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Updates to "*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*"

Note by the Secretariat

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I. Introduction

1. The background information about "*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*" [1] (the Judicial Perspective) may be found in the provisional agenda of the sixtieth session of the Working Group (A/CN.9/WG.V/WP.177, paras. 17–20). As noted there, preparation of an updated publication was considered necessary because a significant amount of jurisprudence applying and interpreting the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) has been accumulated since the last update of the Judicial Perspective was prepared in 2013. In addition, in the light of the finalization of the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (the Digest) in 2020, it was considered necessary to align the two texts.[2]

2. In this context, it should be recalled that the Digest and the Judicial Perspective pursue the same goal. On the basis of article 8 of MLCBI, which provides that in the interpretation of MLCBI "regard is to be had to its international origin", they aim to promote uniformity in the application of the MLCBI by encouraging judges to consider how it has been applied by courts in enacting States. The Digest does so by facilitating access to the case law on MLCBI collected in the system for case law on UNCITRAL texts (CLOUT), grouping it under each article of MLCBI and drawing attention to emerging trends in interpretation and divergent views. The Judicial Perspective discusses main issues arising from the interpretation and application of MLCBI from a judge's perspective, setting them in the order that reflects the sequence in which particular decisions would generally be made by the receiving court under MLCBI. Both texts adopt a neutral tone to avoid any critique of case law or instruction to judges.

3. As was noted in the provisional agenda, the Commission requested the secretariat to prepare the updated Judicial Perspective using a mechanism along the lines of that used for the 2013 updates. Pursuant to that request, the updates were prepared in consultation with a board of experts whose members were: Geoffrey Morawetz (Canada), Myriam Mailly (France), Paul Heath (New Zealand), Kannan Ramesh (Singapore), Alastair Norris (United Kingdom) and Martin Glenn and Allan Gropper (United States). Special acknowledgment is to be made of the contribution to the updates by Ms. Jenny Clift, former Secretary of Working Group V (Insolvency Law).

4. It may be recalled that the Working Group considered both the draft of the first edition of the Judicial Perspective and the 2013 updates before they were transmitted to the Commission.[3] The Working Group may wish to do the same with the current round of updates by reviewing the changes listed in this note before they are submitted to the Commission for consideration at its fifty-fifth session, in 2022. The changes listed in this note should be read together with the Judicial Perspective, the Digest and abstracts of case law on MLCBI available in CLOUT.

[1] The second edition of the publication prepared in 2013 is available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial-perspective-2013-e.pdf.

[2] *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17* (A/75/17), part one, paras. 20 (c) and 63.

[3] A/CN.9/715, paras. 110–116 and working papers A/CN.9/WG.V/WP.97 and Add.1 and 2, and A/CN.9/766, para. 103.

II. The proposed changes to "*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*"

A. Non-substantive updates

5. The preface would be updated with reference to the new edition and the way it was prepared.

6. Throughout the text, including paragraph 7, references would be added, when the context so requires, to: (a) the Digest;[4] (b) the newly adopted UNCITRAL texts in the area of insolvency law, namely the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) and its Guide to Enactment (2018),[5] the UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI) and its Guide to Enactment (2019)[6] and part five of the UNCITRAL Legislative Guide on Insolvency Law (2021); (c) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the "EIR recast") replacing and superseding Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (EIR); and (d) other developments that occurred after 15 April 2013, the cut-off date for updates reflected in the second edition of the Judicial Perspective.

7. In paragraph 7 (f) and (g), footnotes could be added providing more information about the history of the Convention on Insolvency Proceedings of the European Union (1995), the Virgos Schmit Report and their relevance to MLCBI. Reference could be made in particular to the report of the European Union Parliament of 23 April 1999.[7] It may also be explained that, in anticipation of adoption of an insolvency convention by European Union member States, the Virgos Schmit Report was prepared to provide

[4] For example, footnote 9 could be expanded with the following: "The Digest discusses cases interpreting the provision, noting that since it does not require the appointment of the foreign representative to be made by the foreign court, it is sufficiently broad to include appointments made by some other special agency. The Digest also notes the types of body or person that may be appointed: synopsis of case law for art. 2, subpara. (d)."; while footnote 23 could be expanded as follows: "The Digest (synopsis of case law for art. 8) discusses cases in which courts in States that have enacted article 8 have looked beyond their own jurisdictions to foreign interpretations of MLCBI and other extrinsic materials for interpretative guidance, especially where provisions of MLCBI are unclear or ambiguous." A new paragraph 16 bis could be added acknowledging the publication of the Digest and its purpose.

[5] E.g. in the context of *Rubin* (paragraph 177 and footnote 219), MLIJ could be mentioned, explaining that it was designed to address the following points: (a) that the few existing international instruments that deal with the recognition and enforcement of judgments generally exclude from their scope matters relating to insolvency and thus recognition and enforcement of insolvency-related judgments; and (b) that some uncertainty exists with respect to the interpretation of articles 7 and 21 of MLCBI in terms of providing the necessary authority for such recognition and enforcement as a form of relief available on recognition of a foreign insolvency proceeding.

[6] E.g. enterprise group insolvency issues may be discussed in several places throughout the Judicial Perspective with appropriate cross-references to MLEGI (for example, in footnotes 97 and 239). Footnote 97 could be expanded with reference to other cases, such as *In re Servicos de Petroleo Constellation S.A*., *Eurofood* (decided under EIR) and *Mood Media Corp*. In some of them, relevance of MLCBI was assessed (e.g., in *Agrokor,* the United States court said that, while the enterprise group aspects of the foreign law governing the foreign special administration proceeding were novel, the recognition applications dealing with nine separate entities that each had their COMI in the foreign State did not push the boundaries of cross-border insolvency law. In the English case concerning the same group, the court rejected the argument that the proceeding was not a foreign proceeding because it dealt with the company and its associates (i.e., a group), rather than just the company itself, on the basis that, although a group proceeding could not be recognized as such under the English legislation enacting the MLCBI, a group proceeding as a proceeding in respect of a particular debtor could be recognized. In *Zetta Jet,* the Singaporean court found that it was essential to observe the separate legal personalities of members of the group and to treat each entity on its own, unless sufficient reason was shown to deal with them as one.

[7] Available at www.europarl.europa.eu.

guidance on various concepts in the draft convention, in particular the centre of the debtor's main interests (COMI). Notwithstanding the demise of the Convention, the report has been accepted generally as an aid to interpretation of the concept of COMI that was subsequently used in EIR and EIR recast.[8]

8. Paragraph 9 and footnote 7 would be updated with the most recent information on enacting States and jurisdictions and addition of a disclaimer in the footnote reading: "A model law is created as a suggested pattern for law-makers to consider adopting as part of their domestic legislation. Since States enacting legislation based upon a model law have the flexibility to depart from the text, the above list is only indicative of the enactments that were made known to the UNCITRAL secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted."

B. Substantive changes

1. General

9. The subsequent parts of this note focus on the substantive changes suggested to be made in the Judicial Perspective to ensure that the publication continues to meet its stated purpose. The need for those changes arose primarily because of new jurisprudence on MLCBI developed after 15 April 2013, in particular:

(a) *Ivan Cherkasov, William Browder, Paul Wrench v Nogotkov Kirill Olegovich, The Official Receiver of Dalnyaya Step LLC (In Liquidation)*, CLOUT 1797;

(b) *Creative Finance Ltd.*, CLOUT 1624;

(c) *Jaffé v Samsung Electronics Co. Ltd.*, CLOUT 1337;

(d) *Kapila, Re Edelsten*, CLOUT 1475;

(e) *In re Pirogova*, 593 B.R. 402 (Bankr. S.D.N.Y. 2018);[9]

(f) *In the matter of Sturgeon Central Asia Balanced Fund Ltd (in liq*), CLOUT 1860, reversing the 2019 case reported in CLOUT 1819;

(g) *Re Videology Limited*, CLOUT 1823;

(h) *Yakushiji (No. 2)* [2016] FCA 1277 on appeal from the 2015 case reported in CLOUT 1620; and

(i) *Re: Zetta Jet Pte Ltd and Others*, CLOUT 1815 and 1816.

10. The list and synopsises of cases in annex I of the Judicial Perspective would be updated accordingly, reflecting the content of the corresponding CLOUT abstracts. To conform case citations in the Judicial Perspective to those used in the Digest, *Condor Ins Ltd* and *Fairfield Sentry Ltd* mentioned in the 2013 edition of the Judicial Perspective would appear in the updated version as *Fogarty v Petroquest Resources, Inc*. and *Morning Mist Holdings Ltd. v Krys,* respectively.

2. Interpretative value of the 1997 Guide to Enactment of MLCBI and its successor, the 2013 Guide to Enactment and Interpretation

11. In the surveyed case law addressing interpretative value of the 1997 Guide to Enactment of MLCBI (GE), which is no longer available on the UNCITRAL website, and its successor, the 2013 Guide to Enactment and Interpretation (GEI), courts have considered the issue of whether either guide should take priority or how to utilize GEI. In some States, that issue is influenced by the legislation enacting MLCBI, which makes specific reference to the GE. In *Zetta Jet*, for example, the court sets out

[8] https://globalinsolvency.com/resource-article/virgos-schmit-report-convention-insolvency-proceedings-now-regulation-insolvency.

[9] The synopsis of *Pirogova* case, not yet in CLOUT, may be found in an annex to this note.

a conflict test. In another case, *Fibria Cellulose S/A v Pan Ocean Co. Ltd*, CLOUT 1482, the court decided to refer to the GE, but noted that the relevant text had not been altered in the GEI. In *Sturgeon*, the court concluded that by withdrawing the GE from circulation, the body that produced MLCBI intended the GEI to provide a useful and updated tool for interpretation. A number of other English decisions postdating the introduction of the GEI support its use as a tool for interpretation.[10]

12. It is suggested that this jurisprudence could be reflected in paragraph 1, footnote 3.

3. Public policy exception

13. The public policy exception was interpreted restrictively in *Zetta Jet*, with the result that the recognition was granted for limited purposes. The case was preceded by a moratorium issued in Singapore enjoining further action in proceedings in the United States under Chapter 11 of the United States Bankruptcy Code that had not been observed. Although in such circumstances recognition would normally be refused, the Singapore court nevertheless granted recognition for the limited purpose of applying to set aside or appeal the Singapore injunction, characterizing the recognition as a form of modification under article 17(4) of MLCBI or as a form of relief under article 21(1) of MLCBI. It was said that prior actions that contravened the Singapore injunction did not rise to the level of a public policy violation that would preclude recognition. Such limited recognition was made bearing in mind article 8 of MLCBI, which provides for the need to have regard to the international origin of the MLCBI and the promotion of uniformity in its application.

14. In addition, application of the public policy exception has been considered in cases involving bad faith or failure on the part of the foreign representative to make full and frank disclosure of material facts to the receiving court. In *Creative Finance*, it was argued that the proceedings for which recognition was sought in the United States were commenced in the British Virgin Islands (BVI) in bad faith. On this question, the court observed that although it was offended by the conduct of the debtors, there was no precedent for applying the article 6 public policy exception on the sole ground of misbehaviour. In *Ivan Cherkasov*, the applicant for recognition did not disclose to the receiving English court facts relating to the decision by the Government of the United Kingdom not to assist in criminal proceedings in the originating State on the basis that to do so would be likely to prejudice the sovereignty, security, *ordre public* or other interests of the United Kingdom. The English court found that, when seeking recognition, full and frank disclosure must be made to the court in relation to the consequences of recognition on third parties who were not before the court, including from intended future applications enabled by recognition. The recognition order was therefore dismissed *ab initio*.

15. It is suggested that this jurisprudence should be reflected in paragraphs 53 bis (*Zetta Jet)*, 54 bis (*Creative Finance*) and 54 ter (*Ivan Cherkasov*).

16. As relevant to the public policy exception, footnote 71 to paragraph 49 could be expanded with reference to *Agrokor* where the English court found that the fact that the priorities of the law of Croatia in reorganizing or liquidating the company were different from those that apply or would apply under English law, was not enough to support recognition being denied on the public policy ground.

4. Review or rescission of recognition order

17. In *Sturgeon*, the court reviewed a recognition order granted on an *ex parte* basis. The application for review sought termination of the recognition order under article 17(1) (a) of MLCBI on the basis that the grounds for granting the order were fully lacking at the time because the solvent liquidation of Sturgeon was not a "foreign proceeding" for the purpose of article 2(a) of MLCBI. In agreement with this finding,

[10] *Re Videology*; *OGX Petroleo e Gas S.A.*, CLOUT 1622; *The OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia,* CLOUT 1822; and *In re Agrokor*, CLOUT 1798.

the court terminated the recognition order. It is suggested that this jurisprudence would be reflected in footnote 80 that could also refer to *Cozumel* and *SNP Boat Service.*

18. In *Yakushiji (No.2)*, the receiving court was given notice of a "substantial change" in the status of the foreign proceeding, i.e., that it had been terminated by the Japanese court following acceptance of the rehabilitation plan. A consequence of acceptance of the plan was the retirement of the officers who had previously been designated as representatives of the two companies. As the protection previously ordered under MLCBI was no longer appropriate, vacation of those orders was sought. The court considered that in the case of a substantial change of that kind, where the foreign representative(s), to whom the obligation under article 18 applied, were no longer in place, it was appropriate for the companies to advise the court under article 18. It is suggested that this jurisprudence would be reflected in a footnote to paragraph 57 (a) that could also refer to the 2017 and 2018 cases of *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA,* where the foreign proceeding recognized in Australia had subsequently been terminated without the Australian court being informed. The Australian court noted that while the obligation under article 18 would require it to be notified of the change in the status of the foreign proceeding, a difficulty might arise because that obligation fell upon the foreign representative who may no longer be in office. The footnote could note that in *Yakushiji (No. 2)*, the Australian court found that in such a circumstance the obligation to inform the court might appropriately fall upon the debtor.

19. Paragraph 56 could be expanded to note that in some instances, modification or termination of the decision to recognize will be affected by the obligation of the foreign representative under article 18 to notify the court of changes in the status of the foreign proceeding or the foreign representative's appointment. The footnote to that paragraph may further note that reviewing the recognition decision may present the court with a fuller record of whether recognition was appropriate in the first instance, although a decision to modify recognition might need to be carefully considered, particularly if any disputed issues remain subject to foreign court proceedings.

20. As relevant to this discussion, footnote 63 to paragraph 44 could be expanded with reference to *OGX Petroleo e Gas S.A.,* CLOUT 1622, indicating that the English court in that case recognized that, since many applications for recognition are made on an *ex parte* basis, there must be full and frank disclosure to the court in all respects.

5. The meaning of the "foreign State"

21. Very little consideration has been given to the meaning of the words "foreign State". In paragraph 59 (a), a footnote could be added that would refer to one case that did consider this term. In *In the matter of NMC Healthcare Ltd*., recognition was sought in England for an administration taking place in the Abu Dhabi Global Market (ADGM), a special financial free zone within the United Arab Emirates (UAE) owing its existence to the federal laws of the UAE. The court found that, while the ADGM was not itself a "foreign State", the foreign proceeding was taking place in a "foreign State", the UAE, which had multiple applicable laws.

6. "Collective judicial or administrative proceedings"

22. Paragraph 77, footnote 110 could be expanded with reference to *Innua Can., Ltd*., as an example of case law where the receiving court relied on article 16(1) of MLCBI to recognize the foreign receivership. The court found that the foreign receivership was amounting to a foreign proceeding on the basis that the originating court had declared the receiver to be the foreign representative of a foreign proceeding and authorized the receiver to seek recognition of that proceeding in the receiving State.

7. "Pursuant to a law relating to insolvency"

23. The meaning of a "law relating to insolvency" found in article 2(a) of MLCBI has been clarified in *Sturgeon.* The case involved a company incorporated in Bermuda and a petition by its major shareholder for winding it up on just and equitable grounds, based on a serious breakdown in the basis on which the company was set up and that investors were being denied their rights. On review of an earlier decision recognizing the foreign proceeding, the English court took the view, disagreeing with the finding in *Betcorp*, that a procedure for a solvent legal entity that did not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, was likely not one pursuant to a law relating to insolvency within the meaning intended by article 2(a).

24. It is suggested that this jurisprudence should be reflected in paragraph 83. That paragraph may also note that recital 16 of the EIR recast provides that it applies "[…] to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency."

25. In addition, the growing popularity of schemes of arrangement, and the number of jurisdictions that provide that statutory vehicle, raise a question of whether they are covered by MLCBI as arising "pursuant to a law relating to insolvency". Footnote 113 to paragraph 83 could be expanded to refer to the relevant case law. For example, reference could be made to *Syncreon Group B.V.* where the Canadian court recognized an English scheme of arrangement as a foreign proceeding for the purposes of MLCBI, the proceeding being one pursuant to a law relating to insolvency, where insolvency was interpreted to include a company that "was reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring". Courts in the United States have also recognized and enforced schemes of arrangement from the United Kingdom and South Africa as foreign proceedings under Chapter 15 of the United States Bankruptcy Code (implementing the MLCBI).[11]

8. "Subject to control or supervision by a foreign court"

26. Paragraph 84, footnote 115 could refer to *ENNIA Caribe Holdings N.V.*, a case concerning the insolvency of an insurance company, where the receiving court found that the body with oversight of the insurance industry was a body competent to control or supervise the assets and affairs of the debtor.

27. Footnote 116 in paragraph 85 could be expanded with reference to *Agrokor*, where the English court found that the control or supervision required can be potential rather than actual or indirect rather than direct. Considering the various provisions of the extraordinary administration law of Croatia, which gave certain supervisory and other powers to the court in Croatia, the court found that "once the proceeding has been commenced, and for so long as it lasts, it is under the control or supervision of the court, through the medium of the extraordinary administrator".

28. An additional footnote could be included in this section that would refer to *Oversight & Control Commission of Avanzit, S.A.*, CLOUT 925, where recognition of an insolvency proceeding in Spain, a *suspensión de pagos,* was sought in the United States but was opposed on the grounds that the proceeding was no longer a "foreign proceeding" for the purposes of MLCBI, as the *convenio*, or plan of repayment, reached in the foreign proceeding had been approved by the court in Spain. Under the law in Spain, the foreign representative was not authorized to interfere in the debtor's

[11] See *In re Avanti Commun'c Group PLC* and *In re Cell C Proprietary Ltd*., respectively. However, the definition of foreign proceeding in sect. 101(23) of the United States Bankruptcy Code includes the words "or adjustment of debt" that do not appear in the definition of a "foreign proceeding" in article 2 (a) of MLCBI. The addition of those words may affect the recognition of scheme proceedings in the United States. This point could be reflected in the Judicial Perspective in the relevant context.

operations, absent default under the terms of the *convenio*. The court found that sufficient jurisdiction remained over the debtor's affairs on the basis that the debtor was required to make payments under the *convenio* for two years and failure to comply with the terms of the *convenio* rendered the debtor subject to liquidation in the foreign court. The United States court said that, although the court's level of control or supervision in Spain was reduced, it did not entirely cease and a "foreign proceeding", sufficient to justify recognition under Chapter 15 of the United States Bankruptcy Code, still existed.

9. "For the purpose of reorganization or liquidation"

29. In that section, a footnote could be added to paragraph 91 that could refer to *Agrokor* where the English court rejected the argument that the true purpose of the Extraordinary Administration Law of Croatia (EA Law) was not to reorganize the company's affairs, but to protect the company as a going concern in light of its systemic importance to the economy of Croatia. The court said that the two purposes were not incompatible and that although the EA Law was designed to protect a systemically important Croatian business, it was also designed to reorganize the company's affairs. The footnote could also refer to *Sturgeon* where the English court said it would be contrary to the stated purpose and object of MLCBI to interpret "foreign proceeding" to include solvent debtors and more particularly to include actions that are subject to a law relating to insolvency but have the purpose of producing a return to members not creditors (see para. 23 above).

10. COMI

30. The following from the EIR recast could be added after paragraph 98: "Under the EIR recast, the centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. The presumption shall only apply if the registered office has not been moved to another member State within the 3-month period prior to the request for the opening of insolvency proceedings. In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another member State within the 6-month period prior to the request for the opening of insolvency proceedings."

31. The following sentence could be added in paragraph 108 "The decision in *Bear Stearns* was affirmed on appeal." and the following could replace paragraphs 109–110:

> "The decision in *Bear Stearns* was substantially limited by subsequent authority in which United States courts have held that the reorganization or liquidation activities of the debtor can properly be considered in determining its COMI. In *Morning Mist*, the court held that the decision in *Bear Stearns* was correct in recognizing a proceeding filed in the BVI as a foreign main proceeding based on the fact that more than 18 months before the petition for recognition and more than seven months before the BVI case was filed the debtor had effectively ceased business, severed its relations with its investment manager in New York, and had begun a winding up process. The court concluded that it was appropriate to consider those activities in connection with a determination as to COMI and that 'the debtors' most feasible 'nerve centre' had existed for some time in the BVI.'* There was a similar result in *British American Ins. Co. Ltd*.
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> *Id. at 64, citing *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193-94 (2010) in which the Supreme Court indicated that courts should focus on the actual place where the coordination, direction and control of the corporation was taking place, observing that the location would likely be obvious to members of the public dealing with it."

32. Paragraph 117 bis could be added that would consolidate discussion of natural persons' COMI, which is currently found in different places throughout the Judicial Perspective. It could read as follows:

> "In the case of a natural person, the COMI is presumed, in accordance with article 16, paragraph 3 of MLCBI, to be the person's 'habitual residence'. In *Williams v Simpson (No. 5)*, the New Zealand court held that a finding on location of the habitual residence would largely be based on the facts of each case. It noted that consideration would be given to factors like 'settled purpose, the actual and intended length of stay in a State, the purpose of the stay, the strength of ties to the State and any other State (both in the past and currently), the degree of assimilation in to the State (including living and schooling arrangements), and cultural, social and economic integration.'* Although the debtor had carried on business in England, sometimes lived in England and held both United Kingdom and New Zealand passports, the court found the evidence was insufficient to rebut the presumption and the debtor's habitual residence was in New Zealand.
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> **Williams v Simpson* (No. 5), para. 42, adopting the definition of 'habitual residence' in *Basingstoke v Groot* [2007] NZFLR 363 (CA) on the basis that that definition had been used in another international instrument, the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. See also *Gainsford*, paras. 40-41 of the judgment. In *Kapila*, the Australian court was faced with an individual debtor who it found to be 'a transnational insolvent with multifarious litigation and entrepreneurial activities spread over numerous jurisdictions whose ambulatory behaviour made it difficult to identify his habitual residence, if indeed he had one''; see also the discussion by the United States Bankruptcy Court in *In re Paul Zeital Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013), CLOUT 1274 and *Pirogova*. Some of the factors relevant to determining the COMI of a corporation were found to be useful in instances where the debtor was an individual - see Digest, synopsis of case law for art. 16, section 'COMI with respect to individuals: habitual residence' ".

11. Movement of COMI

33. Several cases addressed movement of COMI that could be reflected in footnotes to paragraphs 126–128 and paragraph 135. For example, footnote 161 could be expanded with reference to *In re Ocean Rig UDW Inc.*, where the principal debtor was a holding company formed in the Marshall Islands that had taken steps to move its COMI from the Marshall Islands to the Cayman Islands, changing its registration, establishing an office there and filing schemes of arrangement in the Cayman court. It took those steps in order to establish jurisdiction in the Caymans and to put in effect a restructuring of debt supported by their creditors. On their petition to obtain recognition in the United States of the Cayman proceedings as foreign main proceedings, the Ocean Rig debtors established that they had never performed any business in the Marshall Islands, that they had publicly disclosed their change of COMI, that they had the support of most of their creditors, that they had bank accounts and books and records and personnel in the Caymans, and that no evidence in the record suggested any location for their COMI other than the Caymans. Based on those findings the United States court held that the debtors had not manipulated their COMI in bad faith, rather demonstrating a legitimate, good faith purpose for the shifting of COMI.

34. A footnote could be added to paragraph 135 noting that several of the United States cases that have used the date of the opening of Chapter 15 recognition proceedings as the applicable date for determining COMI (see on this subject below) have stated that the court can nevertheless consider whether the debtor had changed COMI to the disadvantage of creditors during the period between the commencement of the original insolvency proceedings and the date of the Chapter 15 petition for recognition.[12]

[12] See e.g., *Morning Mist* at 139 (there is a "look backward to thwart manipulation") and *In re Ran,* at 1022 (no evidence the debtor had changed his residence to escape responsibility for his debts).

35. Paragraph 127 could reflect that the EIR recast includes a rule concerning movement of COMI within a certain period of time prior to the request for commencement of an insolvency proceeding, cross-referring to what would be stated earlier on that matter (see para. 30 above).

12. Date at which to determine COMI

36. The Judicial Perspective discusses different choices for the date at which to ascertain COMI. Additional case law on that matter is reported in the Digest. In *Zetta Jet*, the court retained the time at which the application for recognition was made. The holding in *Millennium Global* that the determination of COMI should be at the date of the commencement of the foreign proceeding was disapproved by the appellate court in *Morning Mist*. That approach was however followed in *Kapila* and *Videology*.

37. It is suggested that this jurisprudence should be reflected in paragraphs 129–134 in relevant places, noting also that the approach in *Betcorp* has been followed in a number of cases, including *Gainsford* with respect to the time at which to determine habitual residence, *British American Insurance, Morning Mist* and *Ran*.

38. Paragraph 132 bis could be added describing a third possibility that has been identified: the date the court is called upon to make a decision on the application for recognition. That approach places emphasis on the flexible nature of MLCBI as evidenced by article 18 and the desirability of considering actual facts relevant to the court's decision, rather than setting an arbitrary determination point. That approach has been followed in several cases including *In the matter of Legend International Holdings Inc.* (CLOUT 1619) and *Moore, as Debtor-in-possession of Australian Equity Investors* (CLOUT 1477).

13. Definition of "establishment"

39. The newly added cases elaborate on factual elements for determining whether the debtor has an establishment in the meaning of article 2(f) of MLCBI for recognition of the foreign proceeding as a foreign non-main proceeding. In *Videology*, the court indicated that the requirement that activities should be carried on with the debtor's assets and human agents suggests a business activity consisting of dealings with third parties and not acts of internal administration. In *Pirogova*, the receiving court held that the evidence provided by the foreign representative asserting the debtor's connection to Russia – specifically, the ownership of an apartment, utility bills relating to the apartment, 100% ownership of a Russian company currently in liquidation, membership in a club and ownership of two cars in Russia – was insufficient to demonstrate that the debtor had a place of operations in Russia from which non-transitory economic activity was conducted. The court said that even if it were to conclude that the ownership of a single asset was sufficient to constitute a place of operations, it must also be proved that the debtor carried out non-transitory activities from that place. In *Kapila*, the receiving court was faced with an individual debtor who it found to be "a transnational insolvent with multifarious litigation and entrepreneurial activities spread over numerous jurisdictions whose ambulatory behaviour made it difficult to identify his habitual residence, if indeed he had one". However, the court held that his business dealings in the United States were sufficient to constitute an establishment and the proceedings commenced in the United States could thus be recognized as foreign non-main proceedings.

40. It is suggested that this jurisprudence should be reflected in paragraphs 140 (*Videology*), 141 bis (*Pirogova*) and 142 bis (*Kapila*).

41. That section could also be expanded with the definition of "establishment" found in the EIR recast, article 2, subparagraph (10): " 'Establishment' means any place of operations where the debtor carries out or has carried out in the three month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets." In addition, some case law addressed the term "non-transitory" used in that definition. It could be reflected in an additional footnote to paragraph 138 that would refer to *Office Metro Limited*, a case

decided under the EIR, where the court said that the concept of "non-transitory" was intended to encapsulate such things as "the frequency of the activity, whether it was planned or accidental or uncertain in it occurrence, the nature of the activity and the length of time of the activity itself." Paragraph 138 could note that, as with the definition of "foreign proceeding", the various elements of the definition of "establishment" should be read as a whole rather than being broken down into discrete elements, as each element may colour the others. A cross-reference to *Videology Limited* could be made in a footnote.[13]

42. As connected thereto, difficulties have arisen in cases where a debtor is no longer trading in any State (and thus no establishment could be proved), but nevertheless has assets and debts to be addressed. In such cases, MLCBI has not been available to deal with those assets and debts, as recognition could not be granted (e.g., *Williams v Simpson).* Assistance in such cases might be available under other laws of the receiving State. This point could be reflected, for example, in footnote 89 to paragraph 64.

43. In addition, in *Kim and Yu v STX Pan Ocean Co. Ltd*., CLOUT 1481, the New Zealand court considered the meaning of "assets of the debtor" by reference to the definition of that term in the UNCITRAL Legislative Guide on Insolvency Law, having regard to article 8 of MLCBI and provisions of the enacting legislation authorizing interpretation by reference to MLCBI and any document relating to it originating from UNCITRAL or the working group that assisted in preparing MLCBI. This could be reflected in a footnote to paragraph 164 in the context of article 20(1)(b) or elsewhere.

14. Interim relief

44. In paragraph 151, a footnote could be added referring to *Halo Creative & Design Limited v Comptoir des Indes Inc*., where the interim relief sought was a stay on litigation which, the United States court noted, was available under article 21 of MLCBI only when the foreign proceedings had been recognized.

45. A footnote could also be added to paragraph 152 that would note that one of the factors to be taken into account in granting interim relief is the likelihood that, in due course, a recognition order will be made. For example, in *Williams v Simpson* and *Whittman v UCI Holdings Ltd*, the court said that while a strong likelihood of the substantive application succeeding was not necessary for the interim relief to be granted, nevertheless the likelihood of substantive success was a relevant consideration in granting interim relief.[14]

15. Automatic stay

46. A footnote could be added to paragraph 164 in the context of article 20(1)(a), referring to *Fibria Cellulose S/A v Pan Ocean Co. Ltd.,* CLOUT 1482, where the English court concluded that the service of a notice to terminate a contract, in accordance with its terms, was not the commencement or continuation of an individual action or proceeding and thus the court did not have power to restrain its service under article 20(1)(a) of MLCBI. Footnote 206 to paragraph 166 could be expanded with reference to *Nortel Networks Corp.*, where it was found that the United Kingdom regulator serving, in Canada, a "warning notice" issued under the United Kingdom legislation was a step in a proceeding that constituted a breach of the stay order.

47. Additional case law addressed effects of automatic stay specifically on arbitration, which could be reflected in footnote 204. For example, reference could be made to *Samsung Logix Corporation v DEF*, where the court considered an effect of the recognition decision on an arbitration hearing that was scheduled to take place

[13] Paragraph 79 quoting the relevant part from *Trustees of the Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA.*

[14] Adopting *Tucker, Aero Inventory (UK) Ltd* v *Aero Inventory (UK) Limited* [2009] FCA 1354.

in England on the day following the English court's consideration of the recognition application. The court held that the arbitration was stayed as a result of the recognition decision. In *OGX Petroleo e Gas S.A.*, CLOUT 1622, the English court said the automatic stay was not intended to operate to prevent persons whose claims were not subject to the foreign proceedings from being able to pursue those claims against the debtor (the case concerned arbitration proceedings being conducted under a contract entered into after approval of the reorganization plan and that were not covered by that plan).

16. Duration of the automatic stay

48. In *Yakushiji (No.2)*, the Australian court said that the automatic stay would normally be coterminous with the stay applicable in the corresponding foreign proceeding and would thus cease when the foreign proceeding closed since at that point the purpose of the stay – to allow the debtor time to develop a plan and prevent creditors from pursuing alternative remedies - would no longer be applicable.

49. It is suggested that this jurisprudence should be reflected in paragraph 167 bis, noting also there that there may be situations in which continued enforcement of the stay after the closure of the foreign proceeding might be available, such as where the stay was violated prior to closure (with reference to *Daewoo Logistics Corp.,* CLOUT 1315) or to allow the plan approved in the foreign proceeding to control distribution of the debtor's assets and prevent creditors from seeking to recover debts in excess of the amounts provided in the plan (with reference to *Ho Seok Lee* 348 B.R., CLOUT 754). This could be compared with *Re OJSC International Bank of Azerbaijan*, CLOUT 1822, in which the English court observed that once the foreign proceeding had terminated, there would no longer be a foreign representative who could apply to the English court for assistance, nor would there be a foreign proceeding for which such assistance could be sought. On that basis, the court said, it would anomalous if a stay granted before the termination of the foreign proceeding was permitted to remain in force indefinitely. The court declined to explore the approach in *Daewoo* and *Ho Seok Lee* on the basis that the background to the incorporation of MLCBI in the United States differed significantly from that in Great Britain or Australia.

17. Post-recognition relief

50. Paragraph 169, footnote 210 could be expanded with reference to *Fibria Cellulose S/A v Pan Ocean Co. Ltd (In the matter of Pan Ocean Co. Ltd*), CLOUT 1482, in which the English court discussed different outcomes in the United States and England with respect to the relief sought in the case of *Toft.* Footnotes to paragraph 169 could be added to refer to *In re CGG S.A.*, where the United States court recognized a French sauvegarde proceeding as a foreign proceeding and enforced the order of the French court confirming the sauvegarde plan as being appropriate relief under section 1521 and additional assistance under section 1507 of Chapter 15 (articles 21 and 7 of MLCBI). The additional footnotes could also refer to *In re Rede Energia*, S.A., where the United States court held that Chapter 15 "provides courts with broad, flexible rules to fashion relief that is appropriate to effectuate the objectives of the Chapter in accordance with comity," and noted the "well-established principle that the relief granted in the foreign proceeding and the relief available in the United States do not need to be identical." The court found that appropriate relief under section 1521 of Chapter 15 (article 21 of MLCBI) included enforcing a foreign confirmation order.[15] The footnotes could also refer to *Metcalfe & Mansfield,* where the United States court found that the Canadian court had approved non-debtor relief in limited circumstances which were in accord with the narrow application of article 7 of MLCBI by United States courts. A case to the contrary (*Vitro*) could also be mentioned, although particular facts in that case might have led the appellate court to deny relief. That case nevertheless cited *Metcalf & Mansfield* with approval.

[15] See also *In re Oi* and *In re Agrokor.*

18. Adequate protection of creditors

51. In *Jaffé v. Samsung Electronics Co*., the issue was whether a German trustee could, based on German law, reject patent licenses issued to parties in the United States, or whether those parties were entitled to the protection against rejection available under the United States Bankruptcy Code. The appeal court ruled in favour of the licensees, basing its decision on the adequate protection mandated by article 22 of MLCBI and finding that the bankruptcy court reasonably exercised its discretion in balancing the interests of the licensees against the interests of the debtor and that application of section 365(n) was necessary to ensure the licensees under the foreign debtor's United States patents were sufficiently protected.

52. This jurisprudence could be reflected in paragraph 158 with the rest of paragraph 158 placed in a separate paragraph 158 bis. In addition, footnote 200 could elaborate on the cited case *SNP Boat Service,* in particular that the court in that case identified three basic principles governing the concept of adequate protection: (a) the just treatment of all holders of claims against the bankruptcy estate; (b) the protection of local claimants against prejudice and inconvenience in the processing of claims in the foreign proceeding; and (c) the distribution of proceeds of the foreign estate substantially in accordance with the order prescribed by local law.

19. Acts detrimental to creditors

53. Paragraphs 183-186 could be expanded to note that *Condor Insurance* has been applied in subsequent cases, permitting avoidance claims to be asserted under English and Norwegian law. Footnotes to those paragraphs could refer to *Hosking v. TPG Capital Mgmt., L.P. (In re Hellas Telecomm. (Luxembourg) II SCA)* and *In re Bankruptcy Estate of Norske Skodindustrier ASA*.

20. Cooperation

54. Paragraph 21, footnote 30 could note the content of paragraphs 1 and 3 of article 42 of the EIR recast that call for cooperation of courts to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings and indicate that such cooperation may be implemented by any means the court considers appropriate, in particular: (a) coordination in the appointment of the insolvency practitioners; (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) coordination of the conduct of hearings; and (e) coordination in the approval of protocols, where necessary.

55. Paragraphs 203–204 could be updated with references to the ALI-III Global Principles for Cooperation in International Insolvency Cases 2012; the JIN Guidelines;[16] the EU Cross-Border Insolvency Court-to-Court Cooperation Principles (EU JudgeCo Principles); and the EU Cross-Border Insolvency Court-to-Court Communications Guidelines (EU JudgeCo Guidelines).

56. Footnote 250 could be expanded with reference to *Loo v Quinlan and Kelly* involving hearings in a cross-border insolvency between Australia and New Zealand and appeals against the judgments of each court.

57. That section could also be expanded with reference to *Nortel Networks Corp.* as an example of an enterprise group insolvency case that underscored the need for an efficient and effective cross-border cooperation among courts and insolvency representatives.

[16] www.jin-global.org/jin-guidelines.html.

Annex

In re Pirogova 593 B.R. 402 (Bankr. S.D.N.Y. 2018): synopsis to be added in annex I of the updated Judicial Perspective.

The foreign representative of Russian liquidation proceedings sought recognition of those proceedings in the United States of America as foreign main proceedings. The court in the United States had to consider whether the debtor had her COMI or an establishment in Russia. The court found that the evidence proffered was insufficient to provide a basis on which the court could conclude that, as of the petition date, the debtor's domicile or habitual residence was Russia. The evidence put forward included that the debtor had children, grandchildren, and friends in Moscow; maintained a current internal Russian passport; was, and had been, a long-term member of a Yacht Club in Moscow; continued to maintain insurance for a motor vehicle in Russia; had assets in Russia and creditors who expected their claims to be adjudicated in the Russian insolvency proceedings and had been perpetuating a fraud, avoiding debts, and evading authorities in Russia. The court weighed that evidence against the debtor's stated intention to leave Russia permanently in 2008 and never reside there again; the fact that she had obtained permanent residence status in the United States in 2008; and the absence of direct evidence that she had a habitual residence in Russia at the time of the petition date. The court also found that the evidence was insufficient to find that the debtor had an establishment in Russia from which she conducted non-transitory economic activity; even though she may have owned an apartment in Moscow, there was scant evidence as to the conduct of such activity from that address. Moreover, the ability to participate in the insolvency proceedings of a company owned by the debtor (but currently in the late stages of insolvency) did not satisfy the requirement for "minimal management", nor did the existence of the insolvency proceedings themselves constitute economic activity. The court declined to recognize the Russian proceedings as either main or non-main proceedings.