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The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective

Note by the Secretariat

I. Introduction

1. At its forty-fourth session, in 2011, the Commission finalized and adopted The Model Law on Cross-Border insolvency: the Judicial Perspective[1] and requested the Secretariat to establish a mechanism for updating that text on an ongoing basis in the same flexible manner as it was developed, ensuring that its neutral tone is maintained and that it continues to meet its stated purpose.[2]

2. The Secretariat established a board of experts to advise on updating The Judicial Perspective to take account of recent jurisprudence interpreting the Model Law on Cross-Border Insolvency and to reflect revisions being prepared to the Guide to Enactment of the Model Law.

3. The text below sets forth those paragraphs of The Judicial Perspective that have been updated to reflect the most recent jurisprudence, as well as the revisions to the Guide to Enactment of the Model Law proposed by Working Group V (see A/CN.9/WG.V/WP.112) for consideration by the Commission at its forty-sixth session, including proposed amendments made at the forty-third session of Working Group V (Insolvency Law) in April 2013 (see A/CN.9/766). Paragraphs that are not to be updated (and thus remain as set forth in the published version of the text) have not been included below; they are indicated by […]. Annex I includes only summaries of new cases to be added to the text; the case list indicates all cases that will be included in the complete annex.

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[1] Available at the date of this document from www.uncitral.org/uncitral/uncitral_texts/insolvency/2011Judicial_Perspective.html.

[2] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 198.

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II. The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective

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Preface

Paras. 1-3 […].

The Judicial Perspective was updated in 2013 to reflect the revisions to the Guide to Enactment of the Model Law adopted by the Commission in 2013 as the Guide to Enactment and Interpretation of the Model Law and to include recent jurisprudence applying and interpreting the Model Law. The updates to the published text of *The Judicial Perspective* were noted by Working Group V (Insolvency Law) at its forty-third session (April 2013) and by the Tenth Multinational Judicial Colloquium, held in The Hague in May 2013, prior to consideration by the Commission in 2013.

I. Introduction

A. Purpose and scope

1. The present text discusses the UNCITRAL Model Law on Cross-Border Insolvency from a judge's perspective. Recognizing that some enacting States have amended the Model Law to suit local circumstances, different approaches might be required if a judge concludes that the omission or modification of a particular article from the text as enacted necessitates such a course.[3] The present text is based on the Model Law as endorsed by the General Assembly of the United Nations in December 1997 and its accompanying Guide to Enactment.[4] The Guide to Enactment has been revised to include additional guidance with respect to the interpretation and application of selected aspects of the Model Law relating to "centre of main interests" in the light of the emerging jurisprudence interpreting the Model Law in those States that have enacted legislation based upon it. The revisions were adopted by the Commission in 2013 as the "Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency".

2. […]

3. […]

4. […]

B. Glossary

1. Terms and explanations

5. […]

2. Reference material

(a) References to cases

6. […]

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[3] The present text neither makes reference to nor expresses views on the various adaptations to the Model Law made in some enacting States.

[4] General Assembly resolution 52/158.

(b) References to texts

7. […]

(a) […]

(b) "Guide to Enactment and Interpretation": Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, as revised in 2013;

(c) "UNCITRAL Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004), including part three adopted in 2010;

(d)-(g) […]

II. Background

A. Scope and application of the UNCITRAL Model Law

8. In December 1997, the General Assembly endorsed the Model Law on Cross-Border Insolvency, developed and adopted by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law was accompanied by a Guide to Enactment that provided background and explanatory information to assist those preparing the legislation necessary to implement the Model Law and judges and others responsible for its application and interpretation. As noted above, the Guide to Enactment has been revised to include additional guidance with respect to the interpretation and application of selected aspects of the Model Law relating to "centre of main interests" and was adopted by the Commission in 2013 as the "Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency".

9. Revise the last sentence as follows: "As at the end of April 2013, 20 States and territories had enacted legislation based on the Model Law.[5]"

10-15. […]

B. A judge's perspective

16. While the UNCITRAL Model Law emphasizes the desirability of a uniform approach to its interpretation based on its international origins,[6] the domestic law of

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[5] Australia (2008), British Virgin Islands (overseas territory of the United Kingdom of Great Britain and Northern Ireland; 2003), Canada (2005), Colombia (2006), Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2002), Serbia (2004), Slovenia (2007), South Africa (2000), Uganda (2011) and United States of America (2005). The year of enactment indicated above is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force some time after enactment.

[6] In States that enact the Model Law as drafted, its terms must be interpreted having regard "to its international origin and to the need to promote uniformity in its application and the observance of good faith" (UNCITRAL Model Law, art. 8).

most States is likely to require interpretation in accordance with national law; unless the enacting State has endorsed the "international" approach in its own legislation.[7] In any event, any court considering legislation based on the Model Law is likely to find the international jurisprudence of assistance to its interpretation.

17-23. […]

24. Add the following sentence at the end of the paragraph: "The revisions to the published text were noted by Working Group V (Insolvency Law) at its forty-third session (April 2013) and by the Tenth Multinational Judicial Colloquium, held in The Hague in May 2013, prior to consideration by the Commission in 2013."

C. Purpose of the UNCITRAL Model Law

25. […]

26. As mentioned above, the Model Law respects 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. These include:

(a)-(f) […]

(g) Establishing rules for coordination of relief granted in the enacting State to assist two or more insolvency proceedings involving the same debtor that may take place in multiple States.

27-28. […]

III. Interpretation and application of the UNCITRAL Model Law

A. The "access" principle

29-34. […]

35. The UNCITRAL Model Law envisages a "foreign representative" as including one appointed on an "interim basis", but not one whose appointment has not yet commenced — for example, by virtue of a stay of an order appointing the insolvency representative pending an appeal.[8] Where there is a change in the status of the foreign representative subsequent to their appointment, that issue would be addressed under article 18, subparagraph (a). One approach to determining whether

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[7] Indeed, the UNCITRAL Model Law itself makes it clear that the terms of any relevant treaty or agreement to which an enacting State is a party will take precedence over the terms of the Model Law (art. 3) and paras. 76-78 of the Guide to Enactment and Interpretation.

[8] See the definition of "foreign representative" in the UNCITRAL Model Law, art. 2, para. (d). A foreign representative whose appointment had commenced, but whose status might nevertheless be subject to further consideration by the originating court, would be considered to be a foreign representative for the purposes of article 2 (see *Lightsquared*, paras. 19-20). If the foreign representative's status were to be changed as a result of that further consideration, however, the receiving court would have to review the issue in the light of article 18 of the Model Law.

a "foreign representative" has standing is to consider whether the definition of "foreign proceeding" is met before determining whether the applicant has been authorized[9] to administer a qualifying reorganization or liquidation of the debtor's assets or affairs, or to act as a representative of the foreign proceeding.

36. Under that approach, a judge would need to be satisfied that:

(a) The "foreign proceeding" in respect of which recognition is sought is a judicial or administrative proceeding, (including an interim proceeding) in a foreign State;[10]

(b)-(e) […]

37. […]

B. The "recognition" principle

1. Introductory comment

38-39. […]

2. Evidential requirements

40. […]

3. Power to recognize a foreign proceeding

41-45. […]

4. Reciprocity

46. Add "and Uganda" to the footnote to this paragraph.

5. The "public policy" exception

47. The receiving court retains the ability to refuse to take any action covered by the Model Law, including to deny recognition or the relief sought, if to take that action would be "manifestly contrary" to the public policy of the State in which the receiving court is situated. The notion of "public policy" is grounded in domestic law and may differ from State to State. For that reason, there is no uniform definition of "public policy" in the Model Law.

48. 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 to do otherwise would contravene those fundamental principles. What is considered to be a fundamental principle is governed by the constitutional and statutory legislation of

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[9] For the purposes of the UNCITRAL Model Law, art 2, para. (d).

[10] See the discussion of interim and final orders in *Gerova* (pp. 12 and 18), footnote to para. 54 (b) below.

the receiving State. In *Ephedra*, the inability to have a jury trial in Canada on certain issues to be resolved in the Canadian proceedings, in circumstances in which there was a constitutional right to such a trial in the United States, was held not to be "manifestly contrary to the public policy of the United States". The United States court held, on appeal, that the term "manifestly contrary to public policy" created a very narrow exception "intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State." It concluded that, notwithstanding the importance in the United States of the constitutional right to a jury trial, the procedures at issue plainly afforded claimants a fair and impartial proceeding (notwithstanding that there was no jury trial) and nothing more was required by the provision of the United States law equivalent to article 6.[11]

49-51. […]

51A. Application of the public policy exception has been considered in several cases in addition to *Ephedra*. In *Gold & Honey*, a United States court refused recognition of Israeli proceedings on several grounds, including that of public policy. In that case, after insolvency proceedings had been commenced in the United States and after the automatic stay had come into force, a receivership order was made in Israel in respect of the debtor company. The United States judge declined to recognize that receivership proceeding on the basis that not only was the Israeli receivership not a collective proceeding or one in which the debtor's assets and affairs were subject to control or supervision by the court, but also that to afford recognition "would reward and legitimize [the] violation of both the automatic stay and [subsequent orders of the court] regarding the stay".[12] Because recognition "would severely hinder United States bankruptcy courts' abilities to carry out two of the most fundamental policies and purposes of the automatic stay — namely, preventing one creditor from obtaining an advantage over other creditors, and providing for the efficient and orderly distribution of a debtor's assets to all creditors in accordance with their relative priorities",[13] the United States judge considered that the high threshold required to establish the public policy exception had been met.

51B. In *Toft*, a United States court declined to grant the foreign representative of German insolvency proceedings the right to intercept the debtor's postal and electronic mail in the United States. The judge considered that such an order would fall within the public policy exception because it exceeded the traditional limits on the powers of a trustee under United States law, constituted relief that was banned by statute in the United States and might subject anyone who carried it out to criminal prosecution. The request for such relief on an ex parte basis was also contrary to United States law. A similar order had been recognized and enforced in England on the basis that (a) the relief granted in Germany did not violate English public policy because, under English law, the court could enter a mail redirection order similar to the one entered in Germany, and (b) there should be no concern about lack of procedural fairness in granting ex parte relief, because the debtor had

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[11] *Ephedra*, p. 349.
[12] *Gold & Honey*, p. 371.
[13] Ibid., p. 372.

been able to oppose the mail interception order in the German proceeding, and his challenge had been rejected by the German court.[14]

6. "Main" and "non-main" foreign proceedings

52. […]

7. Review or rescission of recognition order

53. It is possible for the receiving court to review its decision to recognize a foreign proceeding as either "main" or "non-main" where it is demonstrated that the grounds for making a recognition order were "fully or partially lacking or have ceased to exist".[15]

54. Examples of circumstances in which modification or termination of an earlier recognition order might be appropriate are:

(a) […]

(b) […]. Add the following footnote to the end of the paragraph: "In *Gerova*, certain creditors argued that the foreign proceedings should not be recognized in the United States because the order commencing the foreign proceedings was subject to an appeal. The United States court held that there was nothing in 11 USC § 1517, 1515 [article 17 or article 15, subparagraph 2(a) MLCBI] that required the decision to be final or not subject to an appeal. The court observed that the order of the foreign court was sufficient to permit the foreign representatives to take up their duties and if it were to be reversed on appeal, article 18 would require them to advise the court accordingly (p. 12)."

(c) If the nature of the recognized foreign proceeding has changed, for example, a reorganization proceeding has been converted into a liquidation proceeding or the status of the foreign representative has changed;

(d) […]

55. […]

C. The process of recognition

1. Introductory comments

56. […]

(a) Is a collective judicial or administrative proceeding in a foreign State;

(b)-(c) […]

57-58. […]

59. The critical question, in determining whether a foreign proceeding (in respect of a corporate debtor) should be characterized as "main" is whether it is taking place "in the State where the debtor has the centre of its main interests".[16] In the case of a

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[14] Order by the High Court, 16 February 2011.

[15] Ibid., art. 17, para. 4.

[16] See the discussion in paras. 75-110 below.

natural person, the "centre of main interests" is presumed to be the person's "habitual residence". In *Re Stojevic*[17] the English court found that, essentially, a man's habitual residence was his settled, permanent home, the place where he lived with his wife and family until the younger members of the family grew up and left home and the place to which he returned from business trips elsewhere or abroad. It also noted that a man might have another residence, called an ordinary residence, which was a place where he lived and which was not his settled, permanent home and the place where he lived when away from home on business or on holiday with his wife and family. Depending on the nature of his work, a man might well live away from his settled, permanent home for a greater number of days in any given year than he spent there with his wife and family. 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 into the State (including living and schooling arrangements), and cultural, social and economic integration."[18] 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.

60-63. […]

64. A number of the decided cases that considered the meaning of "foreign proceeding", "foreign main proceeding" and "foreign non-main proceeding" have involved members of enterprise groups. For the purposes of the Model Law, the focus is on individual entities and therefore on each and every member of an enterprise group as a distinct legal entity.[19] It may be that the centre of main interests of each individual group member is found to lie in the same jurisdiction, in which case the insolvency of those group members can be conducted in a single jurisdiction, but there is no scope for addressing the centre of main interests of the enterprise group as such under the Model Law.

65. […]

2. Elements of the definition of "foreign proceeding"

65A. 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. Whether a foreign proceeding possesses or possessed those characteristics would be considered at the time the application for recognition is considered.

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[17] [2007] BPIR 141, para. 58 and following.

[18] Para. 42, citing *Basingstoke v Groot* [2007] NZFLR 363 (CA).

[19] This point is emphasized by the Canadian court in *Lightsquared*, para. 29; see also *Eurofood*, para. 37 (decided under the EC Regulation).

(a) "Collective judicial or administrative proceeding"

66. The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. Revisions to the Guide to Enactment and Interpretation indicate that the notion of a "collective" insolvency proceeding is based on the desirability of 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 as a tool for gathering up assets in a winding up[20] 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 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 purpose of liquidation or reorganization (see below, paras. …).

66A. 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. However, a proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors' rights is unaffected by it. 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. 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; to receive an equitable distribution or satisfaction of their claims; to participate in the proceedings; and to receive notice of the proceedings in order to facilitate that participation.[21]

67-69. […]

70. In another case, *Stanford International Bank*, a receivership order made by a court in the United States was held by a court in England not to be a collective proceeding pursuant to an insolvency law. The receiving court held that the order was made after an intervention by the Securities Exchange Commission of the United States "to prevent a massive ongoing fraud". The purpose of the order was to

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[20] "Winding up" is a procedure in which the existence of a corporation and its business are brought to an end.

[21] In *Ashapura Minechem*, the United States court considered that although the Indian legislation under which the foreign proceeding had commenced did not include a formal mechanism for participation by unsecured creditors, in practice those creditors were given a voice (at the discretion of the Board for Industrial and Financial Reconstruction that administered the legislation), they could receive distributions under an arrangement with creditors and had the ability to appeal adverse determinations made by the Board and have those appeals heard in the Indian judicial system. The court concluded that the availability of appellate review and the ability of creditors to participate before the Board demonstrated that the proceedings were collective (pp. 5-6).

prevent detriment to investors, rather than to reorganize the corporation or to realize assets for the benefit of all creditors.[22] That view was upheld on appeal, largely for the reasons given by the English lower court.[23] In a further decision concerning *Stanford International Bank*, a United States appeal court noted the language in other United States court opinions that had contrasted a collective proceeding to a receivership and found a receivership not to be a collective proceeding[24] on the basis that it was a remedy instigated at the request and for the benefit of a single secured creditor. The United States court went on to find that the receivership in *Stanford* was not that type of receivership, it being instituted "at the request of the Securities and Exchange Commission for the benefit of all Stanford Entities' investor-victims and creditors". The court concluded that although the case before it did not require it to decide the question, it would nevertheless find the receivership to be a collective proceeding.[25]

70A. In *ABC Learning Centres*, the United States court considered that various provisions of Australian law indicated the collective nature of the liquidation proceedings that were the subject of the application for recognition. Those provisions included the duty of the liquidator to consider the rights of the creditors in distributing the assets of the debtor; that subject to priorities etc. debts and claims ranked equally and were to be paid pro rata; that adequate notice was to be given to all creditors with respect to the insolvency proceedings and related creditors' meetings; that the decision to commence those proceedings was backed by the majority of creditors both in number and in amount of debt; that the creditors' committee set up as required by Australian law had included representatives of various types of creditors; and that creditors had the right to seek court review. The receivership proceedings that were taking place concurrently with the liquidation proceedings, a situation contemplated under Australian law, were agreed not to be collective proceedings as they were, by design, for the benefit of the secured creditors that had commenced that action.[26]

(b) "Pursuant to a law relating to insolvency"

70B. The Model Law includes the requirement that the foreign proceeding be "pursuant to a law relating to insolvency" 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 that 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[27] and irrespective of whether the law that contained the rules related exclusively to insolvency.

70C. This aspect of article 2, subparagraph (a) has been considered by the courts in several cases concerning voluntary liquidation proceedings. In *Stanford International Bank*, the English court at first instance concluded that the liquidation

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[22] *Stanford International Bank*, paras. 73 and 84.
[23] *Stanford International Bank* (on appeal), paras. 26-27.
[24] These cases are cited in *Betcorp*, p. 281.
[25] *Stanford International Bank*, District Court, Northern District of Texas, 2012, p. 19, footnote 20.
[26] *ABC Learning Centres*, at IV.1.c.
[27] United Nations document A/CN.9/422, para. 49, available at www.uncitral.org/uncitral/en/commission/sessions/29th.html.

of an Antiguan company, ordered by the Antiguan court on the basis that it was just and equitable to do so, was "pursuant to a law relating to insolvency". Although the ground for liquidation was confined to regulatory misbehaviour under the applicable legislation, the insolvency of the company was a factor relevant to the Antiguan court's discretion to make the order. That decision was upheld on appeal, the English appellate court observing that since the Antiguan law provided for liquidation of corporations on just and equitable grounds, which included insolvency, as well as infringements of regulatory requirements, it could be characterized as "pursuant to a law relating to insolvency". In *Betcorp*, the United States court held that a voluntary liquidation commenced under Australian law was "pursuant to a law relating to insolvency" because when the nature of the relevant legislation (the Corporations Act) was considered as a whole, it was a law that regulated the whole life-cycle of an Australian corporation, including its insolvency. That decision was followed by the United States court in *ABC Learning Centres*, which also concerned an Australian creditors' voluntary liquidation conducted under the same law.

70D. In *Chow Cho Poon*, an Australian court considered whether a judicial liquidation, ordered by a court in Singapore on the ground that it was just and equitable to do so, was a proceeding "pursuant to a law relating to insolvency". The court considered the decisions in *Stanford International Bank*, *Betcorp* and *ABC Learning Centres* and concluded that those decisions pointed to a clear basis on which provisions concerning such liquidations might be classified as "a law relating to insolvency". Accordingly, even though the particular liquidation was ordered on the just and equitable ground alone and apparently without any finding, express or implied, of insolvency, it could be said to be made "pursuant to a law relating to insolvency".

70E. Following consideration and discussion of this issue in the Working Group and the Commission, revisions to the Guide to Enactment and Interpretation of the Model Law take a different approach to the decisions cited above, clarifying that 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 for the purposes of article 2, subparagraph (a). Where a type of 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.

(c) "Subject to control or supervision by a foreign court"

71. No distinction is drawn, in the definition of "foreign court",[28] between a reorganization and liquidation proceeding controlled or supervised by a judicial body or by an administrative body. That approach was taken to ensure that those

[28] UNCITRAL Model Law, art. 2, para. (e).

legal systems in which control or supervision was undertaken by non-judicial authorities would still fall within the definition of "foreign proceeding".[29]

71A. 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. Revisions to the Guide to Enactment and Interpretation indicate that 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. 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.

71B. Proceedings in which the court exercises control or supervision at a late stage of the insolvency process or 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 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.

71C. Subparagraph (a) of article 2 makes it clear that both assets and affairs of the debtor should be subject to control or supervision; it would not be sufficient if only one or the other were covered by the foreign proceeding.[30]

72. The concept of "control or supervision" has received limited judicial attention to date.

73. [*deleted*]

74. The court in *Betcorp* held that the voluntary liquidation proceeding in Australia was subject to supervision by a judicial authority: the Australian courts. That view was based on three factors: (a) the ability of liquidators and creditors in a voluntary liquidation to seek court determination of any question arising in the liquidation; (b) the general supervisory jurisdiction of Australian courts over actions of liquidators; and (c) the ability of any person "aggrieved by any act, omission or decision" of a liquidator to appeal to an Australian court, which could "confirm, reverse or modify the act or decision or remedy the omission, as the case may be".[31]

74A. In the later case of *ABC Learning Centres*, the application for recognition of foreign proceedings commenced in Australia was opposed on several grounds,

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[29] Guide to Enactment and Interpretation, para. 74. In *Ashapura Minechem*, for example, the Indian proceeding recognized in the United States was pending before the Board for Industrial and Financial Reconstruction, an administrative agency authorized to function as an administrative tribunal under the Sick Industrial Companies (Special Provisions Act, 1985). In *Tradex Swiss AG* (384 BR 34 at 42 (2008)) [CLOUT case no. 791], the Swiss Federal Banking Commission was held to be a "foreign court" because it controlled and supervised liquidation of entities in the brokerage trade.

[30] *Gold & Honey*, p. 371.

[31] *Betcorp*, pp. 283-284.

including that the foreign insolvency proceeding was not controlled or supervised by a foreign court. However, the United States court found, based upon the factors outlined in *Betcorp* that, notwithstanding that Australian courts do not direct the day-to-day operations of the debtor and that most liquidators proceed with their duties largely without court involvement, the relevant law gave the Australian court various control and supervisory roles with respect to liquidation proceedings that satisfied the requirements of article 2, subparagraph (a).[32]

(d) "For the purpose of liquidation or reorganization"

74B. Some types of proceeding that may satisfy certain elements of the definition of foreign proceeding 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.

74C. 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.[33] Such measures would generally not satisfy the requirement for collectivity nor for control or supervision by the court (see paras. 71-74 above).

3. The main proceeding: centre of main interests

(a) Introductory comments

75-76. […]

77. Delete the words "In contrast to the UNCITRAL Model Law provision," at the beginning of the third sentence.

78-80. […]

(b) Court decisions interpreting "centre of main interests"

81. There have been a number of court decisions which consider the meaning of the phrase "centre of main interests", either in the context of the EC Regulation or domestic laws based on the UNCITRAL Model Law and which identify the factors relevant to rebutting the presumption in article 16, paragraph 3 of the Model Law as it relates to corporate debtors and to individuals. A number of subtle differences in approach have emerged, and it might be noted that courts in some jurisdictions

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[32] *ABC Learning Centres*, [citation to be completed].

[33] Such contractual arrangements would 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.

might seek evidence of a greater quality or quantity to rebut the presumption than is the case in other States.[34]

82-85. […]

86. *Eurofood* places significant weight on the need for predictability in determining the centre of main interests of a debtor. In the subsequent case of *Interedil*, the ECJ held that the second sentence of article 3 must be interpreted to mean that "a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties." When management, including the making of management decisions, and supervision of a company takes place in the same location as the registered office, in a manner that is ascertainable by third parties, the presumption cannot be rebutted. However, where a company's central administration is not in the same place as its registered office, a comprehensive assessment of all the relevant factors must be undertaken in order to establish, in a manner that is ascertainable by third parties, the location of the company's actual centre of management and supervision and of the management of its interests. In that particular case, the court held that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated could not be regarded as sufficient factors to rebut the presumption, unless the comprehensive assessment of all relevant factors pointed to that other Member State."[35]

87. [*moved to the footnote to para. 81*]

88. [*deleted*]

89. In *Bear Stearns*, the United States court considered the question of determination of the centre of main interests of a debtor. The application for recognition involved a company registered in the Cayman Islands which had been placed into provisional liquidation in that jurisdiction.

90. The court identified the rationale for the change made to the presumption by the United States legislation, i.e. replacing "proof" with "evidence".[36] The judge said, by reference to the legislative history of the provision:

> "The presumption that the place of the registered office is also the centre of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy."[37]

91-92. […]

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[34] For example, under Chapter 15 of the United States Bankruptcy Code (the chapter enacting the UNCITRAL Model Law), the wording of the presumption was changed from "proof" to the contrary to "evidence" to the contrary (Section 1516 (c) provides: "In the absence of evidence to the contrary the debtor's registered office … is presumed to be the centre of the debtor's main interests."). The legislative history behind that change suggests it was one reflecting terminology, namely that the way in which the word "evidence" is used in the United States may more closely reflect the term "proof" as used in some other English-speaking States. Decisions of United States courts must be read in that context.

[35] *Interedil*, para. 59.

[36] See footnote to para. 81.

[37] [*Citation to be completed.*]

93. Add the following sentence to the footnote: "The decision was affirmed on appeal to the District Court [2011 WL 4357421 (SDNY, 16 Sept. 2012)] and is now on further appeal."

94. The decision in *Bear Stearns* was appealed, on the ground that the judgement did not "accede" to principles of comity and cooperation and on the ground of an asserted erroneous interpretation of the presumption by the judge. On appeal, the appellate judge had no difficulty in holding that principles of comity had been overtaken by the concept of recognition. The appellate judge held that "recognition" ought to be distinguished from "relief".

95. The appellate court affirmed the lower court's decision that the burden lay on a foreign representative to rebut the presumption and that the court had a duty to determine independently whether that had been done, irrespective of whether party opposition was or was not present.[38]

96. […]

97. Sentences 1-3 […]; sentences 4-7 dealing with timing have been moved to paragraph 102L.

98. Further decisions are those of the English courts at first instance and on appeal in *Stanford International Bank*. That case involved an application for recognition in England of a proceeding commenced in Antigua and Barbuda. It considered whether a "head office functions" test, articulated in earlier decisions by English courts, was still good law, having regard to *Eurofood*.

99-101. […]

102. Add the following sentence to the end of the paragraph: "Subsequent cases under the Model Law have confirmed the requirement of ascertainability."[39]

(c) Revisions to the Guide to Enactment and Interpretation

102A. Revisions to the Guide to Enactment and Interpretation of the Model Law [adopted by the Commission in 2013] respond to uncertainty and unpredictability that have arisen with respect to interpretation of the concept of centre of main interests. The revised Guide notes (paras. 123-123E) that where the debtor's centre of main interests coincides with its place of registration, no issue concerning rebuttal of the presumption in article 16, paragraph 3 of the Model Law will arise. In reality, however, the debtor's centre of main interests may not coincide with its place of registration and the party alleging that it is not at that place will be required to satisfy the court as to its location. The court of the receiving State will be required to consider independently where the debtor's centre of main interests is located and whether the requirements of the Model Law are met. It may in some cases be assisted in that task by information included in the order of the originating

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[38] *Bear Stearns* (on appeal), p. 335.

[39] *Lightsquared*, *Massachusetts Elephant & Castle*; *Millennium Global*; *Ackers v Saad* ([2010] FCA 221); *Gerova*.

court as to the nature of the foreign proceeding,[40] although that order clearly is not binding on the receiving court. In those cases where the debtor's centre of main interests does not coincide with its place of registration, the centre of main interests will be identified by factors that indicate to those who deal with the debtor (especially creditors) where it is located.

102B. The revisions to the Guide propose that 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.

102C. 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, which is readily ascertainable by creditors.

102D. 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.

102E. The Guide indicates that the order in which the additional factors are set out is not intended to indicate the priority or weight to be accorded to them, nor it is intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a given case.

102F. Several cases decided during the revision of the Guide to Enactment and Interpretation considered the factors determining centre of main interests and adopted the approach of focusing upon a few principal factors. In *Massachusetts Elephant & Castle*, the Canadian court considered three principal factors — that the location was one (a) where the debtor's principal assets or operations are found;

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[40] As an example, the Canadian court in *Cinram International* outlined the factors that the applicants had submitted indicated that the location of the debtors' centre of main interests was Canada. The court indicated that it had included that outline with respect to the centre of main interests "for informational purposes only. This court clearly recognizes that it is the function of the receiving court — in this case, the United States Bankruptcy Court for the District of Delaware — to make the determination on the location of the centre of main interests and to determine whether this CCAA proceeding is a 'foreign main proceeding' for the purposes of Chapter 15" (para. 42).

(b) where the management of the debtor took place; and (c) that was readily ascertainable by a significant number of creditors as the debtor's centre of main interests, noting that while other factors might also be considered relevant, they should perhaps be considered to be of secondary importance and only to the extent that they supported these three factors.[41] Those factors were followed in *Lightsquared*,[42] where the Canadian judge also observed that while in most cases these principal factors will all point to a single jurisdiction as the centre of main interests, there may be some instances where there will be conflicts among the factors that would require a more careful review of the facts. 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 judge said, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

102G. In *Think3*,[43] the Japanese court was required to determine whether the foreign main proceeding was a proceeding commenced in the United States or one commenced in Italy. At both first instance and on appeal, the courts considered the factors being discussed in the course of the revision of the Guide to Enactment and Interpretation and also whether the location of the headquarter function or nerve centre of the debtor was an element of the factors to be considered.

(d) Movement of centre of main interests

102H. 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.[44] Whenever there is 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 102B and D 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 to 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.

102I. In *Interedil*, the ECJ considered the impact of the move of the debtor's registered office before commencement of the insolvency proceedings. It held that

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[41] *Massachusetts Elephant & Castle*, para. 30.

[42] *Lightsquared*, paras. 25-26.

[43] In the Japanese legislation enacting the Model Law, the phrase "principal place of business" is used rather than "centre of main interests" and there is no presumption with respect to registered office that is equivalent to article 16, paragraph 3 of the Model Law. As the court at first instance explains in *Think3*, however, principal place of business is considered to have substantively the same meaning in the Japanese legislation as "centre of main interests" and judicial precedents in other countries regarding centre of main interests and the trend of discussion in UNCITRAL are to be considered and examined [chapter 3, issue 2-2(2), p. 19].

[44] 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.

where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of the new registered office.[45]

102J. 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 time relevant to that determination is the date of commencement of the foreign proceeding, as discussed below in paragraph 102O.

(e) Date at which to determine centre of main interests

102K. The Model Law does not expressly indicate the date by reference to which the centre of main interests (or establishment) should be determined, other than to provide in article 17, subparagraph 2(a) 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." The use of the present tense in article 17 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, there is no proceeding eligible for recognition under the Model Law.

102L. There has been some judicial consideration of the question of timing. In *Betcorp*, for example, the judge held that the time at which the centre of main interests should be determined was the time at which the application for recognition was made.[46] That interpretation seems to arise from the tense in which the definition of "foreign main proceeding" is expressed: "means a foreign proceeding taking place in the State where the debtor has the centre of its main interests". A similar problem arises in relation to the place of an "establishment" under the definition of "foreign non-main proceeding": "means a foreign proceeding ... taking place in a State where the debtor has an establishment". The approach in *Betcorp* was followed in *In Re Ran (Fifth Circuit)* and *British American Insurance*.

102M. In more recent cases, courts have held that the relevant date for determining centre of main interests is the date on which the foreign proceeding commenced. In *Millennium Global*, the United States judge at first instance observed that recognition proceedings are ancillary to the foreign proceeding and that the date of the application for recognition is mere happenstance and may take place at any time, even some years, after the commencement of the foreign proceeding. Moreover, if centre of main interests is viewed as equivalent to a debtor's principal place of business, an interpretation used by a number of courts, centre of main interests must refer to the debtor's business before commencement of the foreign proceeding, since after commencement, particularly of liquidation proceedings, the business typically ceases and there is no place of business.[47] This decision was followed in *Gerova*, the United States judge observing that at the date of the application for recognition,

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[45] *Interedil*, para. 59.

[46] *Betcorp*, p. 292.

[47] *Millennium Global*, pp. 12-19; the issue of the date at which to determine centre of main interests and establishment was not considered by the appeal court.

the debtor had no business activities or connections with Bermuda, only the activities of the liquidator winding up the business.[48] The date of the filing of the application for commencement of the foreign proceeding or the commencement of that proceeding was also followed by the Japanese court at first instance in *Think3* and affirmed on appeal.[49] The Japanese court at first instance observed that if the timing of the determination was to be governed by the date of the application for recognition, then in cases where there were multiple applications for recognition of the same foreign proceeding in different countries, the timing of the determination would end up being different in each of those countries and would lead to a lack of unification, with different results in different courts. Moreover, the court said, use of the date of the application for recognition might encourage an arbitrary choice of the time to apply for recognition.

102N. In *Interedil*, decided under the EC Regulation, the ECJ held that it is the location of the debtor's centre of main interests at the date on which the request to open insolvency proceedings was lodged that is relevant for determining the court having jurisdiction.

102O. Revisions to the Guide to Enactment and Interpretation indicate that having regard to the evidence required to accompany the 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 the foreign proceeding is the appropriate date for determining the location of debtor's centre of main interests. The choice of that date provides a test that can be applied with certainty to all insolvency proceedings. It also addresses issues that may arise where the business activity of the debtor has ceased at the time of the application for recognition,[50] where, as may occur in cases of reorganization, it is not the debtor entity that continues to have a centre of main interests, but rather the reorganizing entity, as well as circumstances where there is a change of residence between the commencement of the foreign proceeding and the application for recognition under the Model Law.

103-107. [*deleted*]

(f) Abuse of process

108. On a recognition application, ought the court to 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

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[48] *Gerova*, p. 10.

[49] High Court, chapter 3-2, p. 6; District Court, chapter 3, issue 2-1, pp. 12-14.

[50] In *Fairfield Sentry*, the United States court noted that the debtor had effectively ceased doing business some time before the commencement of liquidation proceedings and before the application for recognition and that its activities had for an extended period of time been conducted only in connection with the liquidation of its business. The judge found that it was appropriate to take that extended period into account in determining the debtor's centre of main interests (p. 64). In *British American Insurance*, the court found that the debtor's centre of main interests may become lodged with the foreign representative where a foreign representative remains in place for an extended period, and relocates all of the primary business activities of the debtor to that location (or brings that business to a halt), thereby causing creditors and other parties to look to the [foreign representative] as the location of the debtor's business, (p. 914).

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 upon domestic law or procedural rules, the Model Law does not explicitly prevent receiving courts from applying domestic law, particularly procedural rules, to respond to a perceived abuse of process.

109. [*deleted*]

110. [*moved to article 6 — para. 51A*]

4. Non-main proceedings: "establishment"

(a) Introductory comments

111-113. […]

(b) Court decisions on interpretation of "establishment"

114. […]

115. It may be that more emphasis should be given to the words "with human means and goods and services" in the definition of "establishment". A business operation, run by human beings and involving goods or services, seems to be implicit in the type of local business activity that will be sufficient to meet the definition of the term "establishment". In *Interedil*, decided under the EC Regulation, the ECJ observed that the fact that the definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organization and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an "establishment".

116. Add the following sentence to the end of the paragraph: "In *Williams v Simpson (No. 5)*, the difficulty in that case was that while, under English law, the winding up of a business in the United Kingdom (by paying debts) constituted a ground on which the debtor could be subject to the insolvency laws of England, it did not amount to an 'establishment' in the context of person who had been retired for some 12 years and had no (actual) existing business in that country."

(c) Date at which to determine the existence of an establishment

116A. As noted above, the Model Law does not expressly indicate the relevant date for determining the centre of main interests of the debtor. The same is true with respect to determining the existence of an establishment. Revisions to the Guide to Enactment and Interpretation suggest that the date of commencement of the foreign proceeding is the appropriate date for determining the existence of an establishment for the debtor.

D. Relief

1. Introductory comments

117-120. […]

121. Consideration of a particular statute enacting the Model Law is required in order to determine whether any type of relief (automatic or discretionary) envisaged by the Model Law has been removed or modified in the enacting State.[51] Once available relief has been identified, it is up to the receiving court, in addition to automatic relief flowing from a recognized "main" proceeding, to craft any appropriate relief required. The decision in *Bear Stearns* that the question of relief should be clearly distinguished from the question of recognition was followed in *Atlas Shipping*, in which the United States court held that, once a court had recognized a foreign main proceeding, Chapter 15 of the United States Bankruptcy Code specifically contemplated that the court would exercise its discretion to fashion appropriate post-recognition relief consistent with the principles of comity.[52] It was also followed in *Metcalfe & Mansfield*, in which a United States court was asked to enforce certain orders for relief issued by a Canadian court, orders that were broader than would have been permitted under United States law. The court noted that principles of comity did not require the relief granted in the foreign proceedings and the relief available in the United States to be identical. The key determination was whether the procedures used in the foreign proceeding met the fundamental standards of fairness in the United States; the court held that the Canadian procedures met that test.[53]

2. Interim relief[54]

122-124. […]

125. Add the following sentences to the footnote: "In the same case, a second application was made for interim relief to allow the examination of certain persons in order to determine issues of ownership of the items that had been seized pursuant to the search warrant. The court refused to grant the application on the grounds that the relief sought was not urgent as required under article 19, paragraph 1 of the Model Law. It held that since the assets whose ownership was in question had already been seized and the issue of ownership would become relevant after the determination on recognition of the foreign proceedings, the order was not necessary."

126-129. […]

129A. Several cases have considered issues relating to adequate protection of creditors. In *Sivec*, the debtor obtained recognition of an Italian reorganization proceeding as a foreign main proceeding and modification of the automatic stay to permit litigation in the United States of two potentially offsetting claims. This litigation resulted in a United States creditor seeking relief from the stay to permit set-off of the two judgements. The Italian debtor requested enforcement of the

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[51] States that have enacted legislation based on the Model Law have taken different approaches. For example, in the United States, the scope of the automatic stay is wider (to conform to chapter 11 of its Bankruptcy Code). In Mexico the stay does not operate to prevent the pursuit of individual actions, as opposed to enforcement. Japan and the Republic of Korea provide that the relief available upon recognition is subject to the discretion of the court on a case-by-case basis, rather than applying automatically as provided by the Model Law.

[52] *Atlas Shipping*, p. 78.

[53] *Metcalf & Mansfield*, pp. 697-698.

[54] The summary that follows is based substantially on the Guide to Enactment and Interpretation, paras. 135-140.

Italian proceedings, which would apparently result in the United States creditor being unable to set-off the two judgements. The United States court determined that it would not accord comity to the Italian proceedings, as the Italian debtor "had failed to provide information regarding Italian law, the status of the Italian bankruptcy case or meet its burden of proof in requesting comity." The court expressed particular concern about lack of notice to the United States creditor, found that basic elements of due process were lacking and that there was a failure to provide protection of a United States creditor's interests.[55]

129B. In *SNP Boat Service*, the concept of "sufficient protection" was interpreted more narrowly. In that case, a Canadian creditor objected to the debtor in a French insolvency proceeding seeking to repatriate assets in the United States to France on the basis that it would not receive "sufficient protection" of its interests in the French proceeding. On appeal, the United States court distinguished between relief under article 21, paragraph 2 and article 22, paragraph 1 of the Model Law, the latter providing more generally that the court may grant relief under articles 19 and 21 only if "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."[56] Although the objecting creditor was Canadian, the court held that it was not precluded from satisfying itself that the interests of foreign creditors in general were sufficiently protected before remitting property to the foreign jurisdiction, but rejected the idea that it could inquire into the individual treatment the particular creditor would receive in France.[57]

3. Automatic relief upon recognition of a main proceeding[58]

130-133. […]

134. […] Add the following footnote to the paragraph: "In *JSC BTA Bank* [434 BR 334 (Bankr. S.D.N.Y. 2010)], the United States court held that the scope of the automatic stay [applicable under the Bankruptcy Code] was limited to proceedings that could have an impact on the property of a debtor located in the United States. An arbitration conducted in Switzerland after the commencement of the Chapter 15 proceedings did not violate that automatic stay where the law of the debtor's centre of main interests did not stay the arbitration and the debtor had apparently participated in it without objection. Similarly, the automatic stay did not apply to actions for purely post-recognition breaches of contract by a foreign debtor or related non-debtors."

135. […]

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[55] *Sivec*, p. 324-326.

[56] *SNP Boat Service*, p. 11.

[57] In a further United States case, *In re Lee*, [472 B.R. 156 (Bankr. D. Mass. 2012)] the foreign representative of Hong Kong-based debtors applied to take possession and control of property owned by the debtor in the United States, testifying that he had a duty under Hong Kong law to take possession of the property interests and that he was a rational actor, with a duty to protect and maximize the value of the property and to respect applicable transfer restrictions. The United States court concluded that the foreign representative had satisfied the burden of proof that creditors and the debtor would be sufficiently protected if the order for possession were granted, and that the debtors had not met their "ultimate burden of establishing the absence of sufficient protection."

[58] The summary that follows is based substantially on the Guide to Enactment and Interpretation, paras. 141-153.

136. […] Add the following footnote: "United States law, for example, includes an exception for governmental units acting in a regulatory or police capacity. In the case of *In re Nortel Networks Corp.*, [669 F.3d 128 (3d Cir. 2011)], the United Kingdom pension regulator sought to commence a proceeding regarding a funding shortfall for Nortel's United Kingdom pension fund and gave notice under United Kingdom law to Nortel's subsidiaries in the United States and Canada, all of which were involved in plenary and concurrent bankruptcy cases. The United States courts held that since the United Kingdom pension regulator was acting as a trustee on behalf of private creditors for a pecuniary purpose and not as a regulator protecting the public safety or welfare, the action proposed by the regulator would violate the automatic stay."

137. […]

4. Post-recognition relief[59]

(a) The provisions of the Model Law

138-143. […]

144. Add a cross-reference at the end of the first sentence to paras. 129-129C above.

145. […]

146. On a second appeal, the Supreme Court overturned the decision of the Court of Appeal and held that the judgements were subject to the ordinary private international law rules preventing enforcement because the defendants were not subject to the jurisdiction of the foreign court.[60] The court also held that there was nothing in the Model Law that suggests it would apply to recognition and enforcement of foreign judgements against third parties.

(b) Approaches to questions of discretionary relief

147-149. […]

149A. Another example is provided by *In re Vitro*, in which the United States appeal court outlined an approach for analysing requests for relief under articles 7 and 21 that required a court to first determine whether relief requested by a foreign representative fell into one of the enumerated categories of article 21. If not, the court should decide whether the relief could be considered "appropriate relief" under article 21, paragraph 1, which entailed consideration of whether the requested relief had previously been granted under the law applicable before the enactment of Chapter 15 and whether it would otherwise be available under United States law. Third, if the requested relief went beyond the relief available under the previous law or currently available under United States law, article 7 functioned as a "catch-all" that included forms of relief "more extraordinary" than those permitted under either

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[59] The present summary is taken substantially from the Guide to Enactment and Interpretation, paras. 154-160.

[60] The decision of the United Kingdom Supreme Court in *Rubin* was conjoined with an appeal in the case of *New Cap Reinsurance Corp Ltd & Anor V Grant and others* [2012] UKSC 46. In that case, the Supreme Court held that the foreign judgement could be enforced because New Cap had submitted to jurisdiction by filing proofs of debt in the foreign insolvency proceedings.

the specific or the general provisions of article 21.[61] The court reasoned that such a framework would prevent courts from subjecting relief under article 7 to the same limitations as relief under article 21, unless those limitations were specifically applicable and would avoid "all-encompassing applications" under article 7 and "prematurely expanding the reach of Chapter 15 beyond current international insolvency law."[62]

149B. Applying this framework to the facts before it, the court affirmed the denial of the foreign representative's request to enforce an order confirming a Mexican reorganization plan that novated and in effect released the obligations of subsidiaries of the Mexican debtor that had guaranteed notes issued by the debtor but had not themselves applied to commence insolvency proceedings. The court first determined that article 21, paragraphs 1 and 2 did not provide for discharge of the obligations of non-debtor guarantors. Next, the court determined that the general grant of relief in article 21, paragraph 1 did not provide the requested relief because non-consensual, non-debtor releases through a bankruptcy proceeding were "generally not available" under United States law and were "explicitly prohibited" in the particular court.[63] Turning to article 7, the court noted that such releases were sometimes available in other courts and the relief sought was therefore not precluded under article 7. The court found, however, that since Vitro had failed to provide evidence of the existence of extraordinary circumstances sufficient to establish a case for non-debtor releases under the law of those courts that allowed such releases, the lower court had not abused its discretion in denying relief under article 7.[64]

(c) Relief in cases involving suspect antecedent transactions

150-153. […]

E. Cooperation and coordination

1. Introductory comments

154-156. […]

157. The articles leave the decision as to 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 UNCITRAL Model Law does not require a formal decision to recognize that foreign proceeding. Accordingly, cooperation may 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

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[61] *Vitro*, para. 19.

[62] *Vitro*, para. 20.

[63] *Vitro*, para. 22.

[64] The refusal to recognize third-party releases in *Vitro* stands in contrast to the recognition of such releases in *Metcalfe & Mansfield*. There the court found that the Canadian court approved non-debtor relief in limited circumstances which were in accord with the United States courts narrow application of article 7. Thus, the United States court concluded that the orders granted in the foreign proceeding should be enforced.

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.

158. […]

2. Cooperation

159. […]

160. […]

(a) […]

(b) Add to the footnote after the word "involved" the following sentences: "In *Chow Cho Poon*, the court pointed out that there should be express acknowledgement of cooperation by the courts involved and that it is not possible for one court to cooperate with another without the other being aware. It observed that article 27 of the Model law contemplates cooperation to start by either a request from one court to another or by way of subscribing to an agreed plan (para. 56)."

(c)-(e) […]

161-165. […]

165A. A different example is the efforts of courts to cooperate by containing the effects of their decisions, when those decisions conflict with decisions of another States courts. In *Perpetual Trustee Company Ltd v Lehman Bros. Special Financing Inc.*,[65] a series of requests led to an English court responding to the United States court in a form that explained the steps and decisions taken in England and inviting the United States judge not to make formal orders, at that time, that might be in conflict with those made in England.[66] Knowing that its decision would directly conflict with that of the English court, the United States court declared its view of the law, but did not require immediate compliance by the parties. The conflict was discussed by the courts but not resolved, although part of it was subsequently settled in the United States case.

166. Another example of cooperation is the exchange of correspondence containing or responding to requests for assistance from one of the courts involved in the proceeding. In *In re Lehman Brothers Australia Limited*,[67] the court discussed the

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[65] [2009] EWHC 2953 paras. 12-23. In *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd.*, ([2011] UKSC 38), the English Supreme Court summarized communications between the English and United States courts as follows (para. 33): "Following communications between the High Court in England and the Bankruptcy Court in New York, it was agreed that, in order to limit potential conflict between decisions in the two jurisdictions, relief would be limited to declaratory relief: *Perpetual Trustee Co. Ltd v BNY Corporate Trustee Services Ltd.* [2010 2 BCLC 237]; *In re Lehman Bros Holdings Inc.* (2010) 422 BR 407 (Bankr. SDNY)."

[66] *Perpetual Trustee*, paras. 41-50.

[67] *Parbery; in the matter of Lehman Brothers Australia Limited* (in liq) [2011] FCA 1449 [CLOUT case no. 1215].

impact of the decisions in the United States and United Kingdom Lehman cases on the statutory responsibilities of the liquidator of the Australian entities and a request by those liquidators that the court communicate with the United States court. The Australian court declined to do so at that time on the basis that it might pre-empt the United States court decision on certain matters; impinge on the principle of comity which is based on common courtesy and mutual respect and be seen by the United States judge as an unwarranted interference; the application had been made ex parte and all concerned parties had not been heard; and cooperation between the Australian court and any foreign court would generally occur within a framework or protocol that had previously been approved by the court, and was known to the parties in the particular proceeding. Nevertheless, the judge agreed that it might be appropriate to write to the United States judge to inform him of the present application and to ask whether a protocol for future communication might be established. A draft of the letter to be sent to the United States court was appended to the judgement.

167-170. […]

3. Coordination

171-187. […]

Annex I

Case summaries

1.	***In re ABC Learning Centres Limited***	445 B.R. 318 (Bankr. D. Del 2010) [CLOUT case no. 1210]
2.	***Ashapura Minechem Ltd***	480 B.R. 129 (S.D.N.Y. 2012)
3.	***In re Atlas Shipping A/S***	404 B.R. 726 (Bankr. S.D.N.Y. 2009)
4.	***In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd***	389 B.R. 325 (S.D.N.Y. 2008) [CLOUT case nos. 760, 794]
5.	***In re Betcorp Ltd (in liquidation)***	400 B.R. 266 (Bankr. D. Nev. 2009) [CLOUT case no. 927]
6.	***In re British American Ins. Co. Ltd***	425 B.R. 884 (Bankr. S.D.Fla. 2010) [CLOUT case no. 1005]
7.	***Re Chow Cho Poon (Private) Limited***	(2011) NSWSC 300 (15 April 2011) [CLOUT case no. 1218]
8.	***Re Cinram International Inc***	2012 ONSC 3767 (Ont. SCJ [Commercial List]) [CLOUT case no. …]
9.	***In re Ephedra Products Liability Litigation***	349 B.R. 333 (S.D.N.Y. 2006) [CLOUT case no. 765]
10.	***Re Eurofood IFSC Ltd***	[2006] Ch 508 (ECJ)
11.	***In re Fairfield Sentry Ltd***	2011 WL 4357241
12.	***Fogarty v Petroquest Resources Inc. (In re Condor Ins. Ltd)***	601 F.3d 319, (5th Cir. 2010) [CLOUT case nos. 928, 1006]
13.	***Gainsford, in the matter of Tannenbaum v Tannenbaum***	(2012) FCA 904 [CLOUT case no. 1214]
14.	***In re Gerova Financial Group, Ltd.***	482 B.R. 86 (Bankr. S.D.N.Y. 2012)
15.	***In re Gold & Honey, Ltd***	410 B.R. 357 (Bankr. E.D.N.Y. 2009) [CLOUT case no. 1008]
16.	***Re HIH Casualty and General Insurance Ltd***	[2005] EWHC 2125; first appeal [2006] EWCA Civ 732;
	McGrath v Riddle	second appeal [2008] UKHL 21
17.	***Interedil, Srl***	[2011] EUECJ C-396/09, [2012] Bus LR 1582
18.	***Re Lightsquared LP***	2012 ONSC 2994 (Ont. SCJ [Commercial List]) [CLOUT case no. 1204]

19.	***Massachusetts Elephant & Castle Group, Inc.***	2011 ONSC 4201 (Ont. SCJ [Commercial List]) [CLOUT case no. 1206]
20.	***In re Metcalfe & Mansfield Alternative Investment***	421 BR 685 (Bankr. S.D.N.Y. 2010) [CLOUT case no. 1007]
21.	***Millennium Global Emerging Credit Master Fund Limited et al***	District Ct 11 Civ. 7865 June 2012
22.	***In re Ran***	607 F.3d. 1017 (5th Cit. 2010) [CLOUT case no. 929]
23.	***Rubin v Eurofinance SA***	[2012] UKSC 46
24.	***In re Sivec Srl, as successor in liquidation to Sirz Srl***	476 B.R. 310 (Bankr. E.D. Okla 2012)
25.	***SNP Boat Service, S.A. v. Hotel le St. James***	483 B.R. 776 (S.D. Fla. 2012)
26.	***Stanford International Bank Ltd***	[2010] EWCA Civ. 137 [CLOUT case no. 1003]
27.	***Think3***	Case no. 1757 of 2012 Appeal against dismissal order on petition for recognition of and assistance for foreign insolvency proceedings and administration order (Case no. of the court of first instance: 3 and 5 of 2011 at the Tokyo District Court)
28.	***In re Juergen Toft***	453 B.R. 186 (Bankr. S.D.N.Y. 2011) [CLOUT case no. 1209]
29.	***In the matter of Vitro S.A.B. de C.V.***	2012 WL 5935630 (5th Cir. 28 Nov 2012)
30.	***Williams v Simpson***	[2011] B.P.I.R. 938 (High Court of New Zealand, Hamilton, 17 September 2010);
	Williams v Simpson (no. 5)	High Court of New Zealand, Hamilton, 12 October 2010

1. ***In re ABC Learning Centres Limited***[68]

The debtor was the Australian parent company of a group of 38 subsidiaries, which had owned and operated child care centres in Australia, New Zealand, the United Kingdom, Canada and the United States of America. In November 2008, the boards of directors of the debtor and its 38 subsidiaries resolved that since the companies were likely to become insolvent, they should enter into voluntary administration in Australia and administrators were appointed. The commencement of the voluntary administration breached the terms of certain loan agreements, and the lenders exercised their rights under the Australian Corporations Act as secured creditors to

[68] 445 B.R. 318 (Bankr. D. Del 2010) [CLOUT case no. 1210].

appoint receivers to represent their interests and commence receivership proceedings. In June 2010, creditors resolved to liquidate the companies and the administrators were appointed as liquidators. The receivership proceedings were conducted concurrently with the liquidation. In 2008 and 2009, litigation was commenced in the United States against certain of the debtor companies. In 2010, the liquidators sought recognition in the United States of the liquidation proceedings as foreign main proceedings. The court found that the liquidation proceedings were "foreign proceedings" for the purposes of Chapter 15 and accorded recognition as foreign main proceedings.

2. ***Ashapura Minechem Ltd***[69]

In October 2011, the foreign representative of the debtor, a mining and industrial business headquartered in Mumbai, sought recognition in the United States of America of proceedings commenced in India and pending before the Board for Industrial and Financial Reconstruction, an agency authorized to function as an administrative tribunal under the Sick Industrial Companies (Special Provisions) Act 1985. The United States court considered that although the Indian legislation in question did not include a formal mechanism for participation by unsecured creditors, in practice the manner in which those creditors could participate in the proceedings demonstrated that the proceedings were collective for the purposes of 11 USC § 101(23) [article 2 MLCBI]. Although the public policy exception was argued by several creditors, the court found that they had not discharged the burden of proof on that issue and recognition of the application could not be refused on that ground.

4. ***In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd***[70]

Add the following sentence at the end of the paragraph: "That decision was affirmed on appeal."

7. ***Re Chow Cho Poon (Private) Limited***[71]

In 2007, the Singapore High Court ordered the liquidation of Chow Cho Poon (CCP), a company incorporated in Singapore, on the basis that it was just and equitable to do so (a decision not based upon the insolvency of the debtor). Having discovered that CCP had bank assets in Australia, the liquidator appointed in Singapore made various requests with respect to those assets, which the Australian bank in question declined to implement, pending recognition in Australia of the liquidator's appointment. Although that recognition was sought under other legislation, the court considered the impact of those provisions on the Cross-Border Insolvency Act 2008 [enacting the Model Law in Australia]. In particular, the court considered whether the Singapore proceeding was a foreign proceeding within the meaning of article 2 of the Model Law. The court found that the liquidator was a foreign representative within article 2, that the liquidation was a judicial proceeding and that the assets of the company were subject to control or supervision by a foreign court. Two issues remained for consideration: whether CCP was a debtor

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[69] 480 B.R. 129 (S.D.N.Y. 2012).

[70] 389 B.R. 325 (S.D.N.Y. 2008) [CLOUT case nos. 760, 794].

[71] (2011) NSWSC 300 (15 April 2011) [CLOUT case no. 1218].

and whether the proceeding was one pursuant to "a law relating to insolvency". Although the court indicated that its instinctive reply to those two questions was negative, a consideration of the decisions of courts in England (*Stanford International Bank Ltd*) and the United States (*Betcorp* and *ABC Learning*) led it to conclude there was a clear basis upon which "the whole of the Singapore Companies Act, or at least the whole of the winding up provisions, might be classified as 'a law relating to insolvency', even though the particular winding up was ordered on the just and equitable ground alone and apparently without any finding (express or implied) of insolvency." On the second issue, the court noted that in none of the decisions considered was any separate attention given to the question of whether the company subjected to the winding up was properly described as a "debtor", each court apparently content to work on the basis that an entity subject to a "foreign proceeding" was, for that reason alone, within the relevant "debtor" concept.

8. ***Re Cinram International Inc***[72]

The Cinram Group was a replicator and distributor of CDs and DVDs with an operational footprint across North America and Europe. Having experienced financial difficulties, several Canadian incorporated entities of the group commenced proceedings in Canada seeking extensive relief to enable them to put in place various restructuring measures, as well as authorization for one of the debtor entities to act as foreign representative to pursue recognition of the Canadian proceedings in the United States. In addition to the Canadian incorporated entities, the group included entities incorporated in the United States and Europe, although the latter were not to form part of the proceedings. The parties in the Canadian proceedings contended that the centre of main interests of the group was Canada, providing extensive evidence in support of that claim. The court commenced the proceedings and granted the relief sought. With respect to the issue of centre of main interests, the court outlined in its order the evidence provided by the Canadian debtors, noting that it was doing so for informational purposes only. The court said it clearly recognized that it was the function of the receiving court — in this case, the United States Bankruptcy Court for the District of Delaware — to make the determination on the location of the COMI and to determine whether the Canadian proceeding is a "foreign main proceeding" for the purposes of Chapter 15 of the United States Bankruptcy Code.

11. ***In re Fairfield Sentry Ltd***[73]

Add the following sentence at the end of the paragraph: "The decision was affirmed on appeal to the District Court and is now on further appeal."

13. ***Gainsford, in the matter of Tannenbaum v Tannenbaum***[74]

The South African insolvency representatives of Tannenbaum, a South African citizen who had moved to Australia in 2007, sought recognition of the South African proceedings in Australia and various orders relating to examination of the affairs of

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[72] 2012 ONSC 3767 (Ont. SCJ [Commercial List]).
[73] 2011 WL 4357241 (S.D.N.Y., 16 Sept. 2012).
[74] (2012) FCA 904 [CLOUT case no. 1214].

the debtor and his wife and other specified persons and entities. The court considered what would constitute the debtor's habitual residence for the purposes of sections 17(2) (a) and 16(3) of the Cross-Border Insolvency Act [articles 17(2) (a) and 16(3) MLCBI], noting the decision in *Williams v Simpson* (see below) and the interpretation of that term as used in the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. The court made two points: first, that application of the expression "habitual residence" permitted consideration of a wide variety of circumstances that bear upon where a person is said to reside and whether that residence is to be described as habitual. Secondly, the past and present intentions of the person under consideration will often bear upon the significance to be attached to particular circumstances, such as the duration of a person's connections with a particular place of residence. Since Tannenbaum had taken a deliberate decision to quit South Africa in 2007, had lived and worked in Australia since 2007 and had his habitual residence in Australia, the fact that he retained his South African citizenship and had not made any steps towards enrolment onto the Australian electoral roll was not determinative. Since the debtor was not a habitual resident of the South Africa and did not have an establishment in South Africa, the foreign proceedings could not be recognized as either main or non-main proceedings. Relief was granted under other applicable legislation.

14. ***Gerova Financial Group, Ltd***[75]

Both Gerova entities were registered in Bermuda. After a securities analyst published a report claiming Gerova was in effect a Ponzi scheme, Gerova was sued in the United States and subsequently ceased all business by May 2011. In October 2011, three creditors sought to commence insolvency proceedings in Bermuda. The proceedings were adjourned at the request of Gerova, which managed to settle the claims of two of those creditors and successfully disputed the claims of the third. A fourth creditor was substituted as a petitioner and presented an amended petition, which the court declined to stay or dismiss. It did, however, give Gerova the opportunity to pay the fourth creditor's debt in full. Having failed to do so, the court ordered commencement of insolvency proceedings against the two Gerova entities in July and August 2012. The liquidators sought recognition of the Bermudan proceedings in the United States; an appeal against the July order of the Bermudan court was pending at the time. Recognition was opposed by several creditors on the basis that (a) it was unnecessary, including because it was opposed by a significant number of creditors, (b) the order for commencement was subject to appeal, and (c) for these reasons recognition would be covered by the public policy exception in 11 USC § 1506 [article 6 MLCBI]. The court found that the Bermudan proceedings were foreign main proceedings, that there was nothing in § 1507 of the Bankruptcy Code [article 7 MLCBI] that conditioned recognition on a cost-benefit analysis or approval by a majority of creditors; that it was for the Bermudan court to decide whether the proceedings should be commenced and not for the receiving court to condition recognition on a re-examination of that need; that nothing in the language of § 1517 [article 17 MLCBI] required the Bermudan decision to be final or non-appellable and since the order of the Bermudan court was sufficient to enable the liquidators to take up their duties, § 1518 [article 18 MLCBI] would require the liquidators to notify the United States court if that order was reversed on appeal;

[75] 482 B.R. 86 (Bankr. S.D.N.Y. 2012).

and that nothing in the present case violated a matter of fundamental importance that would invoke the public policy exception.

15. ***In re Gold & Honey, Ltd***[76]

In July 2008, a receivership proceeding was commenced in Israel by the debtor's principal lender, but due to the occurrence of certain events, the appointment of a receiver was denied by the Israeli court. In September 2008, reorganization proceedings were commenced in the United States and the debtor's principal lender was notified of that commencement. Notwithstanding the commencement of the proceedings in the United States and the automatic stay that arose on such commencement, the principal lender continued its application for appointment of a receiver in the Israeli court, arguing that the automatic stay did not apply to its actions or its attempt to have a receiver appointed. In October 2008, the United States court determined, on an application by the debtor and on the basis of a hearing at which the principal lender was represented, that the automatic stay applied to the debtor's property wherever located and by whomever held. While the court did not reach the issue of whether the stay applied specifically to the Israeli receivership or whether it had in personam jurisdiction over the principal lender, it did advise the principal lender that if it proceeded with the receivership proceeding in Israel, it did so at its own peril. The principal lender continued with the receivership application and in late October 2008, the Israeli court determined that it had jurisdiction and in November 2008 appointed receivers to liquidate the debtor's assets in Israel despite the proceedings in the United States and the application of the worldwide stay. In early January 2009, the principal lender sought an order from the United States court vacating the automatic stay with respect to the Israeli receivership or dismissing the United States insolvency proceedings. In late January 2009, the Israeli receivers applied for recognition of the Israeli proceedings in New York in order to transfer assets located in New York to Israel for application in the Israeli proceeding. The United States court denied recognition, finding: (a) that the Israeli representatives had not met the burden of showing that the Israeli proceeding was a collective proceeding and that the debtor's assets and affairs were subject to the control or supervision of a foreign court pursuant to the definition in 11 U.S.C. § 101 (23) [article 2, subparagraph (a) MLCBI]; (b) that the Israeli representatives had been appointed in violation of the automatic stay; and (c) that the threshold required to establish the public policy exception in 11 U.S.C. § 1506 [article 6 MLCBI] had been met.

17. ***Interedil, Srl***[77]

Interedil was registered in Italy until July 2001 when it transferred its registered office to the United Kingdom, was removed from the register of companies in Italy and added to the register of companies in the United Kingdom. At the time of the transfer, Interedil was being acquitted by a British group Canopus and a few months later its title to properties in Italy was transferred to another British company as part of that acquisition. In 2002, Interedil was removed from the United Kingdom register of companies. In October 2003, Intesa applied to commence insolvency proceedings against Interedil in Bari, Italy. Interedil challenged the application on

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[76] 410 B.R. 357 (Bankr. E.D.N.Y. 2009) [CLOUT case no. 1008].

[77] [2011] EUECJ C-396/09, [2012] Bus LR 1582.

the basis that only the courts of the United Kingdom had jurisdiction and sought a ruling on jurisdiction from the superior court in Italy. Without waiting for that ruling, the Bari court commenced proceedings in May 2004. In June 2004, Interedil lodged an appeal against that order. In May 2005, the Italian superior court ruled on the first application, ordering that the Bari court had jurisdiction on the basis that the presumption that the centre of main interests of a debtor was its registered office could be rebutted, in this case by the presence of immovable property in Italy, a lease agreement in respect of two hotels, a contract with a bank and that fact that the Italian companies register had not been notified of the transfer of the registered office. The Bari court then referred several questions to the European Court of Justice for a preliminary ruling. With respect to the question concerning rebuttal of the registered office presumption, the ECJ ruled that a debtor's main centre of interests must be determined by attaching greater importance to the place of its central administration which must be established by objective factors ascertainable by third parties. Where management, including the making of management decisions and supervision are conducted in the same place as the registered office in a manner ascertainable by third parties, the presumption cannot be rebutted. Where the central administration is not in the same place as the registered office, the factors cited in the present case were not sufficient to rebut the presumption unless a comprehensive assessment of factors makes it possible to establish, in a manner ascertainable to third parties, that the actual centre of management and supervision is located in that other place. It went on to hold that where a debtor company's registered office is transferred before an application to commence insolvency proceedings, the centre of main interests is presumed to be the place of the new registered office.

18. ***Re Lightsquared LP***[78]

The debtor included *Lightsquared* and some 20 of its affiliates — sixteen were incorporated and had their headquarters in the United State, three were incorporated in various provinces of Canada and one was incorporated in Bermuda. They each commenced voluntary reorganization proceedings in the United States and in May 2012 *Lightsquared*, as foreign representative of the debtor, sought recognition in Canada of the United States proceedings as foreign main proceedings, recognition of certain orders of the United States court and certain ancillary relief. The Canadian court considered the facts concerning the organization and structure of the debtor entities in order to determine the location of the centre of main interests of the Canadian entities. The judge concluded that where it was necessary to go beyond the registered office presumption, the following principal factors, considered as a whole, would tend to indicate whether the location in which the proceeding commenced was the debtor's centre of main interests: (i) the location was readily ascertainable by creditors; (ii) the location is the one in which the debtor's principal assets or operations are found; and (iii) the location is where the management of the debtor takes place. On the basis of those factors, the judge found the centre of main interests of the Canadian entities to be in the United States, recognized the foreign proceedings as foreign main proceedings, recognized the orders of the United States court and granted the ancillary relief sought.

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[78] 2012 ONSC 2994 (Ont. SCJ [Commercial List]) [CLOUT case no. 1204].

19. ***Massachusetts Elephant & Castle Group, Inc.***[79]

The debtors operated and franchised full-service British-style pubs in the United States of America and Canada. In June 2011, Chapter 11 proceedings commenced against the debtors in the United States and recognition of those proceedings was sought in Canada. Except for three group members that were incorporated in Canada, the remaining 11 debtor companies were incorporated in the United States. The Canadian court considered the factors relevant to determining the location of the centre of main interests of the three Canadian companies, finding that the following three factors were usually significant: (a) the location of the debtor's headquarters or head office functions or nerve centre, (b) the location of the debtor's management, (c) the location which significant creditors recognize as being the centre of the company's operations. While other factors might be relevant in specific cases, the court took the view that they should be considered to be of secondary importance and only to the extent that they related to or supported the three prime factors. Applying those factors to the facts, the court noted that: the head office of all of the Chapter 11 debtors was in Boston; the group functioned as an integrated North American business, all decision-making for which was centralized at the head office in Boston; and all members of the debtors' management were located, as were the human resources, accounting/finance, other administrative functions and information technology functions in Boston. The court concluded that the centre of main interests of the Canadian companies was located in Boston, recognized the United States proceedings as foreign main proceedings and granted relief additional to the mandatory relief available on recognition, primarily recognizing certain orders of the United States court in the Chapter 11 proceedings.

21. ***Millennium Global Emerging Credit Master Fund Limited et al***[80]

The two debtors (a feeder fund and a master fund) were offshore investment funds that invested in sovereign and corporate debt instruments from issuers in developing countries. Both funds were incorporated in Bermuda, the feeder fund in 2006 and the master fund in 2007. After incorporation of the master fund, the feeder fund transferred substantially its entire asset to it, in exchange for a 97 per cent ownership interest in the master fund. In October 2008, the funds ran into severe cash flow problems and failed to meet various margin calls. The fund directors applied for commencement of liquidation proceedings in Bermuda and in 2009 the court commenced the proceeding and appointed the foreign representatives as liquidators of both funds. The liquidators sought informal discovery from several United States-based entities, but when attempts to negotiate informal production of documents failed, they sought recognition of the Bermudan proceedings in the United States of America. At first instance, the United States court held that the debtor's centre of main interests should be determined by reference to the date of the commencement of the foreign proceeding and that both debtors' centre of main interests at that date was Bermuda. The finding as to the location of the centre of main interests was challenged on the basis that a number of facts concerning the arrangement of the debtors' affairs pointed to the centre of main interests as being in the United Kingdom. The finding with respect to timing was not challenged. On appeal, the court assessed the circumstances against five factors (the location of the

[79] 2011 ONSC 4201; (2011) 81 C.B.R. (5th) [CLOUT case no. 1206].

[80] District Ct 11 Civ. 7865 (LBS) June 2012.

debtor's headquarters, the location of those who manage the debtor, the location of the debtor's primary assets, the location of the majority of the debtor's creditors who would be affected by the case, and the jurisdiction whose law would apply to most disputes) and the expectations of creditors and other interested third parties in terms of the ascertainability of the Funds' centre of main interests. The court concluded that although some of those factors might support a centre of main interests in the United Kingdom, the preponderance of evidence supported Bermuda as the centre of main interests of the debtors, irrespective of whether centre of main interests was to be determined by reference to the date of the commencement of the foreign proceeding or the date of the filing of the Chapter 15 application.

23. ***Rubin v Eurofinance SA***[81]

The representatives of insolvency proceedings commenced in the United States in 2007 against The Consumers Trust sought recognition of those proceedings in England under the Cross-Border Insolvency Regulations 2006, which give effect to the Model Law in Great Britain, and enforcement of a judgement of the United States court holding Eurofinance liable for the debts of The Consumers Trust. The Consumers Trust was a business trust, recognized as a legal entity under United States law. In 2009, the English court at first instance recognized the foreign insolvency proceedings as main proceedings, but dismissed the application for enforcement of the judgement. The first appeal against the dismissal of the application for enforcement was allowed, the court concluding that ordinary rules for enforcing or not enforcing foreign judgements in personam did not apply to insolvency proceedings and that the mechanisms available in insolvency proceedings to bring actions against third parties for the collective benefit of all creditors were integral to the collective nature of insolvency and not merely incidental procedural matters. The orders against Eurofinance were therefore part of the insolvency proceedings and for the purpose of the collective enforcement regime of the insolvency proceedings. As such, the orders were not subject to the ordinary rules of private international law preventing the enforcement of judgements because the defendants were not subject to the jurisdiction of the foreign court. A second appeal to the Supreme Court rejected the approach of the appeal court and dismissed the application for enforcement of the judgement. The court held that the orders were subject to the ordinary rules of private international law and that none of the conditions for common law enforcement were met. The court also considered that articles 21 and 25 of the Model Law were concerned with procedural matters and did not impliedly empower the courts to enforce a foreign insolvency judgement against a third party.

24. ***In re Sivec***[82]

In *Sivec*, the debtor obtained recognition in the United States of America of an Italian reorganization as a foreign main proceeding and modification of the automatic stay to permit litigation in the United States of two potentially offsetting claims. The litigation resulted in a judgement for the Italian debtor on the first claim and a judgement in favour of the United States creditor (the creditor) on the second. The creditor then sought relief from the automatic stay to set off the two amounts,

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[81] [2010] EWCA Civ. 895.

[82] 476 B.R. 310 (Bankr. E.D. Okla. 2012).

and the Italian debtor requested enforcement of the reorganization proceeding, which would apparently require payment of the first judgement by the creditor, but give it no ability to claim in the Italian case on the second judgement, as it had not filed a timely claim (it alleged it had never received appropriate notice). The United States court determined that it would not accord comity to the Italian proceedings, as the Italian debtor "had failed to provide information regarding Italian law, the status of the Italian bankruptcy case or meet its burden of proof in requesting comity." The court expressed particular concern about lack of notice to the creditor, found that basic elements of due process were lacking and that there was a failure to provide protection of a United States creditor's interests. Exercising what it called "broad latitude to fashion the appropriate relief in this case," the court determined that the creditor should have stay relief to exercise setoff or recoupment rights under United States law.

25. ***SNP Boat Service, S.A. v. Hotel le St. James***[83]

SNP Boat Service was a French company that entered into a contract with a third party requiring it to accept a trade-in of property owned by St James, a Canadian company. Issue was taken with performance of the contract and the dispute led to litigation in France and Canada. An insolvency proceeding commenced in France for SNP, in which St James lodged a claim. In the Canadian litigation, the court entered a default judgement in favour of St James, which it then sought to enforce against property of SNP in Florida. Before that property could be sold, the foreign representative sought recognition of the French proceeding in the United States. Recognition was granted and a stay with respect to the sale of the Florida property ordered. The property was subsequently released to the foreign representative, but its removal from the jurisdiction of the court prohibited and its sale made subject to approval of the court. The foreign representative then sought approval to repatriate the property to France to be handled under the French proceeding. St James objected claiming, among other things, that it would not receive "sufficient protection" of its interests in the French proceeding. The lower court ordered discovery to determine whether St. James' interests as a creditor were sufficiently protected in the French proceeding and ultimately denied the repatriation request, directed the property to be handed over to the relevant local official and dismissed the Chapter 15 proceeding. On appeal, the court held that it was not precluded from satisfying itself that the interests of foreign creditors in general were sufficiently protected before remitting property to the foreign jurisdiction. However, it rejected the idea that it could inquire into the individual treatment the creditor would receive in France, concluding that "a bankruptcy court is without jurisdiction to inquire whether a particular creditor's interests are sufficiently protected in any specific foreign proceeding." The court concluded that both the discovery order and the denial of the repatriation request were an abuse of discretion and remanded the case for further proceedings.

[83] 483 B.R. 776 (S.D. Fla. 2012).

27. ***Think3***[84]

The debtor (think3.Inc), which was the successor of various companies originally established in Italy and the United States of America, was incorporated in the United States, with a branch office in Italy and subsidiaries in six countries, including Italy and Japan. Insolvency proceedings commenced in Italy in April, 2011, followed by Chapter 11 proceedings in the United States in May 2011. On 1 August 2011, recognition of the Italian proceedings was sought in the United States. On 11 August 2011, recognition of the United States proceedings was sought in Japan and granted the same day, together with certain relief. In October 2011 recognition of the Italian proceedings was also sought in Japan, on the basis that the debtor's principal place of business (the term used in the Japanese legislation enacting the Model Law, which is considered to have substantively the same meaning as centre of main interests) was in Italy, not the United States.[85] In determining the factors to be considered with respect to the debtor's principal place of business, the court at first instance looked to the work being undertaken by UNCITRAL to revise the Guide to Enactment of the Model Law. It found that while it was appropriate to take into consideration all of the various factors that had been raised by different courts around the world, emphasis should be placed on the location of the head office functions, the key assets, the actual place of business of the debtor, the debtor's business management and whether that location was perceivable to creditors. With respect to timing, the court took the view that the determination should be made by reference to the time at which the very first insolvency proceedings concerning the debtor was filed or when those proceedings commenced. Having considered the complex facts of the debtor's recent history in the light of the various factors to be taken into account, the court concluded that the debtor's principal place of business was the United States. That decision was affirmed on appeal.

28. ***In re Dr. Juergen Toft***[86]

The debtor, who was the subject of insolvency proceedings in Germany, had refused to cooperate with the foreign representative, hidden his assets and relocated to an unknown country. The foreign representative had obtained a mail interception order relating to postal and electronic mail in the German proceedings, as well as ex parte recognition of the German proceedings and enforcement of the German mail interception order in England. The foreign representative sought recognition of the German proceedings in the United States, together with ex parte relief enforcing the mail interception order in the United States and compelling certain service providers to disclose and deliver to him all of the debtors emails currently stored on their servers, as well as those received in the future. On the basis that such relief would not be available to an insolvency representative under United States law and that it would contravene certain legislation relating to privacy and wiretapping leading to criminal liability, the court denied the relief sought as being manifestly contrary to

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[84] Case no 1757 of 2012 Appeal against dismissal order on petition for recognition of and assistance for foreign insolvency proceedings and administration order (Case no. of the court of first instance: Case nos. 3 and 5 of 2011 at the Tokyo District Court) available in English and Japanese at www.insol.org/page/304/japan.

[85] See footnote 157 to para. 102G above.

[86] 453 B.R. 186 (Bankr. S.D.N.Y. 2011) [CLOUT case no. 1209].

the public policy of the United States under 11 U.S.C. § 1506 [article 6 MLCBI]. That denial was without prejudice to the right of the foreign representative to seek recognition after providing notice as required under United States law.

29. ***In the matter of Vitro S.A.B. de C.V.***[87]

Vitro was a holding company that together with its subsidiaries constitutes the largest glass manufacturer in Mexico. Between 2003 and 2007, Vitro borrowed a significant sum, predominantly from United States investors, that was evidenced by three series of unsecured notes, which variously fell due in 2012, 2013 and 2017 and guaranteed by substantially all of its subsidiaries. The guarantees, which were governed by New York law, provided that the guarantors would not be released, discharged or otherwise affected by any settlement or release as the result or any insolvency, reorganization or bankruptcy proceeding affecting Vitro and that disputes would be litigated in New York. In 2008, Vitro announced its intention to restructure its debt and stopped making payments on the unsecured notes. In 2009, Vitro entered into certain agreements with Fintech Investments Ltd., one of its largest creditors, which resulted in Vitro generating a large amount of intercompany debt. That debt was not disclosed to the holders of the unsecured notes until approximately 300 days after the completion of the transactions, which took those transactions outside Mexico's 270 day suspect period, during which they would have been subject to additional scrutiny before a business enters insolvency. Between 2009 and 2010, Vitro engaged in several rounds of reorganization negotiations, but its proposals were rejected by creditors. In December 2010, Vitro made an application under Mexico's Business Reorganization Act. Despite an initial rejection of the application because Vitro could not reach the required 40 per cent creditor approval threshold necessary to support such an application without having to rely on the intercompany claims, that decision was overturned on appeal and Vitro was declared bankrupt in April 2011. A reorganization plan was then negotiated with the recognized creditors (including those holding intercompany debt), which provided, inter alia, for extinguishment of the unsecured notes and discharge of the obligations owed by the guarantors. The plan was ultimately approved by the requisite percentage of creditors and approved by the Mexican court in February 2012. That approval decision was then appealed. Creditors dissatisfied with the reorganization attempted to collect on the unsecured notes and guarantees in various ways. On one action commenced in New York, the court held that New York law applied to the guarantees and that non-consensual release, discharge or modification of the obligations in the guarantees was prohibited. In April 2011, recognition of the Mexican proceeding was sought in the United States and ultimately granted as a foreign main proceeding. That decision has been appealed. In March 2012, Vitro's foreign representatives sought various orders for relief in the United States, including enforcement of the Mexican reorganization plan and an injunction prohibiting certain actions in the United States against Vitro, which were denied. That decision was appealed on the ground that the court erred as a matter of law in refusing to enforce the plan because it novated guaranty obligations of non-debtor parties. On appeal, the United States court affirmed the order recognizing the Mexican proceeding and the order denying the relief sought on the ground that although, in exceptional circumstances, the court could under

[87] 2012 WL 5935630 (5th Cir., 28 Nov 2012).

Chapter 15 enforce an order extinguishing the obligations of non-debtor parties, Vitro had failed to demonstrate the existence of exceptional circumstances in this case.

Annex II

Decision of the United Nations Commission on International Trade Law and General Assembly resolution 66/9

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