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Insolvency Law

Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI)

Note by the Secretariat

Contents

(Continued in A/CN.9/WG.V/WP.95/Add.1)

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Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on two insolvency topics, both of which were of current importance, where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the first of those two topics,[1] concerning a proposal by the United States, as described in A/CN.9/WG.V/WP.93/Add.1, paragraph 8, to provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) relating to centre of main interests (COMI) and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.[2]

4. As a preliminary matter, the Working Group may wish to consider, or at least to bear in mind, the need to resolve the form and manner in which the first part of the proposal, i.e. guidance on issues related to COMI, might be presented. The proposal (A/CN.9/WG.V/WP.93/Add.2, paras. 68-70) suggests that, in considering the questions raised below, the Working Group should set out the policy rationale for any conclusions it may reach that could form the basis of guidance to be provided on interpretation of the Model Law. Explaining that policy rationale could also provide a helpful "legislative history" for a jurist or insolvency authority to understand the scope and meaning of the various provisions of the Model Law. The Working Group might wish to consider how that might be achieved. Various types of document could be developed, depending upon the level of guidance the Working Group sought to provide, such as information and commentary on the one hand or recommendations on the other. An information document that could accompany the existing text of the Model Law and Guide to Enactment of the Model Law (the Guide to Enactment) might be one solution, while another might be to add to or revise the Guide to Enactment itself.

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[1] The second topic concerning the liability of directors and officers of a company in insolvency and pre-insolvency is addressed in A/CN.9/WG.V/WP.96.

[2] See the related proposal of the Union Internationale des Avocats (UIA), concerning the possible development of a convention, as referred to in A/CN.9/686, paras. 127-130.

I. Interpretation and application of concepts relating to centre of main interests

A. Background

5. The Model Law has now been adopted by some 19 jurisdictions and a number of cases interpreting various issues arising under the Model Law have been reported in the UNCITRAL CLOUT series.[3]

6. The United States proposal notes that in the majority of proceedings for recognition commenced under laws enacting the Model Law the location of the debtor's COMI being, on the basis of the presumption in article 16, the registered office of the debtor, has not been disputed.[4] The proposal also notes, however, that a number of court decisions have raised issues which could be examined and clarified. These issues include: what is required to satisfy the various elements of the definitions in article 2 of the Model Law, particularly "foreign proceedings" under paragraph (a); the scope of what is required to rebut the presumption in paragraph 3 of article 16 based on place of registration (or incorporation under some laws); whether a decision by a State accepting jurisdiction to commence an insolvency case or other similar decision may be challenged; and the criteria that may be employed to answer these questions. The proposal suggests that harmonizing such criteria may be an important factor in raising predictability in this important area of the law, as the insights of the collaborative body that negotiated the Model Law are likely to be persuasive in many jurisdictions.

7. This note examines the court decisions relating to interpretation and application of the various components of the definitions in article 2 of the Model Law in order to better understand the impact of the issues raised, as well as the areas where uncertainty has arisen.

B. Proceedings qualifying for recognition under the Model Law: article 2

1. Requirement for insolvency of the debtor

8. As a preliminary matter, it might be noted that the Model Law does not define "insolvency" or "insolvency proceeding". Although the possibility of including a definition of those terms in the Model Law was considered by the Working Group, it was concluded that it was not necessary. Rather, since the focus of the Model Law was recognition of foreign proceedings, the Working Group generally agreed that the work should concentrate on identifying the characteristics that a foreign insolvency proceeding should possess in order to qualify for recognition.[5]

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[3] Case Law on UNCITRAL Texts, A/CN.9/SER.C/ABSTRACTS/72, 73, 76 and 92, available online at www.uncitral.org/uncitral/en/case_law.html.

[4] A/CN.9/WG.V/WP.93/Add.2, para. 7.

[5] See A/CN.9/422, para. 47.

9. Notwithstanding the absence of a definition, a consideration of the preparatory documents[6] appears to suggest that, although it was widely acknowledged that different jurisdictions might have different notions of what fell within the term "insolvency proceedings", there was a general understanding that such proceedings involved some form of financial distress or an insolvent debtor. This is reflected in the Guide to Enactment. Paragraph 51 notes that the word "insolvency" as used in the title of the Model Law, refers to the various types of collective proceedings against insolvent debtors. Paragraph 71 notes that the expression "insolvency proceedings" may have a technical meaning in some legal systems, but is intended in subparagraph (a) of article 2 to refer broadly to proceedings involving companies in severe financial distress.

10. The Working Group may recall that the definition of "insolvency" in the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) is "when a debtor generally is unable to pay its debts as they mature or when its liabilities exceed the value of its assets."[7] The Working Group may also recall that the Legislative Guide identifies the key objectives of an effective insolvency law (part one, chap. I, paras. 1-14 and recommendations 1-6), as well as the general features of an insolvency law (part one, chap. I, paras. 20-27 and recommendation 7). With respect to commencement of insolvency proceedings, recommendations 15 and 16 of the Legislative Guide contemplate insolvency or imminent insolvency, as defined above.

11. The Model Law recognizes that, for certain purposes, insolvency proceedings may be commenced under specific circumstances defined by law that do not necessarily mean the debtor is in fact insolvent. Paragraph 195 of the Guide to Enactment notes that for use in jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of foreign main proceedings, a rebuttable presumption of insolvency of the debtor for the purposes of commencing a local insolvency proceeding. Paragraph 194 notes that those circumstances might include cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissipation of its assets or abandonment of its establishment.

12. One case involving recognition of foreign proceedings under legislation enacting the Model Law has raised an issue concerning the insolvency of the debtor. In *Betcorp*,[8] the proceeding for which recognition was sought in the United States was a members' voluntary winding up proceeding, commenced under Australian law, where the debtor was not insolvent.[9] The *Betcorp* court noted that the relevant

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[6] A.CN.9/WG.V/WP.44, 46 and 48 and A/CN.9/422, 433 and 435, available online at www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html.

[7] Legislative Guide, glossary, para. (s).

[8] Short form references to cases are included throughout this note. Full citations for those cases are included in the Annex.

[9] At its incorporation in 1998, Betcorp operated only in Australia, but later expanded its operations to include the provision of online gambling services to the US. This core part of its business was ended with the passage of the Unlawful Internet Gambling Enforcement Act (2006), which prohibited online gambling in the US. The company halted its operations in the US and ceased all operations shortly thereafter. At a meeting in September 2007, shareholders voted overwhelmingly to put the company into voluntary winding up. According to the evidence presented, the company was solvent.

part of the Australian law[10] covered a number of different procedures used to end a corporation's existence; that not all of those procedures required court supervision; and that the law addressed winding up of a company based on its insolvency, as well as grounds for winding up other than insolvency. The court took the view that the element of the definition in paragraph (a) of article 2, "pursuant to a law relating to insolvency", did not require the company to be either insolvent or contemplating using any provisions of the Australian law to adjust any debts.[11]

2. Elements of the definition of "Foreign proceeding"

13. To be recognized under the Model Law, a foreign proceeding must fall within the definition in paragraph (a) of article 2, which contains several elements. The proceedings should be (emphasis added):

(i) *Collective* judicial or administrative proceeding in a foreign State, including an interim proceeding,

(ii) Pursuant to *a law relating to insolvency*,

(iii) In which proceeding the assets and affairs of the debtor *are subject to control or supervision by a foreign court*,

(iv) *For the purpose of reorganization or liquidation*.

14. Paragraph (1) of article 16 creates a presumption with respect to the definitions of "foreign proceeding" and "foreign representative" in article 2. If the decision commencing the foreign proceeding and appointing the foreign representative indicates that the foreign proceeding is a proceeding within the meaning of paragraph (a) of article 2 and that the foreign representative is a person or body within the meaning of paragraph (d) of article 2, the court is entitled to so presume.

15. The courts have relied upon that presumption in several cases. In *Ernst & Young*, a Canadian court order appointing a receiver was recognized in the United States as a foreign proceeding under Chapter 15. Although the nature of the Canadian receivership was questioned, the United States court did not consider that issue, relying instead on the content of the Canadian order appointing the receiver.[12]

16. In the case of *Innua Canada*, the United States court also recognized a Canadian receivership as amounting to a foreign proceeding. Recognition was based on the Canadian court that had appointed the receiver declaring, in its order, that the receiver was the foreign representative of a foreign proceeding and specifically authorizing the receiver to seek recognition in the United States under Chapter 15.

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[10] Australian Corporations Act 2001 (Cth) — while chapter 5 of the Act deals with external administration, the relevant proceedings in *Betcorp* were commenced under part 5.5, which deals with voluntary winding up pursuant to a resolution of a company, where it is a requirement that the company is solvent.

[11] *Betcorp*, p. 282, see below, para. 28. It is relevant to note that the definition of a foreign proceeding in Chapter 15 of the United States Bankruptcy Code (which enacts the Model Law in the United States) includes, in addition to the words "law relating to insolvency", the words "or adjustment of debt".

[12] *Ernst & Young*, p. 776.

The United States court took the view that it was therefore entitled to apply the presumption in paragraph 1 of article 16 of the Model Law.[13]

17. The cases considering article 2 sometimes raise questions relating to only one or two of the requisite elements. This note discusses each of the elements separately, although it might be noted, as stated by the English appeal court in *Stanford International Bank* that, while each factor noted above has to be considered, the definition must be read as a whole.[14]

(a) Collective proceeding

18. The Guide to Enactment notes the requirement that creditors be involved collectively in the foreign proceeding,[15] rather than that the proceeding is one designed to assist a particular creditor to obtain payment. It is also noted that a variety of collective proceedings would be eligible for recognition "be they compulsory or voluntary, corporate or individual, winding-up or reorganization", and would include those where the debtor retained some degree of control over its assets, albeit under court supervision (e.g. debtor-in-possession, suspension of payments).[16] When discussed in the Working Group, it was noted that "a collective character involved representation of the mass of creditors".[17] The Working Group may recall that the Legislative Guide establishes various key objectives of an effective and efficient insolvency law, a number of which expand on the collective nature of insolvency proceedings.[18] The collective nature of different types of proceedings has been raised in several cases concerning requests for recognition of foreign proceedings under the legislation enacting the Model Law in different States.

19. In *Betcorp*, recognition in the United States of an administrative proceeding commenced under Australian law was granted on the basis that the proceeding satisfied the requisite aspect of a "collective" proceeding under Model Law because it considered the rights and obligations of all creditors and realized assets for the benefit of all creditors. The United States court noted that that conclusion was in contrast to, for example, a receivership remedy instigated at the request, and for the benefit of, a single secured creditor.[19]

20. In *Stanford International Bank*, on an application for recognition under the legislation implementing the Model Law in England, the English court held that a receivership order made by a court in the United States was not a collective proceeding pursuant to an insolvency law. The basis for that decision was that the order was made after an intervention by the United Securities Exchange Commission (SEC) "to prevent a massive ongoing fraud".[20] The court took the view that the purpose of the order was to prevent detriment to investors, rather than to

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[13] *Re Innua Canada Ltd*, quoted in *Stanford International Bank*, para. 80.
[14] *Stanford International Bank* (on appeal), para. 23.
[15] Guide to Enactment, para. 23.
[16] Id., para. 24.
[17] A/CN.9/422, para. 48.
[18] Legislative Guide, part one, paras. 3-13.
[19] *Betcorp*, p. 281.
[20] *Stanford International Bank*, para. 73.

reorganize the debtor or to realize assets for the benefit of all creditors. That view was upheld on appeal, largely for the reasons given in the English lower court.

21. In *Gold & Honey*, the United States court denied recognition to an Israeli receivership proceeding, finding that it was not an insolvency or collective proceeding as it did not require the receivers to consider the rights and obligations of all creditors. The court observed that the receivership was more akin to an individual creditor's action for repossession than it was to a reorganization or liquidation by an independent trustee, both of which are instituted by a debtor for the purposes of paying off all creditors with court supervision to ensure evenhandedness.[21]

22. In *British American Insurance*, the court concurred with the findings in *Betcorp* and *Gold & Honey* on the meaning of "collective proceedings". The court added that the word "collective" contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action. Notice to creditors, including general unsecured creditors, may play a role in this analysis. In determining whether a particular foreign action was collective as required, it was appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding as defined in, for example, orders of a foreign tribunal overseeing the action.[22]

23. In *Rubin v Eurofinance*, the appellate court noted that it was not in dispute that the proceeding was collective, but observed that it was a collective proceeding because it was concerned "with collecting and distributing the debtor's assets."[23] The court referred to another case in which it had been observed that insolvency, whether personal or corporate, was a collective proceeding to enforce rights and not to establish them.[24] The appellate court held that bankruptcy proceedings included various mechanisms [in this case dealing with the collective enforcement regime of the insolvency proceedings] which allowed the insolvency representative to bring actions against third parties for the collective benefit of all creditors. Those mechanisms are integral to and are central to the collective nature of bankruptcy and are not merely incidental procedural matters.[25]

(b) Pursuant to a law relating to insolvency

24. Preparatory documents indicate that this formulation was used to allude to the fact that liquidation and reorganization might be conducted under law other than, strictly speaking, insolvency law (e.g. company law).[26] It was approved by the Working Group as being "sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute in which they might be contained."[27]

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[21] *Gold & Honey*, p. 370.

[22] *British American Insurance*, p. 902.

[23] *Rubin v Eurofinance* (on appeal), para. 41.

[24] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26, [2007] 1 A.C. 508, Lord Hoffman, para, 15.

[25] *Rubin v Eurofinance* (on appeal), para. 61.

[26] A/CN.9/WG.V/WP.44, Notes to article 2(c), para. 2.

[27] A/CN.9/422, para. 49.

25. The question of what constitutes "a law relating to insolvency" has been considered by several courts, particularly in the context of determining whether a receivership proceeding is a foreign proceeding that would qualify for recognition.

26. In *Stanford International Bank*, the English court found that the United States proceeding initiated by the SEC did not qualify as a foreign proceeding as, amongst other things, it was not based on a law relating to insolvency.[28] The court said that the underlying cause of action which led to the making of the receivership order had nothing to do with insolvency and no allegation of insolvency featured in the SEC's complaint.[29] It went on to say that the fact that some receiverships may be classified for some purposes as "insolvency proceedings" or be treated as acceptable alternatives to insolvency did not mean that the receivership satisfied the requirements for a foreign proceeding under the Model Law.[30] The general body of common law or equitable principles which bear on the appointment of a receiver and the conduct of a receivership, the court said, was not a law relating to insolvency since it applied in many different situations, many of which had nothing to do with insolvency.[31]

27. On appeal, the presiding judge further considered the nature of a "law relating to insolvency", concluding that it did not have to be statutory (i.e. it could include the common law) nor did it have to be a law relating exclusively to insolvency. The first step, the court said, was "to identify the law under, or pursuant to which, the relevant proceeding was brought and then to consider whether that law related to insolvency and whether the other factors to which the definition [in article 2] refers could be regarded as being brought about 'pursuant' to that law."[32]

28. The presiding judge largely agreed with the reasoning of the lower court and added that the fact that a court may subsequently make orders which bring into force a process which can be recognized as an insolvency proceeding was immaterial unless and until it was done. The principles of the common law or equity did not "relate to insolvency" unless and until they were activated for that purpose.[33]

29. In *Betcorp*, the United States court noted that that element of the definition did not require the company to be either insolvent or to be contemplating using any provisions of the Australian law to adjust any debts. In reaching the conclusion that the Australian proceeding satisfied that part of the definition, the judge relied upon the comprehensive nature of the Australian companies law (under which the voluntary liquidation commenced) and an explanatory statement of the Australian Government that its company laws qualified under the Model Law. With respect to the first point, the court noted that the relevant law addressed the whole of the corporate life cycle of an Australian corporation and that Chapter 5, under which the provisions on voluntary liquidation were to be found, addressed corporate insolvency. With respect to the second point, the court made reference to the explanatory memorandum that accompanied the legislation implementing the Model

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[28] *Stanford International Bank*, para. 84.
[29] Id., para 84 (iii).
[30] Id., para. 84 (viii).
[31] Id., para. 84 (ix).
[32] *Stanford International Bank* (on appeal), para. 24.
[33] Id., para. 26.

Law in Australia, noting that such memoranda may be used by Australian courts in interpreting legislation passed by the Parliament. That memorandum made reference to the parts of Chapter 5 of the Corporations Act to be covered by the Model Law, as well as to parts that were to be excluded; since the part dealing with voluntary liquidation was not specifically excluded, the court concluded that such a liquidation would be covered by the Model Law.[34]

(c) Control or supervision of assets and affairs of the debtor by a foreign court

30. Other than noting that a foreign proceeding would include proceedings in which the debtor retained some measure of control over its assets, albeit under court supervision,[35] the Guide to Enactment does not define the level of control or supervision required to satisfy the definition or the time at which that supervision or control should arise. Preparatory documents suggest that this formulation was adopted to clarify the formal nature of the control or supervision requirement and make it clear that "private financial adjustment arrangements that might be entered into by parties outside of judicial or administrative proceedings [and which] could take a potentially large number of forms"[36] were not suitable for inclusion in a general rule on recognition. Several cases have considered some aspects of this requirement.

31. In *Gold & Honey*, the court took the view that both assets and affairs must be under the control or supervision of the courts. The court found that the receivers had proven that all of the debtor's assets present in Israel were under the control of the Israeli court in the receivership proceeding, but that there was no proof the receivers had been given authority with respect to the debtor's business affairs. Moreover, the lender (which had applied to have the receiver appointed) conceded in oral argument that the receivers were not provided with authority over the business affairs of one of the debtor entities.[37]

32. In *Betcorp*, the United States court took the view that the requirement for supervision or control by a foreign court was met by the administrative or judicial oversight of the liquidators responsible for administering the collective proceeding on behalf of all creditors. The authority responsible for the general supervision of liquidators in the performance of their duties could require liquidators to obtain permission before undertaking certain actions and had the ability to remove or

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[34] *Betcorp*, pp. 281-282. The explanatory memorandum also quoted the last sentence of paragraph 71 of the Guide to Enactment which refers to "companies in severe financial distress" (Chapter 2, para 12 of the explanatory memorandum) — see above, para. 9. The explanatory memorandum is available at www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0C4BA8C26A7BE888CA2573EF00117EAC/$file/13020811.pdf. A discussion paper issued for the purposes of considering adoption of the Model Law in Australia took a different view, noting that: "In the Australian Corporations Act context, […] the scope of the Model Law would extend to liquidations arising from insolvency, reconstructions and reorganisations under Part 5.1 and voluntary administrations under Part 5.3A. It would not extend to receiverships involving the private appointment of a controller. It would also not extend to a members' voluntary winding up or a winding up by a court on just and equitable grounds as such proceedings may not be insolvency related." CLERP 8 (2002), p. 23, available at www.treasury.gov.au/documents/448/PDF/CLERP8.pdf.

[35] Guide to Enactment, para. 24.

[36] A/CN.9/419, para. 29.

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

revoke the authority of any person to be a liquidator. On that basis, it was found to be an "authority competent to control or supervise a foreign proceeding for the purposes of the definition of 'foreign proceeding'".[38] Reference was made to the case of *Tradex Swiss*, in which the Swiss Federal Banking Commission was held to be a foreign court under Chapter 15 because it controlled and supervised the liquidation of securities brokers, such as the debtor. In the alternative, the *Betcorp* court held that the winding up proceedings was also subject to supervision by the courts, since the liquidator or any creditor could have recourse to the court to seek determination of any question arising in the liquidation and the court could take any action it thought fit with respect to the actions of a liquidator. The requirement for control or supervision by a foreign court could also be satisfied on that basis.[39]

33. In *Multicanal*, a case not decided under the Model Law but involving recognition of an Argentinean proceeding in the United States, the court considered the involvement of the court in a debt restructuring agreement. The basic contention was that the court's oversight of the proceeding was inadequate for purposes of recognition because it was brought into the process only after the solicitation of votes was over and it was only authorized to consider limited aspects of the proceedings, such as whether the statement of assets and liabilities of the debtor was adequate and whether the statutory majorities had been obtained in the voting process. After analysing the Argentinean process in detail, the court concluded that it bore many similarities to an analogous United States proceeding, including with respect to judicial oversight, and was the type of proceeding that could be recognized under United States law.[40]

34. A further issue arising under this part of the definition and under the definition of "foreign representative" is whether the particular entity administered by a foreign representative is a "debtor" for the purposes of the domestic law to be applied by the receiving court, that term not being defined in the Model Law.

35. A question of that type arose in *Rubin v Eurofinance*. In that case, receivers and managers had been appointed by the United States court over a debtor referred to as "The Consumers Trust". A trust of that description was recognized as a legal entity, a "business trust", under the law of the United States. On a recognition application to the English Court, it was argued that since English law did not recognize such a trust as a legal entity, it was not a "debtor" for the purposes of recognition under legislation enacting the Model Law. The judge rejected that submission holding that, having regard to the international origins of the Model Law, a "parochial interpretation" of the term "debtor" would be "perverse".[41]

(d) For the purposes of liquidation or reorganization

36. The cases that have considered this issue are those involving appointment of receivers, where the question concerns the purpose of the foreign proceeding and whether the powers accorded the receiver are consistent with the conduct of liquidation or reorganization.

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[38] *Betcorp*, p. 284.

[39] Id.

[40] *Multicanal*, p. 509.

[41] *Rubin v Eurofinance*, paras. 39 and 40; affirmed on appeal.

37. In *Stanford International Bank*, the lower court considered that in determining whether the United States receivership was a foreign proceeding within the requirements of article 2, it was important to consider the actual powers and duties conferred or imposed on the receiver by the United States court order. Citing the example of *Gold & Honey*, the court said that the label of foreign receivership was hardly determinative of recognition issues. The court found that the recited purpose of the receivership order was to prevent dissipation and waste, not to liquidate or reorganize the debtors' estates; the detriment that the court was concerned to prevent was detriment to investors; the powers conferred on and duties imposed on the receiver were duties to gather in and preserve assets, not to liquidate or distribute them; and under the order the receiver had no power to distribute assets of the defendants.[42] Cumulatively, those findings led the court to conclude the proceeding was not a foreign proceeding. On appeal, the presiding judge took the view, as noted above, that at the stage at which the application was considered, the SEC proceeding was not for reorganization or liquidation, but rather for the protection of investors and the assets of the debtor. The fact that the United States court could subsequently make orders that would bring into force a process which could be recognized as an insolvency proceeding was immaterial unless and until it did so.[43]

(e) Issues for consideration

38. The Working Group may wish to consider the issues raised by the cases cited above with respect to the definition of a "foreign proceeding", including:

(a) Whether a foreign proceeding needs to satisfy all of the elements of the definition in order to qualify for recognition;

(b) Whether criteria should be established to determine what constitutes a collective proceeding, the extent to which the Legislative Guide might be relevant in establishing those criteria, and whether proceedings that are not collective should be eligible for recognition;

(c) Whether insolvency or financial distress is an element of the definition of "foreign proceeding" and thus required for recognition;

(d) The degree of control or supervision of the assets and affairs of the debtor by a foreign court required to satisfy the definition;

(e) The time at which the proceeding should be for the purpose of liquidation or reorganization — at the time of the application for recognition or at a later point if there is a possibility of an additional grant of powers; and

(f) Whether there is a need to define what constitutes a debtor for the purposes of the Model Law.

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[42] *Stanford International Bank*, para. 84.

[43] *Stanford International Bank* (on appeal), para. 26.

C. Uniform interpretation and international origin — article 8

(a) Meaning of article 8

39. Article 8 of the Model Law provides that in interpreting the text, regard is to be had to its international origin and the desirability of promoting uniformity. The Guide to Enactment notes that a provision similar to article 8 appears in a number of private-law treaties, including those of the United Nations and in model laws, including those of UNCITRAL.[44] The importance of Article 8 to interpretation is noted in the decisions of a number of courts.

40. In *Bear Stearns*, for example, the court noted that "Chapter 15 also directs courts to obtain guidance from the application of similar statutes by foreign jurisdictions: '[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.'"[45] In *Stanford International Bank*, the appellate court noted that "The regulation implementing [the Model Law] requires that it be interpreted by reference to any documents of the working group of the UN which produced it and the Guide to its enactment prepared in response to the request for its preparation made by the UN Commission on International Trade in May 1997."[46] The appellate court in *Rubin v Eurofinance* took the view that the striking similarities between certain aspects of the English and United States law justified a harmonized interpretation.[47]

41. In *Betcorp*, the United States court stated that section 1508 of Chapter 15 required that in interpreting phrases such as "centre of main interests" the court "shall consider" how those phrases have been construed in other jurisdictions which have adopted similar statutes, which meant "looking not only at domestic cases, but also at cases decided by the courts of other countries." As stated in the [United States] legislative history: "[n]ot only are these sources persuasive, but they advance the crucial goal of uniformity of interpretation."[48] As noted above, (para. 28), the *Betcorp* court took notice not only of cases decided by other courts, but also of various background and explanatory documents relating to the foreign law.

(b) Issues for consideration

42. The Working Group may wish to consider whether further guidance might be provided on the sources to be used to provide assistance on interpretation of the Model Law under article 8.

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[44] Guide to Enactment, para. 91.

[45] *Bear Stearns*, p. 10.

[46] *Stanford International Bank* (on appeal), judgement of the Chancellor, para. 4; see also *Rubin v Eurofinance*, para. 40.

[47] *Rubin v Eurofinance* (on appeal), para. 60.

[48] *Betcorp*, p. 289.

D. Recognition

1. Public policy exception — article 6

(a) Interpretation of article 6

43. Article 6 of the Model Law provides an exception to recognition of a foreign proceeding where to do so would be "manifestly contrary to the public policy" of the receiving State. The Guide to Enactment indicates that generally this exception should be interpreted restrictively and that it is only intended to apply in exceptional circumstances concerning matters of fundamental importance to the enacting State.[49] Discussion at the thirtieth session of the Commission confirmed that the article was intended to refer only to fundamental principles of law, in particular constitutional guarantees and individual rights, and should only be used to refuse, for example, the application of foreign law, where to do so would contravene those fundamental principles. It was noted, for example, that if the courts were to apply their broad "domestic" notion of public policy, "very few foreign judicial decisions would ever be recognized since most foreign proceedings would, in one or other aspect, depart from procedures which, internally, constituted matters governed by imperative rules."[50] The word "manifestly" was used to avoid a situation where cooperation under the Model Law was frustrated because a particular step or measure was seen to be contrary to a mere technicality of a mandatory nature.[51]

44. In the case of *Ephedra*, involving recognition of a Canadian proceeding in the United States, the inability to have a jury trial on certain issues to be resolved in the Canadian proceedings, in circumstances where 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 court ruled that the exception should be narrowly interpreted and restricted to the most fundamental policies of the United States.[52]

45. In *Ernst & Young*, the parties objecting to recognition of the Canadian receivership in the United States raised two arguments related to the public policy exception. Initially, they contended that Colorado investors (or more broadly, United States investors) were likely to receive less in the Canadian receivership proceeding, which would include creditors from Canada and Israel, than what they would receive from the Colorado court or the Federal Court. However, the court was not persuaded by that argument on the basis that all wronged investors should share in the assets accumulated in the receivership proceeding, regardless of nationality or locale.[53]

46. Second, the objecting parties argued that the costs associated with the Canadian receivership proceeding would deplete the assets of the debtors to such a degree that distributions to the wronged investors would be minimal. However, other than pointing out the receiver was an international firm, the objecting parties provided no evidence to support that allegation. The United States court took the

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[49] Guide to Enactment, paras. 86-89.
[50] A/52/17, para. 171.
[51] Id., para. 172.
[52] *Ephedra*, pp. 336-337.
[53] *Ernst & Young*, p. 781.

view that costs of liquidation were a reality, whether the proceeding was local or foreign. As a result, it could find no evidence to support a conclusion that the receivership proceeding would produce a result so drastically different as to be "manifestly contrary" to United States public policy.

47. In *Gold & Honey*, a United States court refused recognition of Israeli proceedings on public policy grounds. After Chapter 11 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 same debtor company. The United States judge declined to recognize that Israeli proceeding "because such recognition would reward and legitimize [the] violation of both the automatic stay and [subsequent orders of the United States court] regarding the stay".[54] Because recognition would severely hinder the ability of the United States court 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"[55] — the judge considered that the high threshold required to establish the public policy exception had been met.

48. In *Metcalfe and Mansfield*, in addition to recognition, the Canadian foreign representative sought enforcement of certain Canadian orders in the United States, pursuant to the law applicable to enforcement of foreign judgements, the principles of international comity and the public policy embodied in Chapter 15. No objection was made to recognition of the Canadian proceedings. Citing *Bear Stearns*, the court noted that while recognition turned on the objective criteria of the United States equivalent of article 17 of the Model Law, post-commencement relief was largely discretionary and turned on subjective factors that embodied principles of comity. The court decided the relief granted in the foreign proceeding and the relief available in a United States proceeding need not be identical. The key determination required by the court was whether the procedures used in Canada met the United States fundamental standards of fairness. The court concluded that the provision in Chapter 15 equivalent to article 6 did not preclude giving comity to the Canadian orders in this case.[56]

49. An issue that has attracted some attention is whether the public policy exception might be used to address, for example, a problem of forum shopping which has resulted in the debtor being placed in a more favourable position, with consequential prejudice to creditors, or to address behaviour contrary to the law of the recognizing State. In a case not decided under the Model Law, but relating to *Stanford International Bank*, a Canadian court found that the behaviour of the Antiguan liquidators, who were seeking recognition in Canada, contravened Canadian law. That disqualified them from acting and from presenting their application for recognition of the Antiguan proceeding in Canada.[57]

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

[55] Id., p.372.

[56] *Metcalfe and Mansfield*, pp. 697-698.

[57] In the case of the Bankruptcy of Stanford International Bank, 11 September 2009, Superior Court, District of Montreal, Quebec, decision on the application of the liquidators, para. 59.

(b) Issues for consideration

50. The Working Group may wish to consider the following questions with respect to use and interpretation of the public policy exception in article 6:

(a) Whether elaboration of the circumstances in which the public policy exception might be implemented by a court addressing issues of recognition under the Model Law would assist interpretation and application of that article; and

(b) Whether in cases where an applicant requesting relief under the Model Law has contravened a country's established laws or procedures, that contravention could be a basis for denial of recognition under the public policy exception.