially all of their assets with Madoff Securities, they knew where their money was going.

Finally, the district court observed that "the defendants here have no direct relationship" with Madoff Securities. *Id.* But the reason § 550(a)(2)'s tracing provision applies to *subsequent* transferees is ensuring that a trustee *can* recover from entities with no direct relationship to the debtor. If the directness of a transfer

were relevant to a trustee's ability to recover property under § 550(a)(2), we cannot see how a trustee could ever recover property from any subsequent transferee, foreign or domestic.

In sum, we find that prescriptive comity considerations do not limit the reach of the Bankruptcy Code provisions in these actions.

CONCLUSION

We **VACATE** the bankruptcy court's judgments dismissing these actions and **REMAND** for further proceedings consistent with this opinion.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

Case 17-2992, Document 1317, 02/25/2019, 2504169, Page1 of 1

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of February, two thousand and nineteen.

Before: Dennis Jacobs,
Rosemary S. Pooler,
Richard C. Wesley,
Circuit Judges.

In Re: Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC.

JUDGMENT

Docket Nos. 17-2992 (L), 17-2995, 17-2996, 17-2999, 17-3003, 17-3004, 17-3005, 17-3006, 17-3007, 17-3008,17-3009, 17-3010, 17-3011, 17-3012, 17-3013, 17-3014, 17-3016, 17-3018, 17-3019,17-3020, 17-3021, 17-3023, 17-3024, 17-3025, 17-3026, 17-3029, 17-3032, 17-3033, 17-3034, 17-3035, 17-3038, 17-3039, 17-3040, 17-3041, 17-3042, 17-3043, 17-3044, 17-3047, 17-3050, 17-3054, 17-3057, 17-3058, 17-3059, 17-3060, 17-3062, 17-3064, 17-3065, 17-3066, 17-3067, 17-3068, 17-3069, 17-3070, 17-3071, 17-3072, 17-3073, 17-3074, 17-3075, 17-3076, 17-3077, 17-3078, 17-3080, 17-3083, 17-3084, 17-3086, 17-3087, 17-3088, 17-3091, 17-3100, 17-3101, 17-3102, 17-3106, 17-3109, 17-3112, 17-3113, 17-3115, 17-3117, 17-3122, 17-3126, 17-3129, 17-3132, 17-3134, 17-3136, 17-3139, 17-3140, 17-3141, 17-3143, 17-3144, 17-3862

The appeals in the above captioned case from judgments of the United States Bankruptcy Court for the Southern District of New York were argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgments of the Bankruptcy Court are VACATED and the matter is REMANDED for further proceedings consistent with this Court's Opinion.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

18-3226 (L)
In re del Valle Ruiz

In the United States Court of Appeals For the Second Circuit

August Term, 2018

Argued: March 25, 2019
Decided: October 7, 2019

Docket Nos. 18-3226 (L), 18-3474 (Con), 18-3629 (XAP)

IN RE: APPLICATION OF ANTONIO DEL VALLE RUIZ AND OTHERS FOR AN ORDER TO TAKE DISCOVERY FOR USE IN FOREIGN PROCEEDINGS PURSUANT TO 28 U.S.C. § 1782

Appeal from the United States District Court
for the Southern District of New York
Nos. 18-mc-85, 18-mc-127 – Edgardo Ramos, *Judge*.

Before: PARKER, HALL, and DRONEY, *Circuit Judges*.

Banco Santander S.A. ("Santander") acquired Banco Popular Español, S.A. ("BPE") after a government-forced sale. Petitioners, a group of Mexican nationals and two investment and asset management firms, initiated or sought to intervene in various foreign proceedings contesting the legality of the acquisition. Petitioners then filed in the Southern District of New York two applications under 28 U.S.C. § 1782 seeking discovery from Santander and its New York-based affiliate, Santander Investment Securities Inc. ("SIS"), concerning the financial status of BPE. The district court (Ramos, *J.*) denied the applications for the most

part, concluding that it lacked personal jurisdiction over Santander. The court granted discovery against SIS and in doing so rejected Santander's argument that § 1782 does not allow for extraterritorial discovery. These consolidated appeals follow.

We are first asked to delineate the contours of § 1782's requirement that a person or entity "resides or is found" within the district in which discovery is sought. We hold that this language extends § 1782's reach to the limits of personal jurisdiction consistent with due process. We nonetheless conclude that Santander's contacts with the Southern District of New York were insufficient to subject it to the district court's personal jurisdiction.

We are next tasked with deciding whether § 1782 may be used to reach documents located outside of the United States. We hold that there is no per se bar to the extraterritorial application of § 1782, and the district court may exercise its discretion as to whether to allow such discovery. We conclude that the district court acted well within its discretion here in allowing discovery from SIS.

Having so held, we affirm the district court's orders.

AFFIRMED.

JAVIER H. RUBINSTEIN, P.C. (C. Harker Rhodes IV, Kirkland & Ellis LLP, Washington, DC, Lauren F. Friedman, Lucila I.M. Hemmingsen, Joseph Myer Sanderson, Kirkland & Ellis LLP, New York, NY, *on the brief*), Kirkland & Ellis LLP, Chicago, IL, *for Petitioners–Appellants* Antonio del Valle Ruiz, et al.

DAVID MADER (Peter Evan Calamari Bento, *on the brief*), Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY, *for Petitioners–Appellants–Cross-Appellees* Pacific Investment Management Company LLC and Anchorage Capital Group, LLC.

ELBERT LIN (Samuel A. Danon, Hunton Andrews Kurth LLP, Miami, FL, Johnathon E.

Schronce, Hunton Andrews Kurth LLP, Richmond, VA, Joseph J. Saltarelli, Hunton Andrews Kurth LLP, New York, NY, *on the brief*), Hunton Andrews Kurth LLP, Richmond, VA, *for Respondents–Appellees* Banco Santander, S.A., Santander Holdings U.S.A., Inc., and Santander Bank, N.A. and *Respondent–Appellee–Cross-Appellant* Santander Investment Securities Inc.

HALL, *Circuit Judge*:

Banco Santander S.A. ("Santander") acquired Banco Popular Español, S.A. ("BPE") after a government-forced sale. Petitioners, a group of Mexican nationals and two investment and asset-management firms, initiated or sought to intervene in various foreign proceedings contesting the legality of the acquisition. Petitioners then filed in the Southern District of New York two applications under 28 U.S.C. § 1782 seeking discovery from Santander and its New York-based affiliate, Santander Investment Securities Inc. ("SIS"), concerning the financial status of BPE. The district court (Ramos, *J.*) denied the applications for the most part, concluding that it lacked personal jurisdiction over Santander. The court granted discovery against SIS and in doing so rejected Santander's argument that § 1782 does not allow for extraterritorial discovery. These consolidated appeals follow.

We are first asked to delineate the contours of § 1782's requirement that a person or entity "resides or is found" within the district in which discovery is sought. We hold that this language extends § 1782's reach to the limits of personal jurisdiction consistent with due process. We nonetheless conclude that Santander's contacts with the Southern District of New York were insufficient to subject it to the district court's personal jurisdiction.

We are next tasked with deciding whether § 1782 may be used to reach documents located outside of the United States. We hold that there is no per se bar to the extraterritorial application of § 1782, and the district court may exercise its discretion as to whether to allow such discovery. We conclude that the district court acted well within its discretion here in allowing discovery from SIS.

Having so held, we affirm the district court's orders.

I.

Section 1782 provides that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). The order may prescribe the applicable practice and procedure for discovery, but "[t]o the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the

document or other thing produced, in accordance with the Federal Rules of Civil Procedure." *Id.*

A.

As of June 2017, BPE was Spain's sixth-largest bank, with assets of approximately €147 billion. After the financial crisis of 2008, however, BPE became aware that it had many toxic and nonperforming assets ("NPAs") on its books. BPE implemented between 2012 and 2016 a variety of measures to address its exposure to NPAs and did so without any government assistance. By the end of 2016, however, business conditions began to deteriorate after Spanish governmental entities started making large withdrawals.

In May 2017, BPE, contemplating a private sale, created a virtual data room for interested buyers. Among those interested was Santander, which retained New York-based UBS and Citibank to advise on a contemplated bid. After completing its due diligence, Santander purportedly was prepared to offer to buy BPE for €3 billion with an additional capital injection of €4 billion. Meanwhile, BPE suffered an all-out run on deposits after reports that it was a bankruptcy risk and facing resolution, a form of government-forced sale.[1]

[1] *See generally* Regulation 806/2014, of the European Parliament and of the Council of 15 July 2014 on Establishing Uniform Rules and a Uniform Procedure for the Resolution of Credit Institutions and a Single Resolution Fund and Amending Regulation (EU) No 1093/2010, 2014 O.J. (L 225) 1 (discussing the resolution process).

On June 6, 2017, the European Central Bank informed the European Single Resolution Board that BPE was "failing or likely to fail." J. App. 115. That same day, and at the direction of the Single Resolution Board, Spain's national banking supervisory authority ("FROB") invited several banks, including Santander, to submit bids by midnight, ostensibly pursuant to a resolution. Only Santander submitted a bid, and that bid was for one Euro (€1).[2] On June 7, 2017, it was publicly announced that Santander's bid had been accepted. Apparently, another potential bidder had complained that it did not have enough time to prepare a bid. According to a news report, Santander's CEO had stated that "Santander was able to do it because we had done due diligence 20 days earlier. Otherwise, it would have been impossible." J. App. 469.

As a result of BPE's resolution, a group of 55 Mexican investors in BPE (the "del Valle Ruiz Petitioners"), as well as United States-based investment and asset management firms Pacific Investment Management Company LLC and Anchorage Capital Group, LLC (the "PIMCO Petitioners"), suffered significant financial losses. Both sets of petitioners brought legal challenges to the BPE resolution in the Court of Justice of the European Union, the del Valle Ruiz Petitioners brought an international arbitration proceeding against Spain, and the

[2] Yes, really: One Euro. *See* J. App. 685 (letter from FROB stating that bids for the purchase of all BPE shares "must be an exact figure in Euros not a range and must be equal to or greater than one Euro (€1)"); *see also* J. App. 694.

PIMCO Petitioners sought to intervene in Spanish criminal proceedings against BPE. Santander has sought, but at the time of argument had not yet been granted leave, to intervene in these proceedings, all of which are ongoing.[3]

B.

The del Valle Ruiz Petitioners filed a § 1782 application in the Southern District of New York seeking discovery from Santander and its wholly-owned subsidiaries Santander Holdings U.S.A., Inc. ("SHUSA") and Santander Bank, N.A. ("SBNA"). The del Valle Ruiz Petitioners sought documents relating to BPE's liquidity position, both the private-sale and government-sale process, and communications with regulators concerning BPE or the BPE resolution. The PIMCO Petitioners filed a § 1782 application against Santander, SHUSA, SBNA, and SIS, seeking similar documents.[4] Santander protested that it was not "found" in the Southern District within the meaning of § 1782, § 1782 does not apply to

[3] After briefing and argument, Santander informed this Court that it has been allowed to intervene in the European Union proceedings. Appellees' Fed. R. App. P. 28(j) Letter. Given our discussion below, this development does not affect the outcome of these appeals.

[4] Santander is a Spanish banking company with its principal place of business in Madrid, Spain. SHUSA is a Virginia corporation with its principal place of business in Boston, Massachusetts. SBNA is a national banking association with its principal place of business in Boston, Massachusetts. SIS is a Delaware corporation with its principal place of business in New York, New York. Petitioners make no arguments on appeal concerning SHUSA or SBNA. Nor do they argue that either of these entities should somehow be treated as agents of Santander. Accordingly, we focus on only Santander and SIS.

documents or witnesses located overseas, and discovery was otherwise unwarranted. Santander conceded that SIS "resides or is found" in the Southern District but contended that SIS was not involved with the acquisition of BPE.

C.

The district court denied the del Valle Ruiz Petitioners' application and denied in part the PIMCO Petitioners' application, but the court granted the PIMCO Petitioners' request for discovery from SIS. *See generally In re del Valle Ruiz*, 342 F. Supp. 3d 448 (S.D.N.Y. 2018). The court first concluded that whatever the statutory meaning of "found," at a minimum § 1782 must comport with constitutional due process, i.e., the court must have personal jurisdiction. *Id.* at 452–53. Under *Daimler AG v. Bauman*, 571 U.S. 117 (2014), none of the Santander entities except SIS met the requirement for general jurisdiction. *In re del Valle Ruiz*, 342 F. Supp. 3d at 453–57, 459. With respect to specific jurisdiction, all of Santander's alleged New York contacts took place after the resolution had been adopted, and the litigation abroad therefore could not be said to arise out of or relate to those contacts.[5] *Id.* at 453–59.

[5] Although the district court specifically mentioned the retention of investment banks, and specifically noted that those banks were retained "prior to the sale of [BPE], to explore financing options for its acquisition," the court failed to provide any rationale for why that contact was insufficient. *See In re del Valle Ruiz*, 342 F. Supp. 3d at 458.

The district court concluded that SIS "resides or is found" in the Southern District of New York, the court thus had discretion to grant discovery against SIS, and discovery was warranted under *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). *In re del Valle Ruiz*, 342 F. Supp. 3d at 459–60. In doing so, the court noted Santander was not a party to any of the foreign proceedings and, although it had been ordered to produce some discovery in the Spanish criminal proceeding, it was not "an especially *active* participant" in that proceeding. *Id.* at 549. The court rejected Santander's extraterritoriality argument, concluding that producing documents located abroad would not be unduly burdensome or intrusive. *Id.* at 459–60 (citing *In re Accent Delight Int'l Ltd.*, Nos. 16-mc-125, 18-mc-50, 2018 WL 2849724, at *4 (S.D.N.Y. June 11, 2018), *appeal docketed*, No. 18-1755). The district court did not mention SIS specifically in its *Intel* analysis. These consolidated appeals follow.

II.

These appeals present several issues of first impression. The parties dispute the proper interpretation of § 1782's requirement that a respondent "resides or is found" in the district in which the district court ordering discovery sits.[6] Petitioners insist that § 1782's use of the word "found" is coextensive with the

[6] Both parties appear to assume that "resides" is properly understood to refer to where an individual or entity is "essentially at home" for purposes of general personal jurisdiction.

limits of personal jurisdiction consistent with due process (and that less process is due for nonparties), whereas Santander argues that we must restrict § 1782's "found" language to general "tag" jurisdiction over individuals.[7] Santander also contends that § 1782 does not reach evidence located abroad and the district court abused its discretion by allowing discovery against SIS, both points with which Petitioners naturally disagree.[8] We address these arguments in turn.

III.

"We review *de novo* a district court's ruling that a petition satisfies Section 1782's jurisdictional requirements." *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 243 (2d Cir. 2018). We likewise review *de novo* a district court's personal-jurisdiction ruling, "construing all pleadings and affidavits in the light most favorable to the [party asserting jurisdiction] and resolving all doubts in [that party's] favor." *See SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 342 (2d Cir. 2018).

[7] Tag jurisdiction refers to a court's exercise of personal jurisdiction over an individual who is served, and thus "tagged," while physically present in the forum. *See In re Edelman*, 295 F.3d 171, 179 (2d Cir. 2002) (citing *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604 (1990) (plurality opinion)); *see also Kadic v. Karadzic*, 70 F.3d 232, 247 (2d Cir. 1995) ("Fed. R. Civ. P. 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction.").

[8] The Institute of International Bankers have moved for leave to file an amicus curiae brief in support of Santander. That motion has been granted.

Section 1782 does not define "found." Neither did the district court. It instead concluded that even if "found" extended to the limits of personal jurisdiction consistent with due process, Petitioners failed to demonstrate that Santander was subject to either the court's general or specific personal jurisdiction. This is where we begin.

A.

Santander urges us essentially to cabin "found" to the facts of *In re Edelman*, 295 F.3d 171 (2d Cir. 2002). Effectively, this would limit § 1782's reach to individuals and entities over which a district court has general personal jurisdiction. This approach admittedly would result in a tidy, easily applicable rule. We nonetheless decline the invitation and instead conclude that the statutory scope of "found" extends to the limits of personal jurisdiction consistent with due process.

In *In re Edelman*, this Court's only case to address the "found" requirement of § 1782, we addressed that requirement's application to an individual. The respondent there focused on the statutory language—"*is* found," 28 U.S.C. § 1782(a) (emphasis added)—to argue "that a deponent must be residing or be found in the district contemporaneously with the district court's issuance of the discovery order," *In re Edelman*, 295 F.3d at 177–78, whereas the petitioner asserted that a deponent need only be found in the district when served, *id.* at 178. We

reasoned that "another part of § 1782(a) supports a flexible reading of the phrase 'resides or is found,'" specifically, the protections afforded by Rules 45 and 26 of the Federal Rules of Civil Procedure as well as the district court's "prudent exercise of discretion." *Id.* at 178–79.

We further noted that "the question of what it means to be found in a particular locale is already the subject of well-settled case law on territorial jurisdiction," i.e., tag jurisdiction. *Id.* at 179 (citing *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604 (1990) (plurality opinion)). "Given that this so-called tag jurisdiction is consistent with due process," we reasoned, "we do not think that § 1782(a), which is simply a discovery mechanism and does not subject a person to liability, requires more." *Id.* Given this, and legislative history expressing Congress's "aim that the statute be interpreted broadly and that courts exercise discretion in deciding whether, and in what manner, to order discovery in particular cases," we concluded that tag jurisdiction was sufficient to satisfy § 1782's "found" requirement. *Id.* at 179–80. But we did *not* conclude that tag jurisdiction was *necessary* to satisfy § 1782. Indeed, our focus on tag jurisdiction comporting with due process in no way suggests that § 1782's reach should be coextensive only with the limits of a district court's *general* jurisdiction.

Santander nonetheless finds some support for its position in *In re Edelman*'s analysis of § 1782's legislative history. As originally enacted in 1948, § 1782

provided for "[t]he deposition of any witness residing within the United States," so long as the deposition was "taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found." Act of June 25, 1948, Pub. L. No. 80-773, § 1782, 62 Stat. 869, 949. The next year, Congress struck the first "residing," but left the latter "reside[]" or "be found" requirement. Act of May 24, 1949, Pub. L. No. 81-72, § 93, 63 Stat. 89, 103. As we noted, "the change was intended to 'correct[] restrictive language in section 1782 . . . and permit [] depositions in any judicial proceeding without regard to whether the deponent is "residing" in the district *or only sojourning there*.'" *In re Edelman*, 295 F.3d at 179–80 (alterations in original) (quoting H.R. Rep. No. 81-352, at 40 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1254, 1270). We further noted that "a sojourn is a temporary stay (as of a traveler in a foreign country)." *Id.* at 180 (internal quotation marks omitted). Santander hangs its hat on this focus on an individual's physical presence to justify its preference to restrict "found" to general tag jurisdiction.

Santander is not alone: Hans Smit, "a leading academic commentator on the statute who played a role in its drafting," *Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 119 (2d Cir. 2015), has stated of the term "found" that "[t]he evident statutory purpose is to create adjudicatory authority based on presence. Insofar as the term applies to legal rather than natural persons,

it may safely be regarded as referring to judicial precedents that equate systematic and continuous local activities," i.e., general jurisdiction, "with presence." Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT'L L. & COM. 1, 10 (1998) (footnote omitted).

We are not convinced. Courts have consistently given broad interpretations to similar "found" language in other statutes. *See, e.g.*, *Waeltz v. Delta Pilots Ret. Plan*, 301 F.3d 804, 810 (7th Cir. 2002); *Varsic v. U.S. Dist. Ct.*, 607 F.2d 245, 248–49 (9th Cir. 1979); *see also* Appellant Br. at 27–32. We see no reason to replace the "flexible reading of the phrase 'resides or is found'" that we considered appropriate in *In re Edelman*, 295 F.3d at 178, with the cramped reading Santander suggests. Indeed, we have repeatedly recognized Congress's intent that § 1782 be "interpreted broadly," especially given the district court's ability "to exercise discretion in deciding whether, and in what manner, to order discovery in particular cases." *See id.* at 180; *see also Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 80 (2d Cir. 2012) (noting that, in pursuit of the statute's "twin goals" of providing "equitable and efficacious discovery procedures in United States courts for the benefit of tribunals and litigants involved in litigation with international aspects" and encouraging "foreign countries by example to provide similar means of assistance to our courts," "the statute has, over the years, been

given increasingly broad applicability" (internal quotation marks omitted)). We hold, accordingly, that § 1782's "resides or is found" language extends to the limits of personal jurisdiction consistent with due process.

Having so concluded, we turn next to whether Santander's contacts with the Southern District were sufficient to subject it to the district court's specific personal jurisdiction.[9]

B.

"The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. 277, 283–84 (2014) (internal quotation marks omitted). "[T]he touchstone due process principle has been that, before a court may exercise jurisdiction over a person or an organization, such as a bank, that person or entity must have sufficient 'minimum contacts' with the forum 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 134 (2d Cir. 2014) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

[9] Although Petitioners insist that "there is good reason to believe that the district court had *general* jurisdiction over Santander for discovery purposes," they do not press this argument on appeal, *see* Appellant Br. at 36–37, and we do not consider it.

For specific jurisdiction, "there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'" *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017) (alteration in original) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). Put differently, "[s]pecific jurisdiction . . . permits adjudicatory authority only over issues that 'aris[e] out of or relat[e] to the [entity's] contacts with the forum.'" *Gucci Am.*, 768 F.3d at 134 (some alterations in original) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

In principle, the two-step analysis is well established: First, the court must decide if the individual or entity has "purposefully directed his activities at . . . the forum and the litigation . . . arise[s] out of or relate[s] to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks and citation omitted). Second, the court must "determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Id.* at 476 (internal quotation marks omitted). But "[t]he Supreme Court has not . . . addressed specific jurisdiction over nonparties." *Gucci Am.*, 768 F.3d at 136.

In *Gucci America*, we suggested the following framework for nonparties: (1) "first assess the connection between the nonparty's contacts with the forum and the order at issue" and (2) "then decide whether exercising jurisdiction for the

purposes of the order would comport with fair play and substantial justice." *Gucci Am.*, 768 F.3d at 137. We further noted that at least one circuit had likewise applied a "translated" version of the specific-jurisdiction test to discovery requests "by focusing on the connection between the nonparty's contacts with the forum and the discovery order at issue." *Id.* at 141 (citing *Application to Enforce Admin. Subpoenas Duces Tecum of the SEC v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996)). This provides a starting point, but several issues somewhat muddy the analysis.[10]

Petitioners ask that we add clarity to two unresolved issues of specific personal jurisdiction. Petitioners first request that we address exactly what process is due an entity such as Santander, which is not subject to potential liability. They insist that less process is due and that the process Santander received was thus sufficient. Petitioners next seek guidance on what contacts are necessary to give rise to specific personal jurisdiction. That is, what exactly do "arising out of" and "related to" mean in this context? Petitioners insist that "related to" encompasses a much broader swath of conduct than "arising out of," and it includes conduct such as Santander's forum contacts here.

[10] We note that in the context of a § 1782 application, the relevant "forum" is limited to the *district* in which the district court sits. *See* 28 U.S.C. § 1782(a) (referring to "[t]he district court of the district in which a person resides or is found").

1.

Petitioners first urge us to conclude that the process due nonparties is less than that due defendants, though Petitioners fail to define what that "less" might mean.[11] True, we have recognized that a "person who is subjected to liability . . . far from home may have better cause to complain of an outrage to fair play" than a nonparty. *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998). But we have also observed that a nonparty may have interests, such as avoiding the burdens of discovery, "genuinely independent" of any intent to frustrate a court order. *See Heyman v. Kline*, 444 F.2d 65, 65–66 (2d Cir. 1971); *see also Gucci Am.*, 768 F.3d at 137 n.17 (recognizing these views). We decline to hold that there is a categorically lower showing of due process needed to obtain discovery from a nonparty. Instead, we think it enough for purposes of due process in these circumstances that the nonparty's contacts with the forum go to the actual discovery sought rather than the underlying cause of action.

2.

Petitioners next ask us to divine the difference between "arising out of" and "related to," a difference the Supreme Court has yet to concede, much less construe. *See Helicopteros Nacionales*, 466 U.S. at 415 n.10 (declining to reach the

[11] Although Santander and SIS are technically "parties" to this § 1782 proceeding, they are functionally nonparties in the sense that they are not subject to liability in the underlying foreign proceedings.

issues). But regardless of what, if any, conceptual distance separates "arising out of" and "related to," we have always required some *causal* relationship between an entity's in-forum contacts and the proceeding at issue. *See SPV Osus*, 882 F.3d at 344 (observing that courts differ on whether proximate or but-for causation is sufficient for specific personal jurisdiction but noting that "the standard applied [in this Circuit] depends on 'the relationship among the defendant, the forum, and the litigation.'" (quoting *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998))).

In the liability context, "[t]he exercise of specific jurisdiction depends on in-state activity that *gave rise to the episode-in-suit*." *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 331 (2d Cir. 2016) (internal quotation marks omitted); *see also Bristol-Myers Squibb*, 137 S. Ct. at 1781 (holding that unrelated contacts cannot diminish the required showing of an affiliation between the forum and the underlying controversy). Translated to account for a § 1782 respondent's nonparty status, we thus hold that, where the discovery material sought proximately resulted from the respondent's forum contacts, that would be sufficient to establish specific jurisdiction for ordering discovery. That is, the respondent's having purposefully availed itself of the forum must be the primary or proximate reason that the evidence sought is available at all. On the other hand, where the respondent's contacts are broader and more significant, a petitioner

need demonstrate only that the evidence sought would not be available but for the respondent's forum contacts.[12]

3.

That settled, we turn to the case at hand. The district court concluded that Santander's related forum contacts all postdated the acquisition of BPE and could therefore not be even but-for "causes" of the availability of the evidence sought in discovery. With one exception, we agree. That exception is Santander's use of two New York City firms, UBS and Citibank, to conduct due diligence on BPE for a private sale that fell through before BPE was forced into resolution. According to Santander's CEO, *but for* having conducted that due diligence, "it would have been impossible" for Santander to submit its resolution bid in time. *See* J. App. 469. But this is Santander's only forum contact that was connected to the discovery sought. Petitioners were therefore required to show that this contact was the *proximate* reason the evidence sought was available, not merely that the evidence would not have been available but for the contact. This they failed to do. The only conduct

[12] We realize that the use of terminology relating to causation is a somewhat awkward fit for discovery. Nonetheless, we think that the focus on the relationship between a § 1782 respondent's forum contacts and the resulting availability of the evidence is a workable translation of the normal personal-jurisdiction framework. For instance, an applicant could target its discovery to all documents relating to *x* created during the course of respondent's engagement with forum entity *y*. That our holding will generally require a § 1782 applicant to provide additional specificity concerning the discovery it seeks is a feature, not a flaw. *Cf.* Smit, *supra*, at 11.

that Petitioners claim is a cause of their discovery request is described in their affidavit as follow: "According to media reports, Santander apparently was able to complete a full due diligence of BPE approximately 20 days before the Resolution . . . and had retained UBS and another New York-based investment banking and financial services company as advisors in the contemplated bid." J. App. 108. This in-forum conduct relates only to BPE's preresolution effort to seek a buyer. But the Petitioners' claim here (and likewise the bulk of the discovery sought) arises from a separate financial transaction: the forced sale of BPE.[13] *See SPV Osus*, 882 F.3d at 344–45. We thus conclude that the district court properly held that it lacked personal jurisdiction over Santander.

The district court did conclude, however, that it had general personal jurisdiction over SIS, a conclusion not challenged on appeal. We thus turn next to whether § 1782 allows for the discovery from SIS of evidence located abroad. That is, does § 1782 apply extraterritorially?

IV.

Santander, on behalf of SIS, insists that the district court erred by not applying a per se bar against discovery under § 1782 of evidence located abroad,

[13] We need not speculate whether the result would be different had Petitioners sought, for instance, only documents produced by the New York firms, rather than documents concerning BPE more generally, because Petitioners have pressed no such argument either in the district court or on appeal.

relying on the presumption against extraterritoriality. "Because the reach and applicability of a statute are questions of statutory interpretation, we review a lower court's application of the presumption against extraterritoriality," or as here, its failure to do so, "*de novo*." *See In re Picard*, 917 F.3d 85, 96 (2d Cir. 2019).

The "canon of statutory construction known as the presumption against extraterritoriality" states that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016). The presumption both "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries" and also "reflects the more prosaic commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.* (internal quotation marks omitted). We agree with Petitioners that this presumption has no role to play here.

The presumption against extraterritoriality is "typically appl[ied] to discern whether an Act of Congress regulating conduct applies abroad." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013). But § 1782 "is simply a discovery mechanism and does not subject a person to liability." *See In re Edelman*, 295 F.3d at 179. To be sure, the Supreme Court has stated in dicta that "we must ask this question," i.e., whether the presumption against extraterritoriality has been rebutted, "regardless of whether the statute in question regulates conduct, affords

relief, or merely confers jurisdiction." *RJR Nabisco*, 136 S. Ct. at 2101. But the Court's reference to conferring jurisdiction concerned the statute at issue in *Kiobel*, where the Court noted that the statute did "not directly regulate conduct or afford relief" but nonetheless "allow[ed] federal courts to recognize certain causes of action" and was thus subject to the same "principles underlying the canon of interpretation." *See Kiobel*, 569 U.S. at 116; *see also RJR Nabisco*, 136 S. Ct. at 2100–01. The Supreme Court has never applied the presumption against extraterritoriality to a "strictly jurisdictional" statute, *see Kiobel*, 569 U.S. at 116, not otherwise tethered to regulating conduct or providing a cause of action, *see* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 404 cmt. a & n.3 (2018). We see no reason to do so here.[14]

[14] Even if we were to conclude that the presumption against extraterritoriality is applicable to § 1782, we would nonetheless conclude that Congress's incorporation of the Federal Rules of Civil Procedure, which had by then been interpreted to allow for extraterritorial discovery, *see, e.g.*, *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 199–200, 204–06 (1958) (applying the "possession, custody, or control" test to documents held abroad); *see also* Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9(a), 78 Stat. 995, 997 (amending § 1782 to incorporate the Federal Rules of Civil Procedure), is sufficient to overcome the presumption, *see RJR Nabisco*, 136 S. Ct. at 2101 ("At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially."); *cf. id.* at 2102–03 (holding that incorporation of extraterritorial predicates sufficed to give indication that statute applied to some foreign activity and noting that "an express statement of extraterritoriality is not essential").

Still, lower courts in this Circuit have split on whether § 1782 can be used to reach documents stored overseas,[15] and we have yet to address the issue.[16] *See In re Accent Delight Int'l Ltd.*, 696 F. App'x 537, 539 (2d Cir. 2017) (summary order). In *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194 (11th Cir. 2016), the Eleventh Circuit became the first circuit court so far to address whether § 1782 applies

[15] *Compare, e.g.*, *Purolite Corp. v. Hitachi Am., Ltd.*, No. 17-mc-67, 2017 WL 1906905, at *2 (S.D.N.Y. May 9, 2017) (no extraterritorial application); *In re Application of Kreke Immobilien KG*, No. 13-mc-110, 2013 WL 5966916, at *4 (S.D.N.Y. Nov. 8, 2013) (same); *In re Godfrey*, 526 F.Supp.2d 417, 423 (S.D.N.Y. 2007) (same); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 n.5 (S.D.N.Y. 2006) (same); *with In re Accent Delight Int'l Ltd.*, Nos. 16-mc-125, 18-mc-50, 2018 WL 2849724, at *4 (S.D.N.Y. June 11, 2018) (extraterritorial application); *In re Application of Eli Lilly & Co.*, No. 09-mc-296, 2010 WL 2509133, at *4 (D. Conn. June 15, 2010) (same); *In re Application of Gemeinshcaftspraxis Dr. Med. Schottdorf*, No. M19-88, 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006) (same).

[16] Most courts that have concluded that § 1782 does not apply extraterritorially rely on dicta from this Court, a contemporaneous Senate report, and a 1998 article by one of § 1782's principal drafters. *See Application of Sarrio, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997) ("On its face, § 1782 does not limit its discovery power to documents located in the United States. . . . [But] despite the statute's unrestrictive language, there is reason to think that Congress intended to reach only evidence located within the United States."); S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 ("in obtaining oral and documentary evidence *in the United States*" (emphasis added)); Smit, *supra*, at 11 ("[I]f Section 1782 could be used for this purpose, American courts would become clearing houses for requests for information from courts and litigants all over the world in search of evidence to be obtained all over the world."). But given the plain meaning of the statute, which we adopt below, these considerations are insufficient to win the day. *See, e.g.*, *Green v. City of New York*, 465 F.3d 65, 78 (2d Cir. 2006) ("Statutory analysis begins with the text and its plain meaning, if it has one. Only if an attempt to discern plain meaning fails because the statute is ambiguous, do we resort to canons of construction. If both the plain language and the canons of construction fail to resolve the ambiguity, we turn to the legislative history." (citations omitted)).

extraterritorially. The Eleventh Circuit reasoned that the text of § 1782 authorizes discovery pursuant to the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure in turn authorize extraterritorial discovery so long as the documents to be produced are within the subpoenaed party's possession, custody, or control. Hence § 1782 likewise allows extraterritorial discovery. *See id.* at 1199–1200.

The Eleventh Circuit concluded, then, that "the location of responsive documents and electronically stored information—to the extent a physical location can be discerned in this digital age—does not establish a *per se* bar to discovery under § 1782." *Id.* at 1200. We find this reasoning persuasive. Our previous dicta notwithstanding, we join the Eleventh Circuit in holding that a district court is not categorically barred from allowing discovery under § 1782 of evidence located abroad. That said, we note that a court may properly, and in fact should, consider the location of documents and other evidence when deciding whether to exercise its discretion to authorize such discovery. *Cf. Mees v. Buiter*, 793 F.3d 291, 302 (2d Cir. 2015) ("[W]e have instructed that it is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright." (internal quotation marks omitted)).

Having so decided, we turn finally to Santander's argument that the district court abused its discretion by granting discovery against SIS.

V.

Once a district court has concluded that it has jurisdiction, "[w]e review the decision to grant a Section 1782 petition for an abuse of discretion." *Kiobel by Samkalden*, 895 F.3d at 244.

"To guide district courts in the decision to grant a Section 1782 petition, the Supreme Court in *Intel* discussed non-exclusive factors (the '*Intel* factors') to be considered in light of the 'twin aims' of section 1782 . . . ." *Id.* "The *Intel* factors are not to be applied mechanically," and "[a] district court should also take into account any other pertinent issues arising from the facts of the particular dispute." *Id.* at 245. Those factors are (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding," in which event "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad"; (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court assistance"; (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign

country or the United States"; and (4) whether the request is "unduly intrusive or burdensome." *Intel*, 542 U.S. at 264–65.

Santander primarily protests that the district court failed to analyze any of the factors with respect to SIS. The district court stated that it considered the *Intel* factors as to SIS and found "that discovery against SIS is appropriate" but failed to identify SIS in its subsequent analysis. *See In re del Valle Ruiz*, 342 F. Supp. 3d at 459. Nonetheless, the factors plainly weighed in favor of discovery against SIS. First, SIS is not a party to any of the foreign proceedings. Second, there is no evidence that the foreign proceedings would be unreceptive to the evidence. Third, no argument has been made that Petitioners are attempting to procure documents from SIS in contravention of restrictions in place in the foreign proceedings. And fourth, neither Santander nor SIS has made any showing that the production of any responsive documents would be unduly intrusive or burdensome.

CONCLUSION

For the foregoing reasons, we hold that (1) § 1782's "resides or is found" language extends its reach to the limits of personal jurisdiction consistent with due process, but Santander's forum contacts were nonetheless insufficient to subject it to the district court's personal jurisdiction and (2) there is no per se bar under

§ 1782 to extraterritorial discovery, and the district court acted within its discretion when permitting discovery from SIS. We AFFIRM the orders of the district court.

SQUIRE PATTON BOGGS

EU Restructuring Directive – A View From the United States

- On June 26, 2019, the European Parliament and the Council of the European Union published a new directive ("EU Restructuring Directive" or "Directive") on preventive restructuring frameworks, discharge of debt and disqualifications, and measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt. This is an extraordinary achievement given the existing differences in restructuring regimes across EU Member States.

- The EU Restructuring Directive applies to all Member States and is intended to create a baseline system throughout the continent to address financial distress and, to the greatest extent possible, avoid the build-up of non-performing loans, address distress prior to default and minimize the likelihood of formal insolvency proceedings.

- The EU Restructuring Directive is inspired by Chapter 11 of the U.S. Bankruptcy Code.

    - Its primary self-proclaimed objective will resonate with those familiar with the U.S. bankruptcy system.

    - "The objective of this Directive is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications. Without affecting workers' fundamental rights and freedoms, this Directive aims to remove such obstacles by ensuring that: viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance; and that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length."

- The Directive is intended to create a system across Europe to allow "debtors in financial difficulties to continue business, in whole or in part, by changing the composition, conditions or structure of their assets and their liabilities or any other part of their capital structure — including by sales of assets or parts of the business or, where so provided under national law, the business as a whole — as well as by carrying out operational changes."

- EU Member States are required to implement the EU Restructuring Directive by July 17, 2021 (although an extension is possible).

SQUIRE PATTON BOGGS

- While modeled after Chapter 11, the Directive's framework is generally more streamlined than the Chapter 11 reorganization process because it minimizes judicial intervention, which in turn could reduce costs.

- Like Chapter 11, debtors will remain in possession of their property and business.

- Following the US Chapter 11 model, a plan must be approved by at least one class of affected voting parties other than the class of equity-holders or any class of creditors who, upon a valuation of the debtor's assets as a going concern, would not receive any payment in case of liquidation proceedings. This rule seeks to make sure that the plan is approved by at least one class of creditors who is "in the money." This valuation as a going concern may give rise to expert disputes and is likely to be expensive and time consuming.

- The Directive introduces a cross-class cram down provision (with certain elements similar to section 1129(b) of the U.S. Bankruptcy Code) in respect of dissenting classes of capital providers.

    - In respect of the cross-class cram down provision, Member States may choose between the U.S. style absolute priority rule or opt for a certain "relative priority rule" (the "European Relative Priority Rule") which means that dissenting voting classes are to be treated at least "as favourably" as any other class of the same rank and "more favourably" than any junior class. The European Relative Priority Rule is less rigid than the U.S. absolute priority rule and ironically may lead to forum shopping within the EU, which is contrary to the objective of the harmonization of European preventive restructuring frameworks.

- To protect senior creditors' exit rights – and this is different compared to the US system – creditors in a dissenting class must also have the right under the plan to opt for a distribution in cash equal to their share in accordance with their ranking of the liquidation value (cash-out option).

- Unlike Chapter 11 model, the Directive does not provide for debt financing on a super-priority basis, an absence that some view as a weakness.

- Other key elements of the Directive include:

    - Early warning and access to information: to help companies to detect circumstances that could give rise to a likelihood of insolvency and signal to them the need to act quickly.

    - Preventive restructuring frameworks: debtors will have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, thereby protecting jobs and business activity. Those frameworks may be available also at the request of creditors and employees' representatives.

SQUIRE PATTON BOGGS

- Facilitating negotiations on preventive restructuring plans with the appointment, in certain cases, of a practitioner in the field of restructuring to facilitate the restructuring process. Such a practitioner would appear to be able to combine advisory and management/fiduciary services. As expressed in the Directive:

    - "The appointment of a practitioner in the field of restructuring, to supervise the activity of a debtor or to partially take over control of a debtor's daily operations, should not be mandatory in every case, but made on a case-by-case basis depending on the circumstances of the case or on the debtor's specific needs. Nevertheless, Member States should be able to determine that the appointment of a practitioner in the field of restructuring is always necessary in certain circumstances, such as where: the debtor benefits from a general stay of individual enforcement actions; the restructuring plan needs to be confirmed by means of a cross-class cram-down; the restructuring plan includes measures affecting the rights of workers; or the debtor or its management have acted in a criminal, fraudulent, or detrimental manner in business relations."

- Restructuring plans: the new rules foresee a number of elements that must be part of a plan, including a description of the economic situation, the affected parties and their classes, and the terms of the plan. Similar to Chapter 11, plans under the EU Restructuring Directive may provide for the sale of assets and modifications to the debtor's capital structure.

- Stay of individual enforcement actions: debtors may benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework. The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months.

- Discharge of debt: over-indebted entrepreneurs will have access to at least one procedure that can lead to a full discharge of their debt after a maximum period of 3 years, under the conditions set out in the directive.

L 172/18 EN Official Journal of the European Union 26.6.2019

DIRECTIVES

DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 20 June 2019

on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Having regard to the opinion of the Committee of the Regions ([2]),

Acting in accordance with the ordinary legislative procedure ([3]),

Whereas:

(1) The objective of this Directive is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications. Without affecting workers' fundamental rights and freedoms, this Directive aims to remove such obstacles by ensuring that: viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance; and that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length.

(2) Restructuring should enable debtors in financial difficulties to continue business, in whole or in part, by changing the composition, conditions or structure of their assets and their liabilities or any other part of their capital structure — including by sales of assets or parts of the business or, where so provided under national law, the business as a whole — as well as by carrying out operational changes. Unless otherwise specifically provided for by national law, operational changes, such as the termination or amendment of contracts or the sale or other disposal of assets, should comply with the general requirements that are provided for under national law for such measures, in particular civil law and labour law rules. Any debt-to-equity swaps should also comply with safeguards provided for by national law. Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises. Those frameworks should help to prevent job losses and the loss of know-how and skills, and maximise the total value to creditors — in comparison to what they would receive in the event of the liquidation of the enterprise's assets or in the event of the next-best-alternative scenario in the absence of a plan — as well as to owners and the economy as a whole.

([1]) OJ C 209, 30.6.2017, p. 21.
([2]) OJ C 342, 12.10.2017, p. 43.
([3]) Position of the European Parliament of 28 March 2019 (not yet published in the Official Journal) and decision of the Council of 6 June 2019.

(3) Preventive restructuring frameworks should also prevent the build-up of non-performing loans. The availability of effective preventive restructuring frameworks would ensure that action is taken before enterprises default on their loans, thereby helping to reduce the risk of loans becoming non-performing in cyclical downturns and mitigating the adverse impact on the financial sector. A significant percentage of businesses and jobs could be saved if preventive frameworks existed in all the Member States in which businesses' places of establishment, assets or creditors are situated. In restructuring frameworks the rights of all parties involved, including workers, should be protected in a balanced manner. At the same time, non-viable businesses with no prospect of survival should be liquidated as quickly as possible. Where a debtor in financial difficulties is not economically viable or cannot be readily restored to economic viability, restructuring efforts could result in the acceleration and accumulation of losses to the detriment of creditors, workers and other stakeholders, as well as the economy as a whole.

(4) There are differences between Member States as regards the range of the procedures available to debtors in financial difficulties in order to restructure their business. Some Member States have a limited range of procedures that allow the restructuring of businesses only at a relatively late stage, in the context of insolvency procedures. In other Member States, restructuring is possible at an earlier stage but the procedures available are not as effective as they could be, or they are very formal, in particular because they limit the use of out-of-court arrangements. Preventive solutions are a growing trend in insolvency law. The trend favours approaches that, unlike the traditional approach of liquidating a business in financial difficulties, have the aim of restoring it to a healthy state or, at least, saving those of its units which are still economically viable. That approach, among other benefits to the economy, often helps to maintain jobs or reduce job losses. Moreover, the degree of involvement of judicial or administrative authorities, or the persons appointed by them, varies from no involvement or minimal involvement in some Member States to full involvement in others. Similarly, national rules giving entrepreneurs a second chance, in particular by granting them discharge from the debts they have incurred in the course of their business, vary between Member States in respect of the length of the discharge period and the conditions for granting such a discharge.

(5) In many Member States, it takes more than three years for entrepreneurs who are insolvent but honest to be discharged from their debts and make a fresh start. Inefficient discharge of debt and disqualification frameworks result in entrepreneurs having to relocate to other jurisdictions in order to benefit from a fresh start in a reasonable period of time, at considerable additional cost to both their creditors and the entrepreneurs themselves. Long disqualification orders, which often accompany a procedure leading to discharge of debt, create obstacles to the freedom to take up and pursue a self-employed, entrepreneurial activity.

(6) The excessive length of procedures concerning restructuring, insolvency and discharge of debt in several Member States is an important factor triggering low recovery rates and deterring investors from carrying out business in jurisdictions where procedures risk taking too long and being unduly costly.

(7) Differences between Member States in relation to procedures concerning restructuring, insolvency and discharge of debt translate into additional costs for investors when assessing the risk of debtors getting into financial difficulties in one or more Member States, or of investing in viable businesses in financial difficulties, as well as additional costs of restructuring enterprises that have establishments, creditors or assets in other Member States. This is most notably the case with restructuring international groups of companies. Investors mention uncertainty about insolvency rules or the risk of lengthy or complex insolvency procedures in another Member State as being one of the main reasons for not investing or not entering into a business relationship with a counterpart outside the Member State where they are based. That uncertainty acts as a disincentive which obstructs the freedom of establishment of undertakings and the promotion of entrepreneurship and harms the proper functioning of the internal market. Micro, small and medium-sized enterprises ('SMEs') in particular do not, for the most part, have the resources needed to assess risks related to cross-border activities.

(8) The differences among Member States in procedures concerning restructuring, insolvency and discharge of debt lead to uneven conditions for access to credit and to uneven recovery rates in the Member States. A higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general and for a working Capital Markets Union in particular, as well as for the resilience of European economies, including for the preservation and creation of jobs.

(9) The additional cost of risk-assessment and of cross-border enforcement of claims for creditors of over-indebted entrepreneurs who relocate to another Member State in order to obtain a discharge of debt in a much shorter period of time should also be reduced. The additional costs for entrepreneurs stemming from the need to relocate to another Member State in order to benefit from a discharge of debt should also be reduced. Furthermore, the obstacles stemming from long disqualification orders linked to an entrepreneur's insolvency or over-indebtedness inhibit entrepreneurship.

(10) Any restructuring operation, in particular one of major size which generates a significant impact, should be based on a dialogue with the stakeholders. That dialogue should cover the choice of the measures envisaged in relation to the objectives of the restructuring operation, as well as alternative options, and there should be appropriate involvement of employees' representatives as provided for in Union and national law.

(11) The obstacles to the exercise of fundamental freedoms are not limited to purely cross-border situations. An increasingly interconnected internal market, in which goods, services, capital and workers circulate freely, and which has an ever-stronger digital dimension, means that very few enterprises are purely national if all relevant elements are considered, such as their client base, supply chain, scope of activities, investor and capital base. Even purely national insolvencies can have an impact on the functioning of the internal market through the so-called domino effect of insolvencies, whereby a debtor's insolvency may trigger further insolvencies in the supply chain.

(12) Regulation (EU) 2015/848 of the European Parliament and of the Council ([4]) deals with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings as well as with the interconnection of insolvency registers. Its scope covers preventive procedures which promote the rescue of economically viable debtors as well as discharge procedures for entrepreneurs and other natural persons. However, that Regulation does not tackle the disparities between national laws regulating those procedures. Furthermore, an instrument limited only to cross-border insolvencies would not remove all obstacles to free movement, nor would it be feasible for investors to determine in advance the cross-border or domestic nature of the potential financial difficulties of the debtor in the future. There is therefore a need to go beyond matters of judicial cooperation and to establish substantive minimum standards for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs.

(13) This Directive should be without prejudice to the scope of Regulation (EU) 2015/848. It aims to be fully compatible with, and complementary to, that Regulation, by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness. It does not change the approach taken in that Regulation of allowing Member States to maintain or introduce procedures which do not fulfil the condition of publicity for notification under Annex A to that Regulation. Although this Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments.

(14) The advantage of the application of Regulation (EU) 2015/848 is that it provides for safeguards against abusive relocation of the debtor's centre of main interests during cross-border insolvency proceedings. Certain restrictions should also apply to procedures not covered by that Regulation.

(15) It is necessary to lower the costs of restructuring for both debtors and creditors. Therefore, the differences between Member States which hamper the early restructuring of viable debtors in financial difficulties and the possibility of a discharge of debt for honest entrepreneurs should be reduced. Reducing such differences should bring greater transparency, legal certainty and predictability across the Union. It should maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence of restructuring and insolvency procedures should also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union.

([4]) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, 5.6.2015, p. 19).

(16) Removing the barriers to effective preventive restructuring of viable debtors in financial difficulties contributes to minimising job losses and losses of value for creditors in the supply chain, preserves know-how and skills and hence benefits the wider economy. Facilitating a discharge of debt for entrepreneurs would help to avoid their exclusion from the labour market and enable them to restart entrepreneurial activities, drawing lessons from past experience. Moreover, reducing the length of restructuring procedures would result in higher recovery rates for creditors as the passing of time would normally only result in a further loss of value of the debtor or the debtor's business. Finally, efficient preventive restructuring, insolvency and discharge procedures would enable a better assessment of the risks involved in lending and borrowing decisions and facilitate the adjustment for insolvent or over-indebted debtors, minimising the economic and social costs involved in their deleveraging process. This Directive should allow Member States flexibility to apply common principles while respecting national legal systems. Member States should be able to maintain or introduce in their national legal systems preventive restructuring frameworks other than those provided for by this Directive.

(17) Enterprises, and in particular SMEs, which represent 99 % of all businesses in the Union, should benefit from a more coherent approach at Union level. SMEs are more likely to be liquidated than restructured, since they have to bear costs that are disproportionately higher than those faced by larger enterprises. SMEs, especially when facing financial difficulties, often do not have the necessary resources to cope with high restructuring costs and to take advantage of the more efficient restructuring procedures available only in some Member States. In order to help such debtors restructure at low cost, comprehensive check-lists for restructuring plans, adapted to the needs and specificities of SMEs, should be developed at national level and made available online. In addition, early warning tools should be put in place to warn debtors of the urgent need to act, taking into account the limited resources of SMEs for hiring experts.

(18) When defining SMEs, Member States could give due consideration to Directive 2013/34/EU of the European Parliament and of the Council ([5]) or the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises ([6]).

(19) It is appropriate to exclude from the scope of this Directive debtors which are insurance and re-insurance undertakings as defined in points (1) and (4) of Article 13 of Directive 2009/138/EC of the European Parliament and of the Council ([7]), credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council ([8]), investment firms and collective investment undertakings as defined in points (2) and (7) of Article 4(1) of Regulation (EU) No 575/2013, central counterparties as defined in point (1) of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council ([9]), central securities depositories as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council ([10]) and other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU of the European Parliament and of the Council ([11]). Such debtors are subject to special arrangements and the national supervisory and resolution authorities have wide-ranging powers of intervention in relation to them. Member States should be able to exclude other financial entities providing financial services which are subject to comparable arrangements and powers of intervention.

([5]) Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

([6]) Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

([7]) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

([8]) Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

([9]) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

([10]) Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

([11]) Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

(20) For similar considerations, it is also appropriate to exclude from the scope of this Directive public bodies under national law. Member States should also be able to limit the access to preventive restructuring frameworks to legal persons, since the financial difficulties of entrepreneurs may be efficiently addressed not only by means of preventive restructuring procedures but also by means of procedures which lead to a discharge of debt or by means of informal restructurings based on contractual agreements. Member States with different legal systems, where the same type of entity has a different legal status in those legal systems, should be able to apply one uniform regime to such entities. A preventive restructuring framework laid down pursuant to this Directive should not affect claims and entitlements against a debtor that arise from occupational pension systems if those claims and entitlements accrued during a period prior to the restructuring.

(21) Consumer over-indebtedness is a matter of great economic and social concern and is closely related to the reduction of debt overhang. Furthermore, it is often not possible to draw a clear distinction between the debts incurred by entrepreneurs in the course of their trade, business, craft or profession and those incurred outside those activities. Entrepreneurs would not effectively benefit from a second chance if they had to go through separate procedures, with different access conditions and discharge periods, to discharge their business debts and other debts incurred outside their business. For those reasons, although this Directive does not include binding rules on consumer over-indebtedness, it would be advisable for Member States to apply also to consumers, at the earliest opportunity, the provisions of this Directive concerning discharge of debt.

(22) The earlier a debtor can detect its financial difficulties and can take appropriate action, the higher the probability of avoiding an impending insolvency or, in the case of a business the viability of which is permanently impaired, the more orderly and efficient the liquidation process would be. Clear, up-to-date, concise and user-friendly information on the available preventive restructuring procedures as well as one or more early warning tools should therefore be put in place to incentivise debtors that start to experience financial difficulties to take early action. Early warning tools which take the form of alert mechanisms that indicate when the debtor has not made certain types of payments could be triggered by, for example, non-payment of taxes or social security contributions. Such tools could be developed either by Member States or by private entities, provided that the objective is met. Member States should make information about early warning tools available online, for example on a dedicated website or webpage. Member States should be able to adapt the early warning tools depending on the size of the enterprise and to lay down specific provisions on early warning tools for large-sized enterprises and groups that take into account their peculiarities. This Directive should not impose any liability on Member States for potential damage incurred through restructuring procedures which are triggered by such early warning tools.

(23) In an effort to increase the support of employees and their representatives, Member States should ensure that employees' representatives are given access to relevant and up-to-date information regarding the availability of early warning tools and it should also be possible for them to provide support to employees' representatives in assessing the economic situation of the debtor.

(24) A restructuring framework should be available to debtors, including legal entities and, where so provided under national law, natural persons and groups of companies, to enable them to address their financial difficulties at an early stage, when it appears likely that their insolvency can be prevented and the viability of the business can be ensured. A restructuring framework should be available before a debtor becomes insolvent under national law, namely before the debtor fulfils the conditions under national law for entering collective insolvency proceedings, which normally entail a total divestment of the debtor and the appointment of a liquidator. In order to avoid restructuring frameworks being misused, the financial difficulties of the debtor should indicate a likelihood of insolvency and the restructuring plan should be capable of preventing the insolvency of the debtor and ensuring the viability of the business.

(25) Member States should be able to determine whether claims that fall due or that come into existence after an application to open a preventive restructuring procedure has been submitted or after the procedure has been opened are included in the preventive restructuring measures or the stay of individual enforcement actions. Member States should be able to decide whether the stay of individual enforcement actions has an effect on the interest due on claims.

(26) Member States should be able to introduce a viability test as a condition for access to the preventive restructuring procedure provided for by this Directive. Such a test should be carried out without detriment to the debtor's assets, which could take the form of, among other things, the granting of an interim stay or the carrying out without undue delay of the test. However, the absence of detriment should not prevent Member States from requiring debtors to prove their viability at their own cost.

(27) The fact that Member States can limit access to a restructuring framework with regard to debtors that have been sentenced for serious breaches of accounting or book-keeping obligations should not prevent Member States from also limiting the access of debtors to preventive restructuring frameworks where their books and records are incomplete or deficient to a degree that makes it impossible to ascertain the business and financial situation of the debtors.

(28) Member States should be able to extend the scope of preventive restructuring frameworks provided for by this Directive to situations in which debtors face non-financial difficulties, provided that such difficulties give rise to a real and serious threat to a debtor's actual or future ability to pay its debts as they fall due. The time frame relevant for the determination of such threat may extend to a period of several months, or even longer, in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity. This may be the case, for example, where the debtor has lost a contract which is of key importance to it.

(29) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures. Where this Directive is implemented by means of more than one procedure within a restructuring framework, the debtor should have access to all rights and safeguards provided for by this Directive with the aim of achieving an effective restructuring. Except in the event of mandatory involvement of judicial or administrative authorities as provided for under this Directive, Member States should be able to limit the involvement of such authorities to situations in which it is necessary and proportionate, while taking into consideration, among other things, the aim of safeguarding the rights and interests of debtors and of affected parties, as well as the aim of reducing delays and the cost of the procedures. Where creditors or employees' representatives are allowed to initiate a restructuring procedure under national law and where the debtor is an SME, Member States should require the agreement of the debtor as a precondition for the initiation of the procedure, and should also be able to extend that requirement to debtors which are large enterprises.

(30) To avoid unnecessary costs, to reflect the early nature of preventive restructuring and to encourage debtors to apply for preventive restructuring at an early stage of their financial difficulties, they should, in principle, be left in control of their assets and the day-to-day operation of their business. The appointment of a practitioner in the field of restructuring, to supervise the activity of a debtor or to partially take over control of a debtor's daily operations, should not be mandatory in every case, but made on a case-by-case basis depending on the circumstances of the case or on the debtor's specific needs. Nevertheless, Member States should be able to determine that the appointment of a practitioner in the field of restructuring is always necessary in certain circumstances, such as where: the debtor benefits from a general stay of individual enforcement actions; the restructuring plan needs to be confirmed by means of a cross-class cram-down; the restructuring plan includes measures affecting the rights of workers; or the debtor or its management have acted in a criminal, fraudulent, or detrimental manner in business relations.

(31) For the purpose of assisting the parties with negotiating and drafting a restructuring plan, Member States should provide for the mandatory appointment of a practitioner in the field of restructuring where: a judicial or administrative authority grants the debtor a general stay of individual enforcement actions, provided that in such case a practitioner is needed to safeguard the interests of the parties; the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down; it was requested by the debtor; or it is requested by a majority of creditors provided that the creditors cover the costs and fees of the practitioner.

(32) A debtor should be able to benefit from a temporary stay of individual enforcement actions, whether granted by a judicial or administrative authority or by operation of law, with the aim of supporting the negotiations on a restructuring plan, in order to be able to continue operating or at least to preserve the value of its estate during the negotiations. Where so provided by national law, it should also be possible for the stay to apply for the benefit of third-party security providers, including guarantors and collateral givers. However, Member States should be able to provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not fulfil the objective of supporting the negotiations. Grounds for refusal might include a lack of support by the required majorities of creditors or, where so provided under national law, the debtor's actual inability to pay debts as they fall due.

(33) In order to facilitate and accelerate the course of proceedings, Member States should be able to establish, on a rebuttable basis, presumptions for the presence of grounds for refusal of the stay, where, for example, the debtor shows conduct that is typical of a debtor that is unable to pay debts as they fall due — such as a substantial default vis-à-vis workers or tax or social security agencies — or where a financial crime has been committed by the debtor or the current management of an enterprise which gives reason to believe that a majority of creditors would not support the start of the negotiations.

(34) A stay of individual enforcement actions could be general, in that it affects all creditors, or it could apply only to some individual creditors or categories of creditors. Member States should be able to exclude certain claims or categories of claims from the scope of the stay, in well-defined circumstances, such as claims which are secured by assets the removal of which would not jeopardise the restructuring of the business or claims of creditors in respect of which a stay would cause unfair prejudice, such as by way of an uncompensated loss or depreciation of collateral.

(35) In order to provide for a fair balance between the rights of the debtor and those of creditors, a stay of individual enforcement actions should apply for a maximum period of up to four months. Complex restructurings may, however, require more time. Member States should be able to provide that, in such cases, extensions of the initial period of the stay can be granted by the judicial or administrative authority. Where a judicial or administrative authority does not take a decision on the extension of a stay before it lapses, the stay should cease to have effect upon expiry of the stay period. In the interest of legal certainty, the total period of the stay should be limited to 12 months. Member States should be able to provide for an indefinite stay where the debtor becomes insolvent under national law. Member States should be able to decide whether a short interim stay pending a judicial or administrative authority's decision on access to the preventive restructuring framework is subject to the time limits under this Directive.

(36) To ensure that creditors do not suffer unnecessary detriment, Member States should provide that judicial or administrative authorities can lift a stay of individual enforcement actions if it no longer fulfils the objective of supporting negotiations, for example if it becomes apparent that the required majority of creditors does not support the continuation of the negotiations. The stay should also be lifted if creditors are unfairly prejudiced by it, where Member States provide for such a possibility. Member States should be allowed to limit the possibility to lift the stay to situations where creditors have not had the opportunity to be heard before it came into force or before it was extended. Member States should also be allowed to provide for a minimum period during which the stay cannot be lifted. In establishing whether there is unfair prejudice to creditors, judicial or administrative authorities should be able to take into account whether the stay would preserve the overall value of the estate, and whether the debtor acts in bad faith or with the intention of causing prejudice or generally acts against the legitimate expectations of the general body of creditors.

(37) This Directive does not cover provisions on compensation or guarantees for creditors of which the collateral is likely to decrease in value during the stay. A single creditor or a class of creditors would be unfairly prejudiced by the stay if, for example, their claims would be made substantially worse-off as a result of the stay than if the stay did not apply, or if the creditor is put more at a disadvantage than other creditors in a similar position. Member States should be able to provide that, whenever unfair prejudice is established in respect of one or more creditors or one or more classes of creditors, the stay can be lifted in respect of those creditors or classes of creditors or in respect of all creditors. Member States should be able to decide who is entitled to request the lifting of the stay.

(38) A stay of individual enforcement actions should also result in the suspension of a debtor's obligation to file for, or the opening at a creditor's request of, an insolvency procedure which could end in liquidation of the debtor. Such insolvency procedures should, in addition to those limited by law to having as the only possible outcome the liquidation of the debtor, also include procedures that could lead to a restructuring of the debtor. The suspension of the opening of an insolvency procedure at the request of creditors should apply not only where Member States provide for a general stay of individual enforcement actions covering all creditors, but also where Member States provide for the option of a stay of individual enforcement actions covering only a limited number of creditors. Nevertheless, Member States should be able to provide that insolvency proceedings can be opened at the request of public authorities which are not acting in a creditor capacity, but in the general interest, such as a public prosecutor.

(39) This Directive should not prevent debtors from paying, in the ordinary course of business, claims of unaffected creditors, and claims of affected creditors that arise during the stay of individual enforcement actions. To ensure that creditors with claims that came into existence before the opening of a restructuring procedure or a stay of individual enforcement actions do not put pressure on the debtor to pay those claims, which otherwise would be reduced through the implementation of the restructuring plan, Member States should be able to provide for the suspension of the obligation on the debtor with respect to payment of those claims.

(40) When a debtor enters an insolvency procedure, some suppliers can have contractual rights, provided for in so-called ipso facto clauses, entitling them to terminate the supply contract solely on account of the insolvency, even if the debtor has duly met its obligations. Ipso facto clauses could also be triggered when a debtor applies for preventive restructuring measures. Where such clauses are invoked when the debtor is merely negotiating a restructuring plan or requesting a stay of individual enforcement actions or invoked in connection with any event connected with the stay, early termination can have a negative impact on the debtor's business and the successful rescue of the business. Therefore, in such cases, it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay.

(41) Early termination can endanger the ability of a business to continue operating during restructuring negotiations, especially when contracts for essential supplies such as gas, electricity, water, telecommunication and card payment services are concerned. Member States should provide that creditors to which a stay of individual enforcement actions applies, and whose claims came into existence prior to the stay and have not been paid by a debtor, are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential executory contracts during the stay period, provided that the debtor complies with its obligations under such contracts which fall due during the stay. Executory contracts are, for example, lease and licence agreements, long-term supply contracts and franchise agreements.

(42) This Directive lays down minimum standards for the content of a restructuring plan. However, Member States should be able to require additional explanations in the restructuring plan, concerning for example the criteria according to which creditors have been grouped, which may be relevant in cases where a debt is only partially secured. Member States should not be obliged to require an expert opinion regarding the value of assets which need to be indicated in the plan.

(43) Creditors affected by a restructuring plan, including workers, and, where allowed under national law, equity-holders, should have a right to vote on the adoption of a restructuring plan. Member States should be able to provide for limited exceptions to this rule. Parties unaffected by the restructuring plan should have no voting rights in relation to the plan, nor should their support be required for the approval of any plan. The concept of 'affected parties' should only include workers in their capacity as creditors. Therefore, if Member States decide to exempt the claims of workers from the preventive restructuring framework, workers should not be considered as affected parties. The vote on the adoption of a restructuring plan could take the form of a formal voting process or of a consultation and agreement with the required majority of affected parties. However, where the vote takes the form of an agreement with the requisite majority, affected parties which were not involved in the agreement could nevertheless be offered the opportunity to join the restructuring plan.

(44) To ensure that rights which are substantially similar are treated equitably and that restructuring plans can be adopted without unfairly prejudicing the rights of affected parties, affected parties should be treated in separate classes which correspond to the class formation criteria under national law. 'Class formation' means the grouping of affected parties for the purposes of adopting a plan in such a way as to reflect their rights and the seniority of their claims and interests. As a minimum, secured and unsecured creditors should always be treated in separate classes. Member States should, however, be able to require that more than two classes of creditors are formed, including different classes of unsecured or secured creditors and classes of creditors with subordinated claims. Member States should also be able to treat types of creditors that lack a sufficient commonality of interest, such as tax or social security authorities, in separate classes. It should be possible for Member States to provide that secured claims can be divided into secured and unsecured parts based on collateral valuation. It should also be possible for Member States to lay down specific rules supporting class formation where non-diversified or otherwise especially vulnerable creditors, such as workers or small suppliers, would benefit from such class formation.

(45) Member States should be able to provide that debtors that are SMEs, can, on account of their relatively simple capital structure, be exempted from the obligation to treat affected parties in separate classes. In cases where SMEs have opted to create only one voting class and that class votes against the plan, it should be possible for debtors to submit another plan, in line with the general principles of this Directive.

(46) Member States should in any case ensure that adequate treatment is given in their national law to matters of particular importance for class formation purposes, such as claims from connected parties, and that their national law contains rules that deal with contingent claims and contested claims. Member States should be allowed to regulate how contested claims are to be handled for the purposes of allocating voting rights. The judicial or administrative authority should examine class formation, including the selection of creditors affected by the plan, when a restructuring plan is submitted for confirmation. However, Member States should be able to provide that such authority can also examine class formation at an earlier stage should the proposer of the plan seek validation or guidance in advance.

(47) Requisite majorities should be established by national law to ensure that a minority of affected parties in each class cannot obstruct the adoption of a restructuring plan which does not unfairly reduce their rights and interests. Without a majority rule binding dissenting secured creditors, early restructuring would not be possible in many cases, for example where a financial restructuring is needed but the business is otherwise viable. To ensure that parties have a say on the adoption of restructuring plans proportionate to the stakes they have in the business, the required majority should be based on the amount of the creditors' claims or equity holders' interests in any given class. Member States should, in addition, be able to require a majority in the number of affected parties in each class. Member States should be able to lay down rules in relation to affected parties with a right to vote which do not exercise that right in a correct manner or are not represented, such as rules allowing those affected parties to be taken into account for a participation threshold or for the calculation of a majority. Member States should also be able to provide for a participation threshold for the vote.

(48) Confirmation of a restructuring plan by a judicial or administrative authority is necessary to ensure that the reduction of the rights of creditors or interests of equity holders is proportionate to the benefits of the restructuring and that they have access to an effective remedy. Confirmation is particularly necessary where: there are dissenting affected parties; the restructuring plan contains provisions on new financing; or the plan involves a loss of more than 25 % of the work force. Member States should, however, be able to provide that confirmation by a judicial or administrative authority is necessary also in other cases. A confirmation of a plan which involves the loss of more than 25 % of the work force should only be necessary where national law allows preventive restructuring frameworks to provide for measures that have a direct effect on employment contracts.

(49) Member States should ensure that a judicial or administrative authority is able to reject a plan where it has been established that it reduces the rights of dissenting creditors or equity holders either to a level below what they could reasonably expect to receive in the event of the liquidation of the debtor's business, whether by piecemeal liquidation or by a sale as a going concern, depending on the particular circumstances of each debtor, or to a level below what they could reasonably expect in the event of the next-best-alternative scenario where the restructuring plan is not confirmed. However, where the plan is confirmed through a cross-class cram-down, reference should be made to the protection mechanism used in such scenario. Where Member States opt to carry out a valuation of the debtor as a going concern, the going-concern value should take into account the debtor's business in the longer term, as opposed to the liquidation value. The going-concern value is, as a rule, higher than the liquidation value because it is based on the assumption that the business continues its activity with the minimum of disruption, has the confidence of financial creditors, shareholders and clients, continues to generate revenues, and limits the impact on workers.

(50) While compliance with the best-interests-of-creditors test should be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground in order to avoid a valuation being made in every case, Member States should be able to provide that other conditions for confirmation can be examined *ex officio*. Member States should be able to add other conditions which need to be complied with in order to confirm a restructuring plan, such as whether equity holders are adequately protected. Judicial or administrative authorities should be able to refuse to confirm restructuring plans which have no reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business. However, Member States should not be required to ensure that such assessment is made *ex officio*.

(51) Notification to all affected parties should be one of the conditions for confirmation of a restructuring plan. Member States should be able to define the form of the notification, to identify the time when it is to be made, as well as to lay down provisions for the treatment of unknown claims as regards notification. They should also be able to provide that non-affected parties have to be informed about the restructuring plan.

(52) Satisfying the 'best-interest-of-creditors' test should be considered to mean that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed. Member States should be able to choose one of those thresholds when implementing the best-interest-of-creditors test in national law. That test should be applied in any case where a plan needs to be confirmed in order to be binding for dissenting creditors or, as the case may be, dissenting classes of creditors. As a consequence of the best-interest-of-creditors test, where public institutional creditors have a privileged status under national law, Member States could provide that the plan cannot impose a full or partial cancellation of the claims of those creditors.

(53) While a restructuring plan should always be adopted if the required majority in each affected class supports the plan, it should still be possible for a restructuring plan which is not supported by the required majority in each affected class to be confirmed by a judicial or administrative authority, upon the proposal of a debtor or with the debtor's agreement. In the case of a legal person, Member States should be able to decide if, for the purpose of adopting or confirming a restructuring plan, the debtor is to be understood as the legal person's management board or a certain majority of shareholders or equity holders. For the plan to be confirmed in the case of a cross-class cram-down, it should be supported by a majority of voting classes of affected parties. At least one of those classes should be a secured creditor class or senior to the ordinary unsecured creditors class.

(54) It should be possible that, where a majority of voting classes does not support the restructuring plan, the plan can nevertheless be confirmed if it is supported by at least one affected or impaired class of creditors which, upon a valuation of the debtor as a going concern, receive payment or keep any interest, or, where so provided under national law, can reasonably be presumed to receive payment or keep any interest, if the normal ranking of liquidation priorities is applied under national law. In such a case, Member States should be able to increase the number of classes which are required to approve the plan, without necessarily requiring that all those classes should, upon a valuation of the debtor as a going concern, receive payment or keep any interest under national law. However, Member States should not require the consent of all classes. Accordingly, where there are only two classes of creditors, the consent of at least one class should be deemed to be sufficient, if the other conditions for the application of a cross-class cram-down are met. The impairment of creditors should be understood to mean that there is a reduction in the value of their claims.

(55) In the case of a cross-class cram-down, Member States should ensure that dissenting classes of affected creditors are not unfairly prejudiced under the proposed plan and Member States should provide sufficient protection for such dissenting classes. Member States should be able to protect a dissenting class of affected creditors by ensuring that it is treated at least as favourably as any other class of the same rank and more favourably than any more junior class. Alternatively, Member States could protect a dissenting class of affected creditors by ensuring that such dissenting class is paid in full if a more junior class receives any distribution or keeps any interest under the restructuring plan (the 'absolute priority rule'). Member States should have discretion in implementing the concept of 'payment in full', including in relation to the timing of the payment, as long as the principal of the claim and, in the case of secured creditors, the value of the collateral are protected. Member States should also be able to decide on the choice of the equivalent means by which the original claim could be satisfied in full.

(56) Member States should be able to derogate from the absolute priority rule, for example where it is considered fair that equity holders keep certain interests under the plan despite a more senior class being obliged to accept a reduction of its claims, or that essential suppliers covered by the provision on the stay of individual enforcement actions are paid before more senior classes of creditors. Member States should be able to choose which of the above-mentioned protection mechanisms they put in place.

(57) While shareholders' or other equity holders' legitimate interests should be protected, Member States should ensure that they cannot unreasonably prevent the adoption of restructuring plans that would bring the debtor back to viability. Member States should be able to use different means to achieve that goal, for example by not giving equity holders the right to vote on a restructuring plan and by not making the adoption of a restructuring plan conditional on the agreement of equity holders that, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied. However, where equity holders have the right to vote on a restructuring plan, a judicial or administrative authority should be able to confirm the plan by applying the rules on cross-class cram down notwithstanding the dissent of one or more classes of equity holders. Member States that exclude equity holders from voting should not be required to apply the absolute priority rule in the relationship between creditors and equity holders. Another possible means of ensuring that equity holders do not unreasonably prevent the adoption of restructuring plans would be to ensure that restructuring measures that directly affect equity holders' rights, and that need to be approved by a general meeting of shareholders under company law, are not subject to unreasonably high majority requirements and that equity holders have no competence in terms of restructuring measures that do not directly affect their rights.

(58) Several classes of equity holders can be needed where different classes of shareholdings with different rights exist. Equity holders of SMEs that are not mere investors, but are the owners of the enterprise and contribute to the enterprise in other ways, such as managerial expertise, might not have an incentive to restructure under such conditions. For this reason, the cross-class cram-down should remain optional for debtors that are SMEs.

(59) The restructuring plan should, for the purposes of its implementation, make it possible for equity holders of SMEs to provide non-monetary restructuring assistance by drawing on, for example, their experience, reputation or business contacts.

(60) Throughout the preventive restructuring procedures, workers should enjoy full labour law protection. In particular, this Directive should be without prejudice to workers' rights guaranteed by Council Directives 98/59/EC ([12]) and 2001/23/EC ([13]), and Directives 2002/14/EC ([14]), 2008/94/EC ([15]) and 2009/38/EC ([16]) of the European Parliament and of the Council. The obligations concerning information and consultation of employees under national law transposing those Directives remain fully intact. This includes obligations to inform and consult employees' representatives on the decision to have recourse to a preventive restructuring framework in accordance with Directive 2002/14/EC.

(61) Employees and their representatives should be provided with information regarding the proposed restructuring plan in so far as provided for in Union law, in order to allow them to undertake an in-depth assessment of the various scenarios. Furthermore, employees and their representatives should be involved to the extent necessary to fulfil the consultation requirements laid down in Union law. Given the need to ensure an appropriate level of protection of workers, Member States should be required to exempt workers' outstanding claims from any stay of individual enforcement actions, irrespective of the question of whether those claims arise before or after the stay is granted. A stay of enforcement of workers' outstanding claims should be allowed only for the amounts and for the period for which the payment of such claims is effectively guaranteed at a similar level by other means under national law. Where national law provides for limitations on the liability of guarantee institutions, either in terms of the length of the guarantee or the amount paid to workers, workers should be able to enforce any shortfall in their claims against the employer even during the stay period. Alternatively, Member States should be able to exclude workers' claims from the scope of the preventive restructuring frameworks and provide for their protection under national law.

(62) Where a restructuring plan entails the transfer of a part of an undertaking or business, workers' rights arising from a contract of employment or from an employment relationship, in particular the right to wages, should be safeguarded in accordance with Articles 3 and 4 of Directive 2001/23/EC, without prejudice to the specific rules applying in the event of insolvency proceedings under Article 5 of that Directive and in particular the possibilities provided for in Article 5(2) of that Directive. This Directive should be without prejudice to the rights to information and consultation, which are guaranteed by Directive 2002/14/EC, including on decisions likely to lead to substantial changes in work organisation or in contractual relations with a view to reaching an agreement on such decisions. Furthermore, under this Directive, workers whose claims are affected by a restructuring plan should have the right to vote on the plan. For the purposes of voting on the restructuring plan, Member States should be able to decide to place workers in a class separate from other classes of creditors.

(63) Judicial or administrative authorities should only decide on the valuation of a business — either in liquidation or in the next-best-alternative scenario, if the restructuring plan was not confirmed — if a dissenting affected party challenges the restructuring plan. This should not prevent Member States from carrying out valuations in another context under national law. However, it should be possible that such a decision also consists of an approval of a valuation by an expert or of a valuation submitted by the debtor or another party at an earlier stage of the process. Where the decision to carry out a valuation is taken, Member States should be able to provide for special rules, separate from general civil procedural law, for a valuation in restructuring cases, with a view to ensuring that it is carried out in an expedited manner. Nothing in this Directive should affect the rules on burden of proof under national law in the case of a valuation.

(64) The binding effects of a restructuring plan should be limited to the affected parties that were involved in the adoption of the plan. Member States should be able to determine what it means for a creditor to be involved, including in the case of unknown creditors or creditors of future claims. For example, Member States should be able to decide how to deal with creditors that have been notified correctly but that did not participate in the procedures.

([12]) Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, 12.8.1998, p. 16).

([13]) Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

([14]) Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L 80, 23.3.2002, p. 29).

([15]) Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ L 283, 28.10.2008, p. 36).

([16]) Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works council or a procedure in Community-scale undertakings and community-scale groups of undertakings for the purpose of informing and consulting employees (OJ L 122, 16.5.2009, p. 28).

(65) Interested affected parties should be able to appeal a decision on the confirmation of a restructuring plan issued by an administrative authority. Member States should also be able to introduce the option of appealing a decision on the confirmation of a restructuring plan issued by a judicial authority. However, in order to ensure the effectiveness of the plan, to reduce uncertainty and to avoid unjustifiable delays, appeals should, as a rule, not have suspensive effects and therefore not preclude the implementation of a restructuring plan. Member States should be able to determine and limit the grounds for appeal. Where the decision on the confirmation of the plan is appealed, Member States should be able to allow the judicial authority to issue a preliminary or summary decision that protects the execution and implementation of the plan against the consequences of the pending appeal being upheld. Where an appeal is upheld, judicial or administrative authorities should be able to consider, as an alternative to setting aside the plan, an amendment of the plan, where Member States provide for such a possibility, as well as a confirmation of the plan without amendments. It should be possible for any amendments to the plan to be proposed or voted on by the parties, on their own initiative or at the request of the judicial authority. Member States could also provide for compensation for monetary losses for the party whose appeal was upheld. National law should be able to deal with a potential new stay or extension of the stay in event of the judicial authority deciding that the appeal has suspensive effect.

(66) The success of a restructuring plan often depends on whether financial assistance is extended to the debtor to support, firstly, the operation of the business during restructuring negotiations and, secondly, the implementation of the restructuring plan after its confirmation. Financial assistance should be understood in a broad sense, including the provision of money or third-party guarantees and the supply of stock, inventory, raw materials and utilities, for example through granting the debtor a longer repayment period. Interim financing and new financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures.

(67) National insolvency laws providing for avoidance actions of interim and new financing or providing that new lenders may incur civil, administrative or criminal sanctions for extending credit to debtors in financial difficulties could jeopardise the availability of financing necessary for the successful negotiation and implementation of a restructuring plan. This Directive should be without prejudice to other grounds for declaring new or interim financing void, voidable or unenforceable, or for triggering civil, criminal or administrative liability for providers of such financing, as laid down in national law. Such other grounds could include, among other things, fraud, bad faith, a certain type of relationship between the parties which could be associated with a conflict of interest, such as in the case of transactions between related parties or between shareholders and the company, and transactions where a party received value or collateral without being entitled to it at the time of the transaction or in the manner performed.

(68) When interim financing is extended, the parties do not know whether the restructuring plan will be eventually confirmed or not. Therefore, Member States should not be required to limit the protection of interim finance to cases where the plan is adopted by creditors or confirmed by a judicial or administrative authority. To avoid potential abuses, only financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan should be protected. Furthermore, this Directive should not prevent Member States from introducing an *ex ante* control mechanism for interim financing. Member States should be able to limit the protection for new financing to cases where the plan is confirmed by a judicial or administrative authority and for interim financing to cases where it is subject to *ex ante* control. An *ex ante* control mechanism for interim financing or other transactions could be exercised by a practitioner in the field of restructuring, by a creditor's committee or by a judicial or administrative authority. Protection from avoidance actions and protection from personal liability are minimum guarantees that should be granted to interim financing and new financing. However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties could require further incentives such as, for example, giving such financing priority at least over unsecured claims in subsequent insolvency procedures.

(69) In order to promote a culture that encourages early preventive restructuring, it is desirable that transactions which are reasonable and immediately necessary for the negotiation or implementation of a restructuring plan also be given protection from avoidance actions in subsequent insolvency procedures. Judicial or administrative authorities should be able, when determining the reasonableness and immediate necessity of costs and fees, for instance, to consider projections and estimates submitted to affected parties, a creditor's committee, a practitioner in the field of restructuring or the judicial or administrative authority itself. To this end, Member States should also be able to require debtors to provide and update relevant estimates. Such protection should enhance certainty in respect of transactions with businesses that are known to be in financial difficulties and remove the fear of creditors and investors that all such transactions could be declared void in the event that the restructuring fails. Member States should be able to provide for a point in time prior to the opening of a preventive restructuring procedure and to the granting of the stay of individual enforcement actions, from which fees and costs of negotiating, adopting, confirming or seeking professional advice for the restructuring plan start to benefit from protection against avoidance actions. In the case of other payments and disbursements and the protection of the payment of workers' wages, such a starting point could also be the granting of the stay or the opening of the preventive restructuring procedure.

(70) To further promote preventive restructuring, it is important to ensure that directors are not dissuaded from exercising reasonable business judgment or taking reasonable commercial risks, particularly where to do so would improve the chances of a restructuring of potentially viable businesses. Where the company experiences financial difficulties, directors should take steps to minimise losses and to avoid insolvency, such as: seeking professional advice, including on restructuring and insolvency, for instance by making use of early warning tools where applicable; protecting the assets of the company so as to maximise value and avoid loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; refraining from committing the company to the types of transaction that might be subject to avoidance unless there is an appropriate business justification; continuing to trade in circumstances where it is appropriate to do so in order to maximise going-concern value; holding negotiations with creditors and entering preventive restructuring procedures.

(71) Where the debtor is close to insolvency, it is also important to protect the legitimate interests of creditors from management decisions that may have an impact on the constitution of the debtor's estate, in particular where those decisions could have the effect of further diminishing the value of the estate available for restructuring efforts or for distribution to creditors. It is therefore necessary to ensure that, in such circumstances, directors avoid any deliberate or grossly negligent actions that result in personal gain at the expense of stakeholders, and avoid agreeing to transactions at below market value, or taking actions leading to unfair preference being given to one or more stakeholders. Member States should be able to implement the corresponding provisions of this Directive by ensuring that judicial or administrative authorities, when assessing whether a director is to be held liable for breaches of duty of care, take the rules on duties of directors laid down in this Directive into account. This Directive is not intended to establish any hierarchy among the different parties whose interests need to be given due regard. However, Member States should be able to decide on establishing such a hierarchy. This Directive should be without prejudice to Member States' national rules on the decision-making processes in a company.

(72) Entrepreneurs exercising a trade, business, craft or independent, self-employed profession can run the risk of becoming insolvent. The differences between the Member States in terms of opportunities for a fresh start could incentivise over-indebted or insolvent entrepreneurs to relocate to a Member State other than the Member State where they are established, in order to benefit from shorter discharge periods or more attractive conditions for discharge, leading to additional legal uncertainty and costs for the creditors when recovering their claims. Furthermore, the effects of insolvency, in particular the social stigma, the legal consequences, such as disqualifying entrepreneurs from taking up and pursuing entrepreneurial activity, and the continual inability to pay off debts, constitute important disincentives for entrepreneurs seeking to set up a business or have a second chance, even if evidence shows that entrepreneurs who have become insolvent have more chances of being successful the next time.

(73) Steps should therefore be taken to reduce the negative effects of over-indebtedness or insolvency on entrepreneurs, in particular by allowing for a full discharge of debt after a certain period of time and by limiting the length of disqualification orders issued in connection with a debtor's over-indebtedness or insolvency. The concept of 'insolvency' should be defined by national law and it could take the form of over-indebtedness. The concept of 'entrepreneur' within the meaning of this Directive should have no bearing on the position of managers or directors of a company, which should be treated in accordance with national law. Member States should be able to decide how to obtain access to discharge, including the possibility of requiring the debtor to request discharge.

(74) Member States should be able to provide for the possibility to adjust the repayment obligations of insolvent entrepreneurs when there is a significant change in their financial situation, regardless of whether it improves or deteriorates. This Directive should not require that a repayment plan be supported by a majority of creditors. Member States should be able to provide that entrepreneurs are not prevented from starting a new activity in the same or different field during the implementation of the repayment plan.

(75) A discharge of debt should be available in procedures that include a repayment plan, a realisation of assets, or a combination of both. In implementing those rules, Member States should be able to choose freely among those options. If more than one procedure leading to discharge of debt is available under national law, Member States should ensure that at least one of those procedures gives insolvent entrepreneurs the opportunity of having a full discharge of debt within a period that does not exceed three years. In the case of procedures which combine a realisation of assets and a repayment plan, the discharge period should start, at the latest, from the date the repayment plan is confirmed by a court or starts being implemented, for example from the first instalment under the plan, but it could also start earlier, such as when a decision to open the procedure is taken.

(76) In procedures that do not include a repayment plan, the discharge period should start, at the latest, from the date when a decision to open the procedure is taken by a judicial or administrative authority, or the date of the establishment of the insolvency estate. For the purposes of calculating the duration of the discharge period under this Directive, Member States should be able to provide that the concept of 'opening of procedure' does not include preliminary measures, such as preservation measures or the appointment of a preliminary insolvency practitioner, unless such measures allow for the realisation of assets, including the disposal and the distribution of assets to creditors. The establishment of the insolvency estate should not necessarily entail a formal decision or confirmation by a judicial or administrative authority, where such decision is not required under national law, and could consist in the submission of the inventory of assets and liabilities.

(77) Where the procedural path leading to a discharge of debt entails the realisation of an entrepreneur's assets, Member States should not be prevented from providing that the request for discharge is treated separately from the realisation of assets, provided that such request constitutes an integral part of the procedural path leading to the discharge under this Directive. Member States should be able to decide on the rules on the burden of proof in order for the discharge to operate, which means that it should be possible for entrepreneurs to be required by law to prove compliance with their obligations.

(78) A full discharge of debt or the ending of disqualifications after a period no longer than three years is not appropriate in all circumstances, therefore derogations from this rule which are duly justified by reasons laid down in national law might need to be introduced. For instance, such derogations should be introduced in cases where the debtor is dishonest or has acted in bad faith. Where entrepreneurs do not benefit from a presumption of honesty and good faith under national law, the burden of proof concerning their honesty and good faith should not make it unnecessarily difficult or onerous for them to enter the procedure.

(79) In establishing whether an entrepreneur was dishonest, judicial or administrative authorities might take into account circumstances such as: the nature and extent of the debt; the time when the debt was incurred; the efforts of the entrepreneur to pay the debt and comply with legal obligations, including public licensing requirements and the need for proper bookkeeping; actions on the entrepreneur's part to frustrate recourse by creditors; the fulfilment of duties in the likelihood of insolvency, which are incumbent on entrepreneurs who are directors of a company; and compliance with Union and national competition and labour law. It should also be possible to introduce derogations where the entrepreneur has not complied with certain legal obligations, including obligations to maximise returns to creditors, which could take the form of a general obligation to generate income or assets. It should furthermore be possible to introduce specific derogations where it is necessary to guarantee the balance between the rights of the debtor and the rights of one or more creditors, such as where the creditor is a natural person who needs more protection than the debtor.

(80) A derogation could also be justified where the costs of the procedure leading to a discharge of debt, including the fees of judicial and administrative authorities and of practitioners, are not covered. Member States should be able to provide that the benefits of that discharge can be revoked where, for example, the financial situation of the debtor improves significantly due to unexpected circumstances, such as winning a lottery, or coming in the possession of an inheritance or a donation. Member States should not be prevented from providing additional derogations in well-defined circumstances and when duly justified.

(81) Where there is a duly justified reason under national law, it could be appropriate to limit the possibility of discharge for certain categories of debt. It should be possible for Member States to exclude secured debts from eligibility for discharge only up to the value of the collateral as determined by national law, while the rest of the debt should be treated as unsecured debt. Member States should be able to exclude further categories of debt when duly justified.

(82) Member States should be able to provide that judicial or administrative authorities can verify, either *ex officio* or at the request of a person with a legitimate interest, whether entrepreneurs have fulfilled the conditions for obtaining a full discharge of debt.

(83) If an entrepreneur's permit or licence to carry on a certain craft, business, trade or profession has been denied or revoked as a result of a disqualification order, this Directive should not prevent Member States from requiring the entrepreneur to submit an application for a new permit or licence after the disqualification has expired. Where a Member State authority adopts a decision concerning a specifically supervised activity, it should be possible to also take into account, even after the expiry of the disqualification period, the fact that the insolvent entrepreneur has obtained a discharge of debt in accordance with this Directive.

(84) Personal and professional debts that cannot be reasonably separated, for example where an asset is used in the course of the professional activity of the entrepreneur as well as outside that activity, should be treated in a single procedure. Where Member States provide that such debts are subject to different insolvency procedures, coordination of those procedures is needed. This Directive should be without prejudice to Member States being able to choose to treat all the debts of an entrepreneur in a single procedure. Member States in which entrepreneurs are allowed to continue their business on their own account during insolvency proceedings should not be prevented from providing that such entrepreneurs can be made subject to new insolvency proceedings, where such continued business becomes insolvent.

(85) It is necessary to maintain and enhance the transparency and predictability of the procedures in delivering outcomes that are favourable to the preservation of businesses and to allowing entrepreneurs to have a second chance or that permit the efficient liquidation of non-viable enterprises. It is also necessary to reduce the excessive length of insolvency procedures in many Member States, which results in legal uncertainty for creditors and investors and low recovery rates. Finally, given the enhanced cooperation mechanisms between courts and practitioners in cross-border cases, set up under Regulation (EU) 2015/848, the professionalism of all actors involved needs to be brought to comparable high levels across the Union. To achieve those objectives, Member States should ensure that members of the judicial and administrative authorities dealing with procedures concerning preventive restructuring, insolvency and discharge of debt are suitably trained and have the necessary expertise for their responsibilities. Such training and expertise could be acquired also during the exercise of the duties as a member of a judicial or administrative authority or, prior to appointment to such duties, during the exercise of other relevant duties.

(86) Such training and expertise should enable decisions with a potentially significant economic and social impact to be taken in an efficient manner, and should not be understood to mean that members of a judicial authority have to deal exclusively with matters concerning restructuring, insolvency and discharge of debt. Member States should ensure that procedures concerning restructuring, insolvency and discharge of debt can be carried out in an efficient and expeditious manner. The creation of specialised courts or chambers, or the appointment of specialised judges in accordance with national law, as well as concentrating jurisdiction in a limited number of judicial or administrative authorities would be efficient ways of achieving the objectives of legal certainty and effectiveness of procedures. Member States should not be obliged to require that procedures concerning restructuring, insolvency and discharge of debt be prioritised over other procedures.

(87) Member States should also ensure that practitioners in the field of restructuring, insolvency, and discharge of debt that are appointed by judicial or administrative authorities ('practitioners') are: suitably trained; appointed in a transparent manner with due regard to the need to ensure efficient procedures; supervised when carrying out their tasks; and perform their tasks with integrity. It is important that practitioners adhere to standards for such tasks, such as obtaining insurance for professional liability. Suitable training, qualifications and expertise for practitioners could also be acquired while practising their profession. Member States should not be obliged to provide the necessary training themselves, but this could be provided by, for example, professional associations or other bodies. Insolvency practitioners as defined in Regulation (EU) 2015/848 should be included in the scope of this Directive.

(88) This Directive should not prevent Member States from providing that practitioners are chosen by a debtor, by creditors or by a creditors' committee from a list or a pool that is pre-approved by a judicial or administrative authority. In choosing a practitioner, the debtor, the creditors or the creditors' committee could be granted a margin of appreciation as to the practitioner's expertise and experience in general and the demands of the particular case. Debtors who are natural persons could be exempted from such a duty altogether. In cases with cross-border elements, the appointment of the practitioner should take into account, among other things, the practitioner's ability to comply with the obligations, under Regulation (EU) 2015/848, to communicate and cooperate with insolvency practitioners and judicial and administrative authorities from other Member States, as well as their human and administrative resources to deal with potentially complex cases. Member States should not be prevented from providing for a practitioner to be selected by other methods, such as random selection by a software programme, provided that it is ensured that in using those methods due consideration is given to the practitioner's experience and expertise. Member States should be able to decide on the means for objecting to the selection or appointment of a practitioner or for requesting the replacement of the practitioner, for example through a creditors' committee.

(89) Practitioners should be subject to oversight and regulatory mechanisms which should include effective measures regarding the accountability of practitioners who have failed in their duties, such as: a reduction in a practitioner's fee; the exclusion from the list or pool of practitioners who can be appointed in insolvency cases; and, where appropriate, disciplinary, administrative or criminal sanctions. Such oversight and regulatory mechanisms should be without prejudice to provisions under national law on civil liability for damages for breach of contractual or non-contractual obligations. Member States should not be required to set up specific authorities or bodies. Member States should ensure that information about the authorities or bodies exercising oversight over practitioners is publicly available. For instance, a mere reference to the judicial or administrative authority should be sufficient as information. It should be possible, in principle, to attain such standards without the need to create new professions or qualifications under national law. Member States should be able to extend the provisions on the training and supervision of practitioners to other practitioners not covered by this Directive. Member States should not be obliged to provide that disputes over remuneration of practitioners are to be prioritised over other procedures.

(90) To further reduce the length of procedures, to facilitate better participation of creditors in procedures concerning restructuring, insolvency and discharge of debt and to ensure similar conditions among creditors irrespective of where they are located in the Union, Member States should put in place provisions enabling debtors, creditors, practitioners and judicial and administrative authorities to use electronic means of communication. Therefore, it should be possible that procedural steps such as the filing of claims by creditors, the notification of creditors, or the lodging of challenges and appeals, can be carried out by electronic means of communication. Member States should be able to provide that notifications of a creditor can only be performed electronically if the creditor concerned has previously consented to electronic communication.

(91) Parties to procedures concerning restructuring, insolvency and discharge of debt should not be obliged to use electronic means of communication if such use is not mandatory under national law, without prejudice to Member States being able to establish a mandatory system of electronic filing and service of documents in procedures concerning restructuring, insolvency and discharge of debt. Member States should be able to choose the means of electronic communications. Examples of such means could include a purpose-built system for the electronic transmission of such documents or the use of email, without preventing Member States from being able to put in place features to ensure the security of electronic transmissions, such as electronic signature, or trust services, such as electronic registered delivery services, in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council ([17]).

(92) It is important to gather reliable and comparable data on the performance of procedures concerning restructuring, insolvency and discharge of debt in order to monitor the implementation and application of this Directive. Therefore, Member States should collect and aggregate data that are sufficiently granular to enable an accurate assessment of how the Directive is working in practice and should communicate those data to the Commission. The communication form for the transmission of such data to the Commission should be established by the Commission assisted by a Committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council ([18]). The form should provide a shortlist of the main outcomes of procedures that are common to all Member States. For example, in the case of a restructuring procedure, those main outcomes could be the following: the plan being confirmed by a court; the plan not being confirmed by a court; the restructuring procedures being converted to liquidation procedures or closed because of the opening of liquidation procedures before the plan was confirmed by a court. Member States should not be required to provide a break-down by types of outcome in respect of the procedures which end before any relevant measures are taken, but could instead provide a common number for all procedures which are declared inadmissible, rejected or withdrawn before being opened.

(93) The communication form should provide a list of options which could be taken into account by the Member States when determining the size of a debtor, by reference to one or more of the elements of the definition of SMEs and large enterprises common to all Member States. The list should include the option of determining the size of a debtor based on the number of workers only. The form should: define the elements of average cost and average recovery rates for which Member States should be able to collect data voluntarily; provide guidance on elements which could be taken into account when Member States make use of a sampling technique, for example on sample sizes to ensure representativeness in terms of geographical distribution, size of debtors and industry; and include the opportunity for Member States to provide any additional information available, for example on the total amount of assets and liabilities of debtors.

(94) The stability of financial markets relies heavily on financial collateral arrangements, in particular, when collateral security is provided in connection with the participation in designated systems or in central bank operations and when margins are provided to central counterparties. As the value of financial instruments given as collateral security may be very volatile, it is crucial to realise their value quickly before it goes down. Therefore, the provisions of Directives 98/26/EC ([19]) and 2002/47/EC ([20]) of the European Parliament and of the Council and Regulation (EU) No 648/2012 should apply notwithstanding the provisions of this Directive. Member States should be allowed to exempt netting arrangements, including close-out netting, from the effects of the stay of individual enforcement actions even in circumstances where they are not covered by Directives 98/26/EC, 2002/47/EC and Regulation (EU) No 648/2012, if such arrangements are enforceable under the laws of the relevant Member State even if insolvency proceedings are opened.

([17]) Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73).

([18]) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

([19]) Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

([20]) Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).

This could be the case for a significant number of master agreements widely used in the financial, energy and commodity markets, both by non-financial and financial counterparties. Such arrangements reduce systemic risks especially in derivatives markets. Such arrangements might therefore be exempt from restrictions that insolvency laws impose on executory contracts. Accordingly, Member States should also be allowed to exempt from the effects of the stay of individual enforcement actions statutory netting arrangements, including close-out netting arrangements, which operate upon the opening of insolvency procedures. The amount resulting from the operation of netting arrangements, including close-out netting arrangements should, however, be subject to the stay of individual enforcement actions.

(95) Member States that are parties to the Convention on international interests in mobile equipment, signed at Cape Town on 16 November 2001, and its Protocols should be able to continue to comply with their existing international obligations. The provisions of this Directive regarding preventive restructuring frameworks should apply with the derogations necessary to ensure an application of those provisions without prejudice to the application of that Convention and its Protocols.

(96) The effectiveness of the process of adoption and implementation of the restructuring plan should not be jeopardised by company law. Therefore, Member States should be able to derogate from the requirements laid down in Directive (EU) 2017/1132 of the European Parliament and of the Council ([21]) concerning the obligations to convene a general meeting and to offer on a pre-emptive basis shares to existing shareholders, to the extent and for the period necessary to ensure that shareholders do not frustrate restructuring efforts by abusing their rights under that Directive. For example, Member States might need to derogate from the obligation to convene a general meeting of shareholders or from the normal time periods, for cases where urgent action is to be taken by the management to safeguard the assets of the company, for instance through requesting a stay of individual enforcement actions and when there is a serious and sudden loss of subscribed capital and a likelihood of insolvency. Derogations from company law might also be required when the restructuring plan provides for the emission of new shares which could be offered with priority to creditors as debt-to-equity swaps, or for the reduction of the amount of subscribed capital in the event of a transfer of parts of the undertaking. Such derogations should be limited in time to the extent that Member States consider such derogations necessary for the establishment of a preventive restructuring framework. Member States should not be obliged to derogate from company law, wholly or partially, for an indefinite or for a limited period of time, if they ensure that their company law requirements do not jeopardise the effectiveness of the restructuring process or if Member States have other, equally effective tools in place to ensure that shareholders do not unreasonably prevent the adoption or implementation of a restructuring plan which would restore the viability of the business. In this context, Member States should attach particular importance to the effectiveness of provisions relating to a stay of individual enforcement actions and confirmation of the restructuring plan which should not be unduly impaired by calls for, or the results of, general meetings of shareholders. Directive (EU) 2017/1132 should therefore be amended accordingly. Member States should enjoy a margin of appreciation in assessing which derogations are needed in the context of national company law in order to effectively implement this Directive, and should also be able to provide for similar exemptions from Directive (EU) 2017/1132 in the case of insolvency proceedings not covered by this Directive but which allow for restructuring measures to be taken.

(97) In respect of the establishment of, and subsequent changes to, the data communication form, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011.

(98) A study should be carried out by the Commission in order to evaluate the necessity of submitting legislative proposals to deal with the insolvency of persons not exercising a trade, business, craft or profession, who, as consumers, in good faith, are temporarily or permanently unable to pay debts as they fall due. Such study should investigate whether access to basic goods and services needs to be safeguarded for those persons to ensure that they benefit from decent living conditions.

(99) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents ([22]), Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

([21]) Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169, 30.6.2017, p. 46).
([22]) OJ C 369, 17.12.2011, p. 14.

(100) Since the objectives of this Directive cannot be sufficiently achieved by the Member States because differences between national restructuring and insolvency frameworks would continue to raise obstacles to the free movement of capital and the freedom of establishment, but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(101) On 7 June 2017, the European Central Bank delivered an opinion ([23]),

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

GENERAL PROVISIONS

Article 1

Subject matter and scope

1. This Directive lays down rules on:

(a) preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor;

(b) procedures leading to a discharge of debt incurred by insolvent entrepreneurs; and

(c) measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

2. This Directive does not apply to procedures referred to in paragraph 1 of this Article that concern debtors that are:

(a) insurance undertakings or reinsurance undertakings as defined in points (1) and (4) of Article 13 of Directive 2009/138/EC;

(b) credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013;

(c) investment firms or collective investment undertakings as defined in points (2) and (7) of Article 4(1) of Regulation (EU) No 575/2013;

(d) central counter parties as defined in point (1) of Article 2 of Regulation (EU) No 648/2012;

(e) central securities depositories as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014;

(f) other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU;

(g) public bodies under national law; and

(h) natural persons who are not entrepreneurs.

3. Member States may exclude from the scope of this Directive procedures referred to in paragraph 1 that concern debtors which are financial entities, other than those referred to in paragraph 2, providing financial services which are subject to special arrangements under which the national supervisory or resolution authorities have wide-ranging powers of intervention comparable to those laid down in Union and national law in relation to the financial entities referred to in paragraph 2. Member States shall communicate those special arrangements to the Commission.

4. Member States may extend the application of the procedures referred to in point (b) of paragraph 1 to insolvent natural persons who are not entrepreneurs.

Member States may restrict the application of point (a) of paragraph 1 to legal persons.

([23]) OJ C 236, 21.7.2017, p. 2.

5. Member States may provide that the following claims are excluded from, or are not affected by, preventive restructuring frameworks referred to in point (a) of paragraph 1:

(a) existing and future claims of existing or former workers;

(b) maintenance claims arising from a family relationship, parentage, marriage or affinity; or

(c) claims that arise from tortious liability of the debtor.

6. Member States shall ensure that preventive restructuring frameworks have no impact on accrued occupational pension entitlements.

Article 2

Definitions

1. For the purposes of this Directive, the following definitions apply:

(1) 'restructuring' means measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements;

(2) 'affected parties' means creditors, including, where applicable under national law, workers, or classes of creditors and, where applicable, under national law, equity holders, whose claims or interests, respectively, are directly affected by a restructuring plan;

(3) 'equity holder' means a person that has an ownership interest in a debtor or a debtor's business, including a shareholder, in so far as that person is not a creditor;

(4) 'stay of individual enforcement actions' means a temporary suspension, granted by a judicial or administrative authority or applied by operation of law, of the right of a creditor to enforce a claim against a debtor and, where so provided for by national law, against a third-party security provider, in the context of a judicial, administrative or other procedure, or of the right to seize or realise out of court the assets or business of the debtor;

(5) 'executory contract' means a contract between a debtor and one or more creditors under which the parties still have obligations to perform at the time the stay of individual enforcement actions is granted or applied;

(6) 'best-interest-of-creditors test' means a test that is satisfied if no dissenting creditor would be worse off under a restructuring plan than such a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed;

(7) 'new financing' means any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan;

(8) 'interim financing' means any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business;

(9) 'entrepreneur' means a natural person exercising a trade, business, craft or profession;

(10) 'full discharge of debt' means that enforcement against entrepreneurs of their outstanding dischargeable debts is precluded or that outstanding dischargeable debts as such are cancelled, as part of a procedure which could include a realisation of assets or a repayment plan or both;

(11) 'repayment plan' means a programme of payments of specified amounts on specified dates by an insolvent entrepreneur to creditors, or a periodic transfer to creditors of a certain part of entrepreneur's disposable income during the discharge period;

(12) 'practitioner in the field of restructuring' means any person or body appointed by a judicial or administrative authority to carry out, in particular, one or more of the following tasks:

(a) assisting the debtor or the creditors in drafting or negotiating a restructuring plan;

(b) supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to a judicial or administrative authority;

(c) taking partial control over the assets or affairs of the debtor during negotiations.

2. For the purposes of this Directive, the following concepts are to be understood as defined by national law:

(a) insolvency;

(b) likelihood of insolvency;

(c) micro, small and medium-sized enterprises ('SMEs').

Article 3

Early warning and access to information

1. Member States shall ensure that debtors have access to one or more clear and transparent early warning tools which can detect circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay.

For the purposes of the first subparagraph, Member States may make use of up-to-date IT technologies for notifications and for communication.

2. Early warning tools may include the following:

(a) alert mechanisms when the debtor has not made certain types of payments;

(b) advisory services provided by public or private organisations.

(c) incentives under national law for third parties with relevant information about the debtor, such as accountants, tax and social security authorities, to flag to the debtor a negative development.

3. Member States shall ensure that debtors and employees' representatives have access to relevant and up-to-date information about the availability of early warning tools as well as of the procedures and measures concerning restructuring and discharge of debt.

4. Member States shall ensure that information on access to early warning tools is publicly available online and that, in particular for SMEs, it is easily accessible and presented in a user-friendly manner.

5. Member States may provide support to employees' representatives for the assessment of the economic situation of the debtor.

TITLE II

PREVENTIVE RESTRUCTURING FRAMEWORKS

CHAPTER 1

Availability of preventive restructuring frameworks

Article 4

Availability of preventive restructuring frameworks

1. Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity.

2. Member States may provide that debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law are allowed to access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.

3. Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets.

4. Member States may limit the number of times within a certain period a debtor can access a preventive restructuring framework as provided for under this Directive.

5. The preventive restructuring framework provided for under this Directive may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law.

Member States shall ensure that such restructuring framework affords debtors and affected parties the rights and safeguards provided for in this Title in a coherent manner.

6. Member States may put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded.

7. Preventive restructuring frameworks provided for under this Directive shall be available on application by debtors.

8. Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are SMEs.

CHAPTER 2

Facilitating negotiations on preventive restructuring plans

Article 5

Debtor in possession

1. Member States shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.

2. Where necessary, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case.

3. Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating and drafting the plan, at least in the following cases:

(a) where a general stay of individual enforcement actions, in accordance with Article 6(3), is granted by a judicial or administrative authority, and the judicial or administrative authority decides that such a practitioner is necessary to safeguard the interest of the parties;

(b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11; or

(c) where it is requested by the debtor or by a majority of the creditors, provided that, in the latter case, the cost of the practitioner is borne by the creditors.

Article 6

Stay of individual enforcement actions

1. Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.

Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph.

2. Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims.

3. Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.

Where a stay is limited, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations as referred to in paragraph 1 on the restructuring plan or of the stay.

4. Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:

(a) enforcement is not likely to jeopardise the restructuring of the business; or

(b) the stay would unfairly prejudice the creditors of those claims.

5. Paragraph 2 shall not apply to workers' claims.

By way of derogation from the first subparagraph, Member States may apply paragraph 2 to workers' claims if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection.

6. The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months.

7. Notwithstanding paragraph 6, Member States may enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions or to grant a new stay of individual enforcement actions, at the request of the debtor, a creditor or, where applicable, a practitioner in the field of restructuring. Such extension or new stay of individual enforcement actions shall be granted only if well-defined circumstances show that such extension or new stay is duly justified, such as:

(a) relevant progress has been made in the negotiations on the restructuring plan;

(b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or

(c) insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor.

8. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed 12 months.

Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings.

9. Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:

(a) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations;

(b) at the request of the debtor or the practitioner in the field of restructuring;

(c) where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or

(d) where so provided for in national law, if the stay gives rise to the insolvency of a creditor.

Member States may limit the power, under the first subparagraph, to lift the stay of individual enforcement actions to situations where creditors had not had the opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority.

Member States may provide for a minimum period, which does not exceed the period referred to in paragraph 6, during which a stay of individual enforcement actions cannot be lifted.

Article 7

Consequences of the stay of individual enforcement actions

1. Where an obligation on a debtor, provided for under national law, to file for the opening of insolvency proceedings which could end in the liquidation of the debtor, arises during a stay of individual enforcement actions, that obligation shall be suspended for the duration of that stay.

2. A stay of individual enforcement actions in accordance with Article 6 shall suspend, for the duration of the stay, the opening, at the request of one or more creditors, of insolvency proceedings which could end in the liquidation of the debtor.

3. Member States may derogate from paragraphs 1 and 2 in situations where a debtor is unable to pay its debts as they fall due. In such cases, Member States shall ensure that a judicial or administrative authority can decide to keep in place the benefit of the stay of individual enforcement actions, if, taking into account the circumstances of the case, the opening of insolvency proceedings which could end in the liquidation of the debtor would not be in the general interest of creditors.

4. Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor. 'Essential executory contracts' shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill.

The first subparagraph shall not preclude Member States from affording such creditors appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors as a result of that subparagraph.

Member States may provide that this paragraph also applies to non-essential executory contracts.

5. Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of:

(a) a request for the opening of preventive restructuring proceedings;

(b) a request for a stay of individual enforcement actions;

(c) the opening of preventive restructuring proceedings; or

(d) the granting of a stay of individual enforcement actions as such.

6. Member States may provide that a stay of individual enforcement actions does not apply to netting arrangements, including close-out netting arrangements, on financial markets, energy markets and commodity markets, even in circumstances where Article 31(1) does not apply, if such arrangements are enforceable under national insolvency law. The stay shall, however, apply to the enforcement by a creditor of a claim against a debtor arising as a result of the operation of a netting arrangement.

The first subparagraph shall not apply to contracts for the supply of goods, services or energy necessary for the operation of the debtor's business, unless such contracts take the form of a position traded on an exchange or other market, such that it can be substituted at any time at current market value.

7. Member States shall ensure that the expiry of a stay of individual enforcement actions without the adoption of a restructuring plan does not, of itself, give rise to the opening of an insolvency procedure which could end in the liquidation of the debtor, unless the other conditions for such opening laid down by national law are fulfilled.

CHAPTER 3

Restructuring plans

Article 8

Content of restructuring plans

1. Member States shall require that restructuring plans submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10, contain at least the following information:

(a) the identity of the debtor;

(b) the debtor's assets and liabilities at the time of submission of the restructuring plan, including a value for the assets, a description of the economic situation of the debtor and the position of workers, and a description of the causes and the extent of the difficulties of the debtor;

(c) the affected parties, whether named individually or described by categories of debt in accordance with national law, as well as their claims or interests covered by the restructuring plan;

(d) where applicable, the classes into which the affected parties have been grouped, for the purpose of adopting the restructuring plan, and the respective values of claims and interests in each class;

(e) where applicable, the parties, whether named individually or described by categories of debt in accordance with national law, which are not affected by the restructuring plan, together with a description of the reasons why it is proposed not to affect them;

(f) where applicable, the identity of the practitioner in the field of restructuring;

(g) the terms of the restructuring plan, including, in particular:

  (i) any proposed restructuring measures as referred to in point (1) of Article 2(1);

  (ii) where applicable, the proposed duration of any proposed restructuring measures;

  (iii) the arrangements with regard to informing and consulting the employees' representatives in accordance with Union and national law;

  (iv) where applicable, overall consequences as regards employment such as dismissals, short-time working arrangements or similar;

  (v) the estimated financial flows of the debtor, if provided for by national law; and

  (vi) any new financing anticipated as part of the restructuring plan, and the reasons why the new financing is necessary to implement that plan;

(h) a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan. Member States may require that that statement of reasons be made or validated either by an external expert or by the practitioner in the field of restructuring if such a practitioner is appointed.

2. Member States shall make available online a comprehensive check-list for restructuring plans, adapted to the needs of SMEs. The check-list shall include practical guidelines on how the restructuring plan has to be drafted under national law.

The check-list shall be made available in the official language or languages of the Member State. Member States shall consider making the check-list available in at least one other language, in particular in a language used in international business.

Article 9

Adoption of restructuring plans

1. Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties.

Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans, and provide for conditions under which they may do so.

2. Member States shall ensure that affected parties have a right to vote on the adoption of a restructuring plan.

Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan.

3. Notwithstanding paragraph 2, Member States may exclude from the right to vote the following:

(a) equity holders;

(b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or

(c) any related party of the debtor or the debtor's business, with a conflict of interest under national law.

4. Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, creditors of secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan.

Member States may also provide that workers' claims are treated in a separate class of their own.

Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes.

Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers.

5. Voting rights and the formation of classes shall be examined by a judicial or administrative authority when a request for confirmation of the restructuring plan is submitted.

Member States may require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage than that referred to in the first subparagraph.

6. A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.

Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75 % of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class.

7. Notwithstanding paragraphs 2 to 6, Member States may provide that a formal vote on the adoption of a restructuring plan can be replaced by an agreement with the requisite majority.

Article 10

Confirmation of restructuring plans

1. Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:

(a) restructuring plans which affect the claims or interests of dissenting affected parties;

(b) restructuring plans which provide for new financing;

(c) restructuring plans which involve the loss of more than 25 % of the workforce, if such loss is permitted under national law.

2. Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following:

(a) the restructuring plan has been adopted in accordance with Article 9;

(b) creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim;

(c) notification of the restructuring plan has been given in accordance with national law to all affected parties;

(d) where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test;

(e) where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.

Compliance with point (d) of the first subparagraph shall be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground.

3. Member States shall ensure that judicial or administrative authorities are able to refuse to confirm a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business.

4. Member States shall ensure that where a judicial or administrative authority is required to confirm a restructuring plan in order for it to become binding, the decision is taken in an efficient manner with a view to expeditious treatment of the matter.

Article 11

Cross-class cram-down

1. Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in Article 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:

(a) it complies with Article 10(2) and (3);

(b) it has been approved by:

(i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,

(ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;

(c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and

(d) no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.

By way of derogation from the first subparagraph, Member States may limit the requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Member States may increase the minimum number of classes of affected parties or, where so provided under national law, impaired parties, required to approve the plan as laid down in point (b)(ii) of the first subparagraph.

2. By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.

Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.

Article 12

Equity holders

1. Where Member States exclude equity holders from the application of Articles 9 to 11, they shall ensure by other means that those equity holders are not allowed to unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan.

2. Member States shall also ensure that equity holders are not allowed to unreasonably prevent or create obstacles to the implementation of a restructuring plan.

3. Member States may adapt what it means to unreasonably prevent or create obstacles under this Article to take into account, inter alia: whether the debtor is an SME or a large enterprise; the proposed restructuring measures touching upon the rights of equity holders; the type of equity holder; whether the debtor is a legal or a natural person; or whether partners in a company have limited or unlimited liability.

Article 13

Workers

1. Members States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework:

(a) the right to collective bargaining and industrial action; and

(b) the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC, in particular:

  (i) information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation, enabling them to communicate to the debtor concerns about the situation of the business and as regards the need to consider restructuring mechanisms;

  (ii) information to employees' representatives about any preventive restructuring procedure which could have an impact on employment, such as on the ability of workers to recover their wages and any future payments, including occupational pensions;

  (iii) information to and consultation of employees' representatives about restructuring plans before they are submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10;

(c) the rights guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC.

2. Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases.

Article 14

Valuation by the judicial or administrative authority

1. The judicial or administrative authority shall take a decision on the valuation of the debtor's business only where a restructuring plan is challenged by a dissenting affected party on the grounds of either:

(a) an alleged failure to satisfy the best-interest-of-creditors test under point (6) of Article 2(1); or

(b) an alleged breach of the conditions for a cross-class cram-down under point (ii) of Article 11(1)(b).

2. Member States shall ensure that, for the purpose of taking a decision on a valuation in accordance with paragraph 1, judicial or administrative authorities may appoint or hear properly qualified experts.

3. For the purposes of paragraph 1, Member States shall ensure that a dissenting affected party may lodge a challenge with the judicial or administrative authority called upon to confirm the restructuring plan.

Member States may provide that such a challenge can be lodged in the context of an appeal against a decision on the confirmation of a restructuring plan.

Article 15

Effects of restructuring plans

1. Member States shall ensure that restructuring plans that are confirmed by a judicial or administrative authority are binding upon all affected parties named or described in accordance with point (c) of Article 8(1).

2. Member States shall ensure that creditors that are not involved in the adoption of a restructuring plan under national law are not affected by the plan.

Article 16

Appeals

1. Member States shall ensure that any appeal provided for under national law against a decision to confirm or reject a restructuring plan taken by a judicial authority is brought before a higher judicial authority.

Member States shall ensure that an appeal against a decision to confirm or reject a restructuring plan taken by an administrative authority is brought before a judicial authority.

2. Appeals shall be resolved in an efficient manner with a view to expeditious treatment.

3. An appeal against a decision confirming a restructuring plan shall have no suspensive effects on the execution of that plan.

By way of derogation from the first subparagraph, Member States may provide that judicial authorities can suspend the execution of the restructuring plan or parts thereof where necessary and appropriate to safeguard the interests of a party.

4. Member States shall ensure that, where an appeal pursuant to paragraph 3 is upheld, the judicial authority may either:

(a) set aside the restructuring plan; or

(b) confirm the restructuring plan, either with amendments, where so provided under national law, or without amendments.

Member States may provide that, where a plan is confirmed under point (b) of the first subparagraph, compensation is granted to any party that incurred monetary losses and whose appeal is upheld.

CHAPTER 4

Protection for new financing, interim financing and other restructuring related transactions

Article 17

Protection for new financing and interim financing

1. Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:

(a) new financing and interim financing shall not be declared void, voidable or unenforceable; and

(b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

2. Member States may provide that paragraph 1 shall only apply to new financing if the restructuring plan has been confirmed by a judicial or administrative authority, and to interim financing which has been subject to *ex ante* control.

3. Member States may exclude from the application of paragraph 1 interim financing which is granted after the debtor has become unable to pay its debts as they fall due.

4. Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims.

Article 18

Protection for other restructuring related transactions

1. Without prejudice to Article 17, Member States shall ensure that, in the event of any subsequent insolvency of a debtor, transactions that are reasonable and immediately necessary for the negotiation of a restructuring plan are not declared void, voidable or unenforceable on the ground that such transactions are detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

2. Member States may provide that paragraph 1 only applies where the plan is confirmed by a judicial or administrative authority or where such transactions were subject to *ex ante* control.

3. Member States may exclude from the application of paragraph 1 transactions that are carried out after the debtor has become unable to pay its debts as they fall due.

4. Transactions referred to in paragraph 1 shall include, as a minimum:

(a) the payment of fees for and costs of negotiating, adopting or confirming a restructuring plan;

(b) the payment of fees for and costs of seeking professional advice closely connected with the restructuring;

(c) the payment of workers' wages for work already carried out without prejudice to other protection provided in Union or national law;

(d) any payments and disbursements made in the ordinary course of business other than those referred to in points (a) to (c).

5. Without prejudice to Article 17, Member States shall ensure that, in the event of any subsequent insolvency of the debtor, transactions that are reasonable and immediately necessary for the implementation of a restructuring plan, and that are carried out in accordance with the restructuring plan confirmed by a judicial or administrative authority, are not declared void, voidable or unenforceable on the ground that such transactions are detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

CHAPTER 5

Duties of directors

Article 19

Duties of directors where there is a likelihood of insolvency

Member States shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to the following:

(a) the interests of creditors, equity holders and other stakeholders;

(b) the need to take steps to avoid insolvency; and

(c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business.

TITLE III

DISCHARGE OF DEBT AND DISQUALIFICATIONS

Article 20

Access to discharge

1. Member States shall ensure that insolvent entrepreneurs have access to at least one procedure that can lead to a full discharge of debt in accordance with this Directive.

Member States may require that the trade, business, craft or profession to which an insolvent entrepreneur's debts are related has ceased.

2. Member States in which a full discharge of debt is conditional on a partial repayment of debt by the entrepreneur shall ensure that the related repayment obligation is based on the individual situation of the entrepreneur and, in particular, is proportionate to the entrepreneur's seizable or disposable income and assets during the discharge period, and takes into account the equitable interest of creditors.

3. Member States shall ensure that entrepreneurs who have been discharged from their debts may benefit from existing national frameworks providing for business support for entrepreneurs, including access to relevant and up-to-date information about these frameworks.

Article 21

Discharge period

1. Member States shall ensure that the period after which insolvent entrepreneurs are able to be fully discharged from their debts is no longer than three years starting at the latest from the date of either:

(a) in the case of a procedure which includes a repayment plan, the decision by a judicial or administrative authority to confirm the plan or the start of the implementation of the plan; or

(b) in the case of any other procedure, the decision by the judicial or administrative authority to open the procedure, or the establishment of the entrepreneur's insolvency estate.

2. Member States shall ensure that insolvent entrepreneurs who have complied with their obligations, where such obligations exist under national law, are discharged of their debt on expiry of the discharge period without the need to apply to a judicial or administrative authority to open a procedure additional to those referred to in paragraph 1.

Without prejudice to the first subparagraph, Member States may maintain or introduce provisions allowing the judicial or administrative authority to verify whether the entrepreneurs have fulfilled the obligations for obtaining a discharge of debt.

3. Member States may provide that a full discharge of debt does not hinder the continuation of an insolvency procedure that entails the realisation and distribution of assets of an entrepreneur that formed part of the insolvency estate of that entrepreneur as at the date of expiry of the discharge period.

Article 22

Disqualification period

1. Member States shall ensure that, where an insolvent entrepreneur obtains a discharge of debt in accordance with this Directive, any disqualifications from taking up or pursuing a trade, business, craft or profession on the sole ground that the entrepreneur is insolvent, shall cease to have effect, at the latest, at the end of the discharge period.

2. Member States shall ensure that, on expiry of the discharge period, the disqualifications referred to in paragraph 1 of this Article cease to have effect without the need to apply to a judicial or administrative authority to open a procedure additional to those referred to in Article 21(1).

Article 23

Derogations

1. By way of derogation from Articles 20 to 22, Member States shall maintain or introduce provisions denying or restricting access to discharge of debt, revoking the benefit of such discharge or providing for longer periods for obtaining a full discharge of debt or longer disqualification periods, where the insolvent entrepreneur acted dishonestly or in bad faith under national law towards creditors or other stakeholders when becoming indebted, during the insolvency proceedings or during the payment of the debt, without prejudice to national rules on burden of proof.

2. By way of derogation from Articles 20 to 22, Member States may maintain or introduce provisions denying or restricting access to discharge of debt, revoking the benefit of discharge or providing for longer periods for obtaining a full discharge of debt or longer disqualification periods in certain well-defined circumstances and where such derogations are duly justified, such as where:

(a) the insolvent entrepreneur has substantially violated obligations under a repayment plan or any other legal obligation aimed at safeguarding the interests of creditors, including the obligation to maximise returns to creditors;

(b) the insolvent entrepreneur has failed to comply with information or cooperation obligations under Union and national law;

(c) there are abusive applications for a discharge of debt;

(d) there is a further application for a discharge within a certain period after the insolvent entrepreneur was granted a full discharge of debt or was denied a full discharge of debt due to a serious violation of information or cooperation obligations;

(e) the cost of the procedure leading to the discharge of debt is not covered; or

(f) a derogation is necessary to guarantee the balance between the rights of the debtor and the rights of one or more creditors.

3. By way of derogation from Article 21, Member States may provide for longer discharge periods in cases where:

(a) protective measures are approved or ordered by a judicial or administrative authority in order to safeguard the main residence of the insolvent entrepreneur and, where applicable, of the entrepreneur's family, or the essential assets for the continuation of the entrepreneur's trade, business, craft or profession; or

(b) the main residence of the insolvent entrepreneur and, where applicable, of the entrepreneur's family, is not realised.

4. Member States may exclude specific categories of debt from discharge of debt, or restrict access to discharge of debt or lay down a longer discharge period where such exclusions, restrictions or longer periods are duly justified, such as in the case of:

(a) secured debts;

(b) debts arising from or in connection with criminal penalties;

(c) debts arising from tortious liability;

(d) debts regarding maintenance obligations arising from a family relationship, parentage, marriage or affinity;

(e) debts incurred after the application for or opening of the procedure leading to a discharge of debt; and

(f) debts arising from the obligation to pay the cost of the procedure leading to a discharge of debt.

5. By way of derogation from Article 22, Member States may provide for longer or indefinite disqualification periods where the insolvent entrepreneur is a member of a profession:

(a) to which specific ethical rules or specific rules on reputation or expertise apply, and the entrepreneur has infringed those rules; or

(b) dealing with the management of the property of others.

The first subparagraph shall also apply where an insolvent entrepreneur requests access to a profession as referred to in point (a) or (b) of that subparagraph.

6. This Directive is without prejudice to national rules regarding disqualifications ordered by a judicial or administrative authority other than those referred to in Article 22.

Article 24

Consolidation of proceedings regarding professional and personal debts

1. Member States shall ensure that, where insolvent entrepreneurs have professional debts incurred in the course of their trade, business, craft or profession as well as personal debts incurred outside those activities, which cannot be reasonably separated, such debts, if dischargeable, shall be treated in a single procedure for the purposes of obtaining a full discharge of debt.

2. Member States may provide that, where professional debts and personal debts can be separated, those debts are to be treated, for the purposes of obtaining a full discharge of debt, either in separate but coordinated procedures or in the same procedure.

TITLE IV

MEASURES TO INCREASE THE EFFICIENCY OF PROCEDURES CONCERNING RESTRUCTURING, INSOLVENCY AND DISCHARGE OF DEBT

Article 25

Judicial and administrative authorities

Without prejudice to judicial independence and to any differences in the organisation of the judiciary across the Union, Member States shall ensure that:

(a) members of the judicial and administrative authorities dealing with procedures concerning restructuring, insolvency and discharge of debt receive suitable training and have the necessary expertise for their responsibilities; and

(b) procedures concerning restructuring, insolvency and discharge of debt are dealt with in an efficient manner, with a view to the expeditious treatment of procedures.

Article 26

Practitioners in procedures concerning restructuring, insolvency and discharge of debt

1. Member States shall ensure that:

(a) practitioners appointed by a judicial or administrative authority in procedures concerning restructuring, insolvency and discharge of debt ('practitioners') receive suitable training and have the necessary expertise for their responsibilities;

(b) the conditions for eligibility, as well as the process for the appointment, removal and resignation of practitioners are clear, transparent and fair;

(c) in appointing a practitioner for a particular case, including cases with cross-border elements, due consideration is given to the practitioner's experience and expertise, and to the specific features of the case; and

(d) in order to avoid any conflict of interest, debtors and creditors have the opportunity to either object to the selection or appointment of a practitioner or request the replacement of the practitioner.

2. The Commission shall facilitate the sharing of best practices between Member States with a view to improving the quality of training across the Union, including by means of the exchange of experiences and capacity building tools.

Article 27

Supervision and remuneration of practitioners

1. Member States shall put in place appropriate oversight and regulatory mechanisms to ensure that the work of practitioners is effectively supervised, with a view to ensuring that their services are provided in an effective and competent way, and, in relation to the parties involved, are provided impartially and independently. Those mechanisms shall also include measures for the accountability of practitioners who have failed in their duties.

2. Member States shall ensure that information about the authorities or bodies exercising oversight over practitioners is publicly available.

3. Member States may encourage the development of and adherence to codes of conduct by practitioners.

4. Member States shall ensure that the remuneration of practitioners is governed by rules that are consistent with the objective of an efficient resolution of procedures.

Member States shall ensure that appropriate procedures are in place to resolve any disputes over remuneration.

Article 28

Use of electronic means of communication

Member States shall ensure that, in procedures concerning restructuring, insolvency and discharge of debt, the parties to the procedure, the practitioner and the judicial or administrative authority are able to perform by use of electronic means of communication, including in cross-border situations, at least the following actions:

(a) filing of claims;

(b) submission of restructuring or repayment plans;

(c) notifications to creditors;

(d) lodging of challenges and appeals.

TITLE V

MONITORING OF PROCEDURES CONCERNING RESTRUCTURING, INSOLVENCY AND DISCHARGE OF DEBT

Article 29

Data collection

1. Member States shall collect and aggregate, on an annual basis, at national level, data on procedures concerning restructuring, insolvency and discharge of debt, broken down by each type of procedure, and covering at least the following elements:

(a) the number of procedures that were applied for or opened, where such opening is provided for under national law, and of procedures that are pending or were closed;

(b) the average length of procedures from the submission of the application, or from the opening thereof, where such opening is provided for under national law, to their closure;

(c) the number of procedures other than those required under point (d), broken down by types of outcome;

(d) the number of applications for restructuring procedures that were declared inadmissible, were rejected or were withdrawn before being opened.

2. Member States shall collect and aggregate, on an annual basis, at national level, data on the number of debtors which were subject to restructuring procedures or insolvency procedures and which, within the three years prior to the submission of the application or the opening of such procedures, where such opening is provided for under national law, had a restructuring plan confirmed under a previous restructuring procedure implementing Title II.

3. Member States may collect and aggregate, on an annual basis, at national level, data on:

(a) the average cost of each type of procedure;

(b) the average recovery rates for secured and unsecured creditors and, where applicable, other types of creditors, separately;

(c) the number of entrepreneurs who, after having undergone a procedure under point (b) of Article 1(1), launch a new business;

(d) the number of job losses linked to restructuring and insolvency procedures.

4. Member States shall break down the data referred to in points (a) to (c) of paragraph 1 and, where applicable and available, the data referred to in paragraph 3 by:

(a) the size of the debtors that are not natural persons;

(b) whether debtors subject to procedures concerning restructuring or insolvency are natural or legal persons; and

(c) whether the procedures leading to a discharge of debt concern only entrepreneurs or all natural persons.

5. Member States may collect and aggregate the data referred to in paragraphs 1 to 4 through a sample technique that ensures that the samples are representative in terms of size and diversity.

6. Member States shall collect and aggregate the data referred to in paragraphs 1, 2, 4 and, where applicable, paragraph 3, for full calendar years ending on 31 December of each year, starting with the first full calendar year following the date of application of implementing acts referred to in paragraph 7. The data shall be communicated annually to the Commission, on the basis of a standard data communication form, by 31 December of the calendar year following the year for which data are collected.

7. The Commission shall establish the communication form referred to in paragraph 6 of this Article by way of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 30(2).

8. The Commission shall publish on its website the data communicated in accordance with paragraph 6 in an accessible and user-friendly manner.

Article 30

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

TITLE VI

FINAL PROVISIONS

Article 31

Relationship with other acts and international instruments

1. The following acts shall apply notwithstanding this Directive:

(a) Directive 98/26/EC;

(b) Directive 2002/47/EC; and

(c) Regulation (EU) No 648/2012.

2. This Directive shall be without prejudice to the safeguarding requirements of funds for payment institutions laid down under Directive (EU) 2015/2366 of the European Parliament and of the Council ([24]) and for electronic money institutions laid down under Directive 2009/110/EC of the European Parliament and of the Council ([25]).

3. This Directive shall be without prejudice to the application of the Convention on international interests in mobile equipment and its Protocol on matters specific to aircraft equipment, signed at Cape Town on 16 November 2001, to which some Member States are party at the time of the adoption of this Directive.

Article 32

Amendment of Directive (EU) 2017/1132

In Article 84 of Directive (EU) 2017/1132, the following paragraph is added:

'4. Member States shall derogate from Article 58(1), Article 68, Articles 72, 73, and 74, point (b) of Article 79(1), Article 80(1) and Article 81 to the extent and for the period that such derogations are necessary for the establishment of the preventive restructuring frameworks provided for in Directive (EU) 2019/1023 of the European Parliament and of the Council (*).

The first subparagraph shall be without prejudice to the principle of equal treatment of shareholders.

(*) Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (OJ L 172, 26.6.2019, p. 18).'.

Article 33

Review clause

No later than 17 July 2026 and every five years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application and impact of this Directive, including on the application of the class formation and voting rules in respect of vulnerable creditors, such as workers. On the basis of that assessment, the Commission shall submit, if appropriate, a legislative proposal, considering additional measures to consolidate and harmonise the legal framework on restructuring, insolvency and discharge of debt.

Article 34

Transposition

1. Member States shall adopt and publish, by 17 July 2021, the laws, regulations and administrative provisions necessary to comply with this Directive, with the exception of the provisions necessary to comply with points (a), (b) and (c) of Article 28 which shall be adopted and published by 17 July 2024 and the provisions necessary to comply with point (d) of Article 28 which shall be adopted and published by 17 July 2026. They shall immediately communicate the text of those provisions to the Commission.

They shall apply the laws, regulations and administrative provisions necessary to comply with this Directive from 17 July 2021, with the exception of the provisions necessary to comply with points (a), (b) and (c) of Article 28, which shall apply from 17 July 2024 and of the provisions necessary to comply with point (d) of Article 28, which shall apply from 17 July 2026.

([24]) Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35).

([25]) Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7).

2. By way of derogation from paragraph 1, Member States that encounter particular difficulties in implementing this Directive shall be able to benefit from an extension of a maximum of one year of the implementation period provided for in paragraph 1. Member States shall notify to the Commission the need to make use of this option to extend the implementation period by 17 January 2021.

3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 35

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 36

This Directive is addressed to the Member States.

Done at Brussels, 20 June 2019.

For the European Parliament	*For the Council*
The President	*The President*
A. TAJANI	G. CIAMBA