



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 52

Cross-Border Insolvency
Should New Zealand adopt
the UNCITRAL Model Law on
Cross-Border Insolvency?

February 1999
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Report/Law Commission, Wellington, 1999

ISSN 0113–2334 ISBN 1–877187–29–1

This report may be cited as: NZLC R52

Also published as Parliamentary Paper E 31AM

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18 February 1999

Dear Minister

I am pleased to submit to you Report 52 of the Law Commission, *Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency?*

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Tony Ryall
Minister of Justice
Parliament Buildings
Wellington

Preface

IN OCTOBER 1997 the Law Commission started a new project on the subject of international trade with the project's first report, *Electronic Commerce Part One: A Guide for the Legal and Business Community* (NZLC R50) released a year later. This is the second report dealing with such issues. It asks the question whether New Zealand should adopt the UNCITRAL Model Law on Cross-Border Insolvency. The Commission brought forward its work on cross-border insolvency to reflect the fact that there have been financial crises in Asia which were likely to impact adversely on New Zealand businesses engaged in trade with countries in that region. More cross-border insolvency cases are likely to arise and it is important that New Zealand have laws which are both modern and able to deal effectively and efficiently with cross-border insolvency problems.

We are grateful to the Ministry of Commerce and the Reserve Bank of New Zealand for the assistance they have provided as well as to Sachin Zodgekar of Chapman Tripp Sheffield Young, Wellington, who provided assistance with the chapter on banking issues. Further, we wish to acknowledge particular assistance by way of peer review from the Rt Hon Justice Blanchard of the Court of Appeal; PD McKenzie, Barrister, Wellington; and Michael Ross, a Senior Lecturer in Law at the University of Auckland. We also acknowledge assistance from overseas reviewers: RG Marantz QC of Toronto (current President of INSOL International); Professor Jay Westbrook of the University of Texas at Austin; Daniel Glosband, Goodwin Procter and Hoar, Boston, USA; Gabriel Moss QC of London, England; Associate Professor Rosalind Mason of the University of Southern Queensland, Toowoomba; Michael Steiner of Denton Hall, Solicitors, London; and the Hon Justice RH Zulman of the Supreme Court of Appeal of South Africa. All of these people have extensive experience, both academic and practical, in the area of cross-border insolvency and their assistance has been gratefully received. In addition, we acknowledge the assistance of Chief Judge Burton R Lifland of New York who provided valuable guidance at a practical level on the cross-border insolvency problems encountered by the Bankruptcy Court of the Southern District of New York.

We also express appreciation to the Joint Insolvency Committee established by the New Zealand Law Society and the Institute of Chartered Accountants of New Zealand for the assistance (by way of debate on points of principle) which it has given on our proposals. A list of all persons who have assisted us appears in the acknowledgements. Draft legislation was drafted by Vivienne Wilson, formerly of the Parliamentary Counsel Office and now an associate in the Wellington office of Simpson Grierson.

The Commissioner in charge of the International Trade Law project is DF Dugdale. Paul Heath QC of Hamilton, a consultant to the Law Commission on commercial law matters, has been responsible for overseeing preparation of this report. Megan Leaf, a researcher at the Law Commission, has undertaken the research on which the report is based.

Executive summary

E1 **I**N THIS REPORT WE CONSIDER whether the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Cross-Border Insolvency (the Model Law) is a suitable framework for New Zealand to adopt to deal with cross-border insolvency issues. Only recently has the understanding that a bankruptcy system is central to fundamental economic reform risen to an international level, focusing attention on the problem of cross-border insolvency. As Professor Westbrook has pointed out:

Just as automotive enthusiasts rarely rave about radiators, bankruptcy is not often a major topic in the discussion of economic development and globalization – until the engine boils over. Recent developments, in particular the adoption of a Model Law on Cross-Border Insolvency by the United Nations Commission on International Trade Law . . . , demonstrate a dramatically increased awareness of this problem and provide a stimulus to look ahead to the next evolution. (Westbrook 1998, 28)

E2 This report:

- First, introduces the issues which arise in a cross-border insolvency and examines factors which influence a state's approach to the determination of such issues (chapter 1).
- Second, considers current New Zealand domestic law in the context of cross-border insolvency issues (chapter 2).
- Third, considers factors in favour and against reform of cross-border insolvency law with a view to determining whether New Zealand should or should not adopt the Model Law (chapter 3).
- Fourth, provides information on how the Model Law came into existence and then considers the provisions of the Model Law both in the context of the New Zealand legislative environment and the global and trading environment in which New Zealand operates (chapter 4).
- Fifth, considers discretely the question whether registered banks should be subject to the provisions of the Model Law (chapter 5).

- E3 We have identified three factors in favour of reform which we consider in this report. Those factors are:
- Globalisation factors: these factors arise from the need to synthesise international commercial law given the nature of the global markets in which trading entities operate.
 - Fiscal factors: these factors impinge upon policy reasons for not discriminating against foreign investors or lenders.
 - Efficiency and fairness factors: these factors go to the process by which relief can be sought when cross-border insolvency issues arise.
- E4 We have identified two factors which militate against reform:
- Adequacy of existing legislation: if our existing legislation is adequate, there may be no need to reform the law.
 - Sovereignty factor: this factor goes to the question whether it is appropriate for New Zealand to adopt an international regime rather than a domestic regime which may better suit or protect its citizens.
- E5 As Kenichi Ohmae notes in the preface to *The Borderless World*, “Nothing is overseas any longer” (Ohmae 1990, viii). A borderless economic world has developed which, at present, must be regulated by states whose jurisdiction is limited by their sovereign territorial boundary. It is necessary to strike a balance between the need for sovereign states to regulate economic activity within their territorial boundaries and the need to create a stable environment in which international trade and commerce can operate. This need for New Zealand to respond to global trade issues has been highlighted recently in our report *Electronic Commerce Part One: A Guide for the Legal and Business Community* (NZLC R50) and in the 1998 paper issued by the Ministry of Commerce, “The ‘Freezer Ship’ of the 21st Century: Government Statement on Electronic Commerce”.
- E6 A cross-border insolvency arises when an insolvent entity is placed in a form of insolvency administration in one state but has assets or debts in other states. The domestic insolvency laws of each state are likely to be different. Nevertheless, the administrator of the formal insolvency regime has a duty to realise assets of the insolvent entity for the benefit of all creditors of that entity, subject to any applicable domestic insolvency laws to the contrary.
- E7 New Zealand has a high degree of foreign investment (both equity and debt) and is heavily dependent upon exports for income. Thus, at a practical level, it is likely that New Zealand entities will

become more and more embroiled in cross-border insolvencies. In our view, it is preferable for the government to enact modern cross-border insolvency laws *before* major problems occur.

- E8 Economic analysis stresses the need for fair treatment of foreign creditors (Bebchuk and Guzman 1998, 19–23). One of the issues that an investor must address before making a major investment overseas is the ability, if things turn sour, to recover money. If the state in which the investment is made allows its creditors to be given preference over foreign creditors or, alternatively, makes or appears to make it difficult for foreign creditors to receive a just dividend, the investment may not proceed or, if it does, the price to be paid by way of interest may be inflated.
- E9 The Model Law seeks to provide uniformity of approach to the initiation of cross-border insolvency proceedings while allowing for flexibility of approach, on a case-by-case basis, to the finding of solutions. For instance, local parties are given the option of retreating to the familiar territory of a local proceeding: this was seen as a political necessity, accepted as part of the UNCITRAL process, to accommodate concerns about potentially over-intrusive foreign proceedings dominating local insolvency systems (Glosband and Tobler 1998, 12).
- E10 We have come to the view that the factors in favour of reform outweigh those against adoption. We have also come to the view that the Model Law, representing the accumulated wisdom of experienced practitioners who have been involved in major cross-border insolvency proceedings, represents the appropriate way to reform New Zealand law and should be adopted accordingly. We have summarised our reasons for reaching these conclusions in the main text of this report (see para 112–117).
- E11 We do, however, recommend that registered banks which are subject to the statutory management procedure established by the Reserve Bank of New Zealand Act 1989 should be excluded from the Model Law's application. In our view statutory management of a registered bank should only be commenced when there is potential systemic risk to the New Zealand financial system. Such a problem should be dealt with within New Zealand alone. A minor amendment has been recommended to s 118 of the Reserve Bank of New Zealand Act 1989 (see chapter 5).
- E12 We also recommend that when a public policy issue is raised as a reason to refuse assistance to a foreign representative, the High Court (being the court we consider should have jurisdiction) should, before refusing relief, consider whether it is necessary to

serve the Solicitor-General with the proceedings. By serving the Solicitor-General with the proceedings, the court will be able to receive argument on the public policy point and, perhaps more importantly, will have a party before it who can provide relevant evidence on the public policy objection.

- E13 The draft legislation which we have prepared provides that the Act will come into force on a date to be appointed by the Governor-General by Order-in-Council. It is envisaged that the draft Act will not be brought into effect until such time as the New Zealand Government is satisfied that the Model Law has been or is about to be enacted by a number of states with which New Zealand has major trading relationships. This is appropriate because:
- first, enactment per se of the Model Law will show that New Zealand is committed to an international approach but,
 - second, it will be unnecessary to repeal existing legislation until such time as the new legislation can be invoked in an international setting.
- E14 We recommend that the Model Law be enacted in terms of the draft legislation we have set out. We have provided an appropriate commentary to our draft legislation. That commentary should be read in conjunction with the commentary contained in the UNCITRAL Secretariat's *Guide to Enactment of the Model Law* which is reproduced in the appendix to this report using the same paragraph numbers used in the Guide. We have also provided a reference table so that readers can identify precisely what portions of the report deal with specific articles in the Model Law (see reference table on page xvi).
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Acknowledgements

THE COMMISSION WISHES TO THANK the following people and organisations for their contribution to this report:

Rt Hon Justice Blanchard of the Court of Appeal
of New Zealand

Mark Carruthers, Ministry of Commerce, Wellington

Daniel Glosband, Goodwin Proctor and Hoar, Boston, USA

Joint Insolvency Committee established by the New
Zealand Law Society and the Institute of Chartered
Accountants of New Zealand

Peter Ledingham, Reserve Bank of New Zealand

Chief Judge Burton R Lifland, Second Circuit Court of
Appeals and Bankruptcy Court of the Southern District of
New York, USA

R Gordon Marantz QC, President of INSOL International,
Toronto, Canada

Associate Professor Rosalind Mason, University of Southern
Queensland, Toowoomba

Peter McKenzie, Barrister, Wellington

Gabriel Moss QC, London, England

Peter Mumford, Ministry of Commerce, Wellington

Michael Ross, Senior Lecturer in Law, University of
Auckland

Mark Steel, Ministry of Commerce, Wellington

Michael Steiner, Denton Hall, London

Professor Jay L Westbook, University of Texas
at Austin, USA

Vivienne Wilson, Simpson Grierson, Wellington

Sachin Zodgekar, Chapman Tripp Sheffield Young,
Wellington

Hon Justice RH Zulman of the Supreme Court
of Appeal of South Africa

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1

Introduction

Insolvency law is the root of commercial and financial law because it obliges the law to choose. There is not enough money to go around and so the law must choose whom to pay. The choice cannot be avoided or compromised or fudged. The law must always decide who is to bear the risk so that there is always a winner and a loser. On bankruptcy it is difficult to split the difference. That is why bankruptcy is the most crucial indicator of the attitudes of a legal system and arguably the most important of all legal disciplines. (Wood 1995, 1)

1 **A** CROSS-BORDER INSOLVENCY ARISES when an insolvent entity has assets or debts in more than one state.¹ When a cross-border insolvency involving New Zealand arises there are two possibilities: first, a New Zealand court may seek assistance from a foreign court for the purpose of enabling an insolvency administrator in New Zealand to fulfil duties under New Zealand law; second, a foreign court might seek assistance from a New Zealand court for similar purposes. In both situations there are three distinct aspects: first, the procedure by which assistance is sought; second, the substantive law which will apply in determining whether assistance will be given; and third, if the court decides to give assistance, the substantive law which will be applied in determining the nature and extent of the assistance.

2 Many cross-border insolvency cases before the courts over the last ten or so years have arisen out of commercial fraud perpetrated out of the ability to process in seconds huge numbers of high unit transactions transferring large amounts of money from one financial centre to another (Goode 1987, 435–436; also Cooper 1998, 2). Indeed, relatively recently Lord Millett (as he now is) was moved to say that “[i]nternational fraud is a growth business” (Millett 1991, 71).

3 Lest the statement made by Lord Millett be regarded as an exaggeration one can point to cases arising out of the aftermath of the collapse of companies such as Maxwell Communications Cor-

¹ We utilise the word “state” as it is the terminology used by the UNCITRAL Model Law on Cross-Border Insolvency and because cross-border insolvency issues may arise not only between different countries but also between different states within a federal system.

poration plc: *Re Maxwell Communications Corporation plc* [1992] BCC 757; Bank of Credit and Commerce International SA: *Re Bank of Credit and Commerce International SA* [1992] BCC 83, and Barings Bank (see Miyake 1996, 238). Closer to home, the collapse of certain companies had cross-border implications for companies left insolvent as a result of fraudulent activities, for example, Equiticorp Industries Group Limited: *Equiticorp Industries Group Limited (In Statutory Management) v The Crown (No 2)* [1996] 3 NZLR 685; (*No 51*) [1996] 3 NZLR 690; (*No 47*) [1998] 2 NZLR 481; and Cory-Wright and Salmon Limited: *Grayburn v Laing* [1991] 1 NZLR 482.

- 4 The increasing ease with which major fraud can be perpetrated increases the likelihood of cross-border insolvency problems and provides an incentive for developing modern cross-border insolvency laws. It would be wrong to wait for cross-border insolvencies to become commonplace before considering legislation.
- 5 When a New Zealand business enterprise is put into a formal insolvency regime the administrator of the regime may need assistance from a foreign court to realise assets in the foreign jurisdiction for the benefit of New Zealand creditors.² In doing so, it will be necessary for the insolvency administrator to consider the law of the state from which aid is sought: the substantive insolvency law of that state is likely to affect the extent to which specified creditors are entitled to obtain priority payment out of assets situated in their country.
- 6 When the administrator of an insolvent business enterprise situated in another state seeks assistance from a New Zealand court to gain the benefit of assets situated in New Zealand, similar considerations apply. Such considerations will affect the question of whether, and if so to what extent, assistance should be given by a New Zealand court. Cases will vary enormously in type. At one end of the scale are cases where a foreign representative simply seeks to close a bank account in New Zealand and to repatriate funds for distribution among creditors in circumstances where there are no competing creditors in New Zealand. At the other end of the scale can be a case in which there are many creditors in New Zealand and

² Although we use the term “business enterprise”, a non-trading individual or corporation is subject to the same considerations; we restrict consideration to trading entities for practical reasons only. For a summary of formal insolvency regimes see *Laws NZ*, Insolvency, para 3.

the decision whether New Zealand creditors will be paid in full or will be paid a dividend of, say, 20 cents in the dollar will turn on whether the funds are repatriated to the foreign insolvency representative for the purpose of distribution among all, rather than only the New Zealand, creditors.

THE MODEL LAW ON CROSS-BORDER INSOLVENCY

- 7 When cross-border insolvency issues arise there is an obvious public interest in ensuring procedures are in place to allow the claims to be determined both efficiently and in accordance with principle. A framework for doing so has been established by the United Nations Commission on International Trade Law (UNCITRAL) in its *Model Law on Cross-border Insolvency* (referred to in this report as the Model Law), approved by the General Assembly of the United Nations in May 1997. The Model Law is accompanied by a *Guide to Enactment* (referred to as the Guide) produced by the Secretariat of UNCITRAL. The Model Law and the Guide are reproduced in the appendix to this report for ease of reference. The Model Law and the Guide, as well as papers of the Working Group on Insolvency can be found at www.un.or.at/uncitral/english/sessions/index.htm or www.un.or.at/uncitral/english/bibliography/consolid.htm. It is intended that the comments made in the text of this report supplement the comments contained in the Guide. The paragraph numbers in the appendix are those used in the Secretariat's Guide.
- 8 The Model Law is essentially procedural in nature. It enables local assets to be governed by local law yet does not attempt to unify the substantive insolvency law of individual states. Nor does it require reciprocity in the jurisdiction in which the proceedings originated as a condition of making an order. It is conceivable that a requirement of reciprocity might arise out of case law, particularly if courts in one state interpret the provisions of the Model Law more restrictively than courts in other states.
- 9 Article 7 of the Model Law envisages that a court may make an order either under the Model Law or under some alternative cross-border insolvency law in force in the state in question. In essence, this gives the court power to choose an appropriate remedy: a New Zealand court does not presently have that option. In broad terms, however, the position is not dissimilar from that which currently applies when a creditor (who may have dissented at a meeting of creditors) seeks an order of adjudication in bankruptcy against an individual who, contemporaneously, is seeking approval of a Pro-

posal filed under Part XV of the Insolvency Act 1967. The court, in determining which order is more appropriate in the circumstances, effectively chooses between two available and alternative remedies. The most appropriate remedy to fit the circumstances will be chosen by the court. We discuss whether it is appropriate to have parallel remedies on the statute book later (see paras 53 and 114–117).

- 10 Because the Model Law is essentially procedural in nature it is unnecessary for us to consider the substantive domestic insolvency law of either New Zealand or other states. It is fair to say, however, that if the Model Law is adopted, there will be a degree of shift in the domestic law of New Zealand towards what might be described as a more universalist approach to cross-border insolvency. What is meant by that shift is discussed in paras 13–19.
- 11 Bebchuk and Guzman pointed out in the National Bureau of Economic Research working paper, “An Economic Analysis of Transnational Bankruptcies”, that a state could benefit from a territorial approach but that the benefits of that approach were limited to domestic creditors:

Our results show . . . that a territorialist country can benefit from territorialism if we assume that investment carries with it positive spillovers such as employment, technology, taxes, and so on. The losers – the ones who pay for the benefits gained by the territorialist country and the dead weight loss that is generated – are foreign firms.

In light of the above finding, we are able to draw certain conclusions about the “political economy” that is at work. Territorialism is inefficient and reduces global welfare, but each country acting individually, has an incentive to adopt a territorialist regime. This highlights the need for a reciprocity requirement or, ideally, international treaties on the subject. (Bebchuk and Guzman 1998, 4)

- 12 On the other hand, a universalist approach will provide more incentive for foreign firms to invest as investment decisions can be made safely on the assumption that all creditors will be treated equally in insolvency (Bebchuk and Guzman 1998, 18).

INSOLVENCY LAW IN AN INTERNATIONAL CONTEXT

- 13 By way of background, it is necessary to consider insolvency law in an international context and to describe the competing theories which have influenced the approach of particular laws enacted in various states to cross-border insolvency issues.

- 14 There has been debate internationally for many years over whether a bankruptcy has universal application or whether its application is limited to the place of adjudication. Those competing theories are known as the “universality” and “territorial” theories of bankruptcy laws. Out of that debate a third theory emerged which is known as “modified universality”.
- 15 As long ago as 1764 it was held in *Solomons v Ross* (1764) 1 H Bl 131n that the doctrine of “ubiquity of bankruptcy” was part of English law.³ Subsequently – and contrary to the doctrine of ubiquity – it was held that a discharge in bankruptcy in another jurisdiction did not release that party from liability in respect of a contract made and to be performed in England: *Re United Railways of The Havana and Regal Warehouses Ltd* [1957] 3 All ER 641, citing *Anthony Gibbs and Sons v La Societe Industrielle et Commercial des Metaux* (1890) 25 QBD 399 (CA).
- 16 In a scholarly analysis of the competing theories Nadelmann noted (in 1946) that:

Beginning with Savigny, who relied on Story for his information, the supporters of the theory that bankruptcy declared at the domicile of the debtor must be recognised everywhere, have referred to the position taken by the English Courts [in *Solomons v Ross*]. Objection to the doctrine of ubiquity, on the other hand, led to the refusal of the Courts in the United States to follow *Solomons v Ross*. (Nadelmann 1946, 154)

The United States and modified universalism

- 17 The United States abandoned notions of “territorialism” in favour of what has been described as “modified universalism” (Westbrook 1991, 499). As Phillip Smart observes in his seminal treatment of the subject:

Yet while a foreign bankruptcy might vest movables in England in the foreign assignee, English law has never adopted the doctrine of the unity of bankruptcy [under which only one set of proceedings, given effect everywhere, is permitted]. In other words, and as was perhaps only to be expected, the pragmatic English judiciary rejected theoretical extremes: neither the strict territorial approach nor the unity of bankruptcy was accepted. Thus even now English rules of cross-border insolvency permit a plurality of insolvency proceedings yet, at

³ See also *Folliott v Odgen* (1789) 1 H Bl 123, *Jollet v Deponthieu* (1769) 1 H Bl 132n and *Neale v Cottingham* (1770) 1 H Bl 132n. For a case of even older vintage see *Mackintosh v Ogilvie* (1747) 3 Swans 380n.

the same time, recognise that a foreign adjudication may have significant consequences within the United Kingdom. (Smart 1991, ix)

We believe that the Model Law can be correctly characterised as an example of “modified universalism”.

- 18 In the United States, Congress established the National Bankruptcy Review Commission to consider a variety of law reform issues affecting bankruptcy law in the United States.⁴ The Commission reported in October 1997 releasing a report entitled *Bankruptcy: The Next Twenty Years*. The Commission opened its discussion on cross-border insolvency with the following observations:

Although there is widespread agreement that the globalization of trade and enterprise requires a coordinated approach to international bankruptcy, the field of bankruptcy law (or, as most of the world calls it, “insolvency law”) has remained steadfastly parochial. “Territorialism” or the “grab rule” has prevailed since time immemorial. When a person or a company with international operations falls into serious financial trouble, each country employs its insolvency laws to grab local assets and administer them locally according to the procedures and priorities of that country’s laws. Even where no local proceeding is opened, the delay and expense of obtaining local judicial cooperation with a foreign insolvency proceeding encourages debtors to conceal assets in foreign caches and prevents realization of full value for assets that are recovered. (*Bankruptcy: The Next Twenty Years*, 353)

- 19 Five major disadvantages of a territorial approach were identified at pages 353–354 of the report:
- Reorganisation of an enterprise is difficult or impossible because each uncoordinated local proceeding focuses on maximising returns for local creditors rather than the total pool of creditors.
 - Even in a liquidation, realisations of greater value can be achieved if national borders are ignored. For example, a division of a company may have manufacturing and distribution facilities in several countries with each division being saleable for a higher price as a unit than would be received for each bundle of assets in each state. Nevertheless, existing laws make it very difficult to sell assets in multinational packages.
 - While virtually all national insolvency laws endorse the principle of equality of distribution to creditors, territorialism produces highly unequal results. Apart from differing priority rules in different countries, distributions depend on assets seizable

⁴ Generally, see the Report of the National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* (Washington DC, 1997).

in each state at the time of bankruptcy. Thus, there is an element of luck as to the quantum of dividend that is recovered in any particular jurisdiction. Because a few, very sophisticated, international creditors may collect in several proceedings and do very well, while most smaller creditors cannot afford to “play that game”, the results are arbitrary and unpredictable. Such unpredictability creates increased transaction costs in international financing.

- Shrewd debtors can exploit modern technology to move assets rapidly from one jurisdiction to another and to transfer assets to insiders or preferred creditors in other countries. Because recognition of foreign insolvency proceedings and co-operation with those proceedings is so cumbersome in most countries, it becomes very difficult for administrators or liquidators to pursue and capture the assets for the benefit of all creditors.
- Although overt discrimination against foreign creditors is relatively rare, they often receive little or no real notice of insolvency proceedings in another jurisdiction and too often suffer de facto discrimination in those proceedings.

Comity

20 Procedural differences exist between jurisdictions which are based on the common law and those which have a civil law base. In the common law jurisdictions the doctrine of comity will apply to assist insolvency administrators appointed in one jurisdiction to gain recognition in other jurisdictions. In civil law jurisdictions the process of *exequatur* is used to similar effect.⁵ In the introduction to the *Guide to Enactment*, those involved in formulating the Model Law recognised that approaches

based purely on the doctrine of comity or on the *exequatur* do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as the one contained in the Model Law, on judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts. For example, in a given legal system general legislation on reciprocal recognition of judgments, including *exequatur*, might be confined to enforcement of specific money judgments or injunctive orders in two-party disputes, thus excluding decisions opening collective insolvency proceedings.

⁵ *Black's Law Dictionary* defines *exequatur* as a written official recognition and authorisation of a consular officer, issued by the government to which he or she is accredited (citing *Doyle v Flemming* 219 F Supp 277, 283 (District Court, Canal Zone) (1963)). *Exequatur* is similar to the common law notion of enforcement of the orders of foreign courts (see Harmer 1994, 149).

Furthermore, recognition of foreign insolvency proceedings might not be considered as a matter of recognizing a foreign “judgment”, for example, if the foreign bankruptcy order is considered to be merely a declaration of status of the debtor or if the order is considered not to be final. (*Guide to Enactment* 8–9)

21 New Zealand bases its law on the English common law. The doctrine of comity has therefore been embraced in New Zealand. The underlying principle of comity is that one should do unto others as they would do unto you. An example of this underlying principle is *Hilton v Guyot* 59 US 113 (1895). In that case the Supreme Court of the United States proceeded on the basis that comity was a matter of discretion and that the question of whether the state seeking assistance would itself grant assistance was a factor to be taken into account in exercising that discretion (212–213). The principle of comity embodied in *Hilton v Guyot* has been applied in New Zealand recently on two occasions: *Fournier v The Ship “Margaret Z”* [1997] 1 NZLR 629 and *Turners & Growers Exporters Limited v The Ship “Cornelis Verolme”* [1998] 2 NZLR 110.

22 We discuss in paras 54–58 the nature of the doctrine of comity as applied in New Zealand case law. But, for present purposes, it is important to note that the term has two quite distinct applications. When used in a context unrelated to formal insolvency procedures (eg, where a creditor is seeking to enforce rights against a debtor *in personam*), the term “comity” has been legally defined as

neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws. (*Hilton v Guyot* 59 US 113 (1895) 163–164)

23 Comity has a rather different meaning when bankruptcy, or some other form of collective insolvency process, is involved. In *Curnard Steamship Co Ltd v Salen Reefer Services AB* 773 F 2d 452 (1985), the Second Circuit of the United States Court of Appeals held that:

The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities. . . . It has long been established that foreign trustees in bankruptcy were granted standing as a matter

of comity to assert the rights of the bankrupt in American courts. . . . Although the early cases upheld the priority of local creditors' attachments . . . the modern trend has been toward a more flexible approach which allows the assets to be distributed equitably in the foreign proceeding. (458)⁶

- 24 The justification for the granting of comity to foreign insolvency proceedings is the need to ensure that a debtor's property is realised as quickly as possible for the benefit of all creditors entitled to participate in the distribution of assets. It is also consistent with economies of scale in having an individual insolvency administrator act on behalf of all creditors,⁷ with a view, subject to priorities accorded by national legislation, to ensuring maximum returns to creditors on a *pari passu* basis (ie, an equal distribution of the realisation of assets among creditors of equal priority).

Theoretical differences underpinning domestic insolvency law

- 25 As well as distinctions based on historical heritage (ie, common law or civil law origin) different values underpin the domestic insolvency laws in different states. Countries have insolvency laws which fall between the two extreme descriptions of "pro-debtor" or "pro-creditor".⁸ Any uniform procedural law which deals with cross-border insolvency issues needs to respect these differences while, at the same time, putting in place a process that enables practical problems to be resolved.
- 26 Theoretical extremes for international insolvency laws were rejected by the "pragmatic English judiciary" (Smart 1991, iv). This meant that neither a strict territorial approach nor an approach

⁶ See also *Banque de Financement SA v First National Bank of Boston* 568 F 2d 911, 920–921 (2d Cir 1977); *Re Culmer* 25 BR 621, 629 (Bankr SDNY 1982); and Riesenfeld, *The Status of Foreign Administrators of Insolvent Estates: A Comparative Survey* 24 (1976) Am J Comp L 288 at 305.

⁷ Ross, "Political Expediency and Misguided Insolvency Reform – The New Zealand Experience with the Corporations (Investigation and Management) Act 1989" (1994) 2 *Insolvency LJ* 25, 27. In this article Ross argues cogently that the "creditors' bargain" is the implicit agreement between creditors that there are economies of scale in having one office, the liquidator [of a company in a company situation] to handle administration of the liquidation and pay creditors under a pre-defined set of statutory rules.

⁸ See Wood 1995, 4–7, for an interesting ranking of some specific jurisdictions based on "pro-debtor" or "pro-creditor" approach. Note that Wood's rankings bear no correlation to the nature of the legal system under consideration nor the degree of industrialisation of a particular state.

based on the universal application of the law was fully accepted as a matter of English law. The same degree of pragmatism is alive and well in New Zealand. Indeed, for any insolvency law to function, a healthy mix of principle and pragmatism is required. The degree of pragmatism required to provide solutions to a clash between insolvency laws based on different values is even greater than the degree of pragmatism required to make domestic insolvency law work.

- 27 The Model Law bridges theoretical bases for cross-border insolvency law. The goal of the Model Law is based on universality: recognition, assistance and co-operation between states are encouraged. But the Model Law does not create a regime in which one insolvency proceeding necessarily dominates. As noted by Glosband and Tobler, “[i]nstead, the Model Law anticipates concurrent proceedings which it attempts to coordinate”. Moreover,

[l]ocal parties . . . always retain the option of retreating to the familiar territory of a local proceeding. This deference to local proceedings was a political necessity and accommodates concerns about potentially over-intrusive foreign proceedings dominating local insolvency systems. (Glosband and Tobler 1998, 12)

It is for these reasons that we characterise the Model Law as “modified universalism”.

- 28 In the United States, the Model Law provisions were passed by each House of the United States Congress as part of comprehensive insolvency reform legislation. Disagreements over other parts of the legislation kept the two Houses from agreeing on a final Bill that reconciled differences in non-Model Law parts of the Bills prior to the end of the legislative session in November 1998. The Model Law provisions are expected to be re-introduced in the Congressional session which began in January 1999 and can be monitored at www.abiworld.org. We are informed that there is agreement between the two Houses of Congress as to the need for legislation based on the Model Law and that enactment in 1999 is likely.

Existing New Zealand law

- 29 **N**EW ZEALAND LAW currently has three distinct mechanisms to deal with cross-border insolvency issues. First, in cases of individual bankruptcy, relief may be granted by the High Court under s 135 of the Insolvency Act 1967. Second, in cases involving overseas companies which have assets in New Zealand, those assets can be liquidated in accordance with New Zealand rules for the liquidation of companies under s 342 of the Companies Act 1993. Third, by application of the common law principles of comity.⁹ We deal with each of these areas in turn.¹⁰
- 30 We note that in cases of insolvency the Reciprocal Enforcement of Judgments Act 1934 is not available as a means of enforcing a judgment because such cases do not constitute an “action in personam”.¹¹

ORDERS IN AID

History

- 31 Prior to the enactment of s 135 of the Insolvency Act 1967, New Zealand courts derived their ability to act in aid of a foreign bankruptcy from s 122 of the Bankruptcy Act 1914 (UK), an Imperial statute which purported to apply not only in the United

⁹ Justification for the common law principles of comity being applied in this country can be found in ss 3 and 16 of the Judicature Act 1908 which, inter alia, gave the High Court all judicial jurisdiction necessary to administer the laws of New Zealand. Generally, see *Laws NZ*, Courts, para 11.

¹⁰ This part of the paper derives from Heath, *International Insolvencies: A New Zealand Perspective* (1998) 6 *Insolv LJ* 90 a paper delivered to the Insolvency Law Conference held at the Park Royal Hotel in Wellington on 6 March 1998. See also *Brooker’s Insolvency Law*, BL 1–BQ 3.06 and *Laws NZ*, Insolvency, paras 552–560.

¹¹ The definition of “action in personam” excludes any proceedings in connection with, amongst other things, bankruptcy and the winding-up of companies: s 2(2) Reciprocal Enforcement of Judgments Act 1934. See: *Laws NZ*, Insolvency, para 553; and, more generally *Laws NZ*, Conflict of Laws: Jurisdiction and Foreign Judgments.

Kingdom but also extra-territorially.¹² The provision was directed to all “British Courts”. The term “British Court” was considered by the English Court of Appeal in *Re James* [1977] Ch 41. The English court had been asked to act in aid of a bankruptcy in Rhodesia after the Unilateral Declaration of Independence by that country in 1966. Both Scarman and Geoffrey Lane LJ held (Lord Denning MR dissenting) that the words “British Court” in s 122 of the English Statute meant a court which, by its constitution, was “British” rather than a court situated geographically in British territory (378–379, Scarman LJ). Because the 1969 Constitution of Rhodesia (following the Unilateral Declaration of Independence) did not recognise the authority of the Queen in Parliament the Court of Appeal held that the Rhodesian Court could no longer be regarded as a “British Court”.

- 32 The extra-territorial effect of a predecessor of s 122 of the Bankruptcy Act 1914 (UK) had been confirmed in *Callender Sykes & Co v Colonial Secretary of Lagos* [1891] AC 460 (PC). In that case the Privy Council, on appeal from the Gold Coast Colony, held that s 74 of the Bankruptcy Act 1869 (UK) did have extra-territorial effect. Although doubts were expressed subsequently both in Victoria (*Federal Bank of Australia v White* (1895) 21 VLR 451) and in Saskatchewan (*Re Graham* [1928] 4 DLR 375) as to whether s 122 of the Imperial Act of 1914 could bind Colonies or Dominions which had full legislative power, the extra-territorial effect of the provision was recognised in New Zealand as recently as 1973.¹³ Subsequently, Barker J in the unreported New Zealand case *Re Beadle* (HC Auckland, 1 September 1980, B116/80) expressed sympathy with the point of view advanced in Victoria and Saskatchewan even though the issue was, by then, moot because of the introduction of s 135 of the Insolvency Act 1967.

Current law

- 33 Section 135 of the Insolvency Act 1967 enjoins the High Court of New Zealand to assist foreign courts having jurisdiction in bankruptcy. Under s 135(1) the court is directed to act in aid of and to be auxiliary to any court of any “Commonwealth country” which

¹² In this context, the term “bankruptcy” is limited to a formal insolvency proceeding involving an individual or a partnership.

¹³ *Re Peebles* (Supreme Court, Auckland, 8 May 1973, B 52/73). While the Insolvency Act 1967 had, by then, come into force, the case involved the transitional provisions of the Act.

has jurisdiction in bankruptcy (see also definition of “Commonwealth country” in s 2(1) of that Act). The provisions of s 135 apply only to personal insolvencies: s 168 Insolvency Act.

- 34 Under s 135(1), an order of a court of a Commonwealth country requesting aid is sufficient to enable the High Court of New Zealand to exercise such powers as it might have exercised in respect of the matter specified in the order had it arisen within New Zealand.
- 35 A similar provision to s 135, the Bankruptcy Act 1966 (Cth) s 29(1), was examined by the Full Court of the Federal Court of Australia which interpreted the word “shall” as a mandatory requirement: *Ayres v Evans* (1981) 39 ALR 129.
- 36 The equivalent English provision to s 135 was considered in *Hughes v Hannover Ruckversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497. In that case, the English Court of Appeal held that the words “shall assist” in s 426(4) of the Insolvency Act 1986 (UK) were directory rather than mandatory in nature (517).¹⁴
- 37 One might ordinarily expect a New Zealand court to follow the Australian approach particularly when the Australian decision dealt with a request for aid from the High Court of New Zealand under a companion provision to s 135 of the New Zealand Act. However, we prefer the view that the word “shall” in s 135(1) of the New Zealand Act was directory rather than mandatory in nature. This was the view taken by Barker J in *Re Beadle* in order to leave open the possibility of the court exercising a residual discretion to refuse to grant aid on public policy grounds. Justice Barker’s approach is consistent with article 6 of the Model Law.
- 38 Under the Insolvency Act 1967 s 135(2), when aid is sought at the request of a court of any state which is not a Commonwealth country the High Court clearly has a discretion whether or not to grant aid.
- 39 So far as procedure is concerned on receipt of an application for aid, Lockhart J, in the first instance decision in *Re Ayres, ex parte Evans* (1981) 34 ALR 582 said:

There have been very few occasions in the past when the aid of this court has been sought by letters of request. The procedure to be followed in cases of this kind has not been prescribed, so I directed the Official Assignee to file applications and serve them on the bankrupt.

¹⁴ See the case note on this decision by Smart in (1998) 114 LQR 46.

The course taken in these matters satisfies me of the desirability generally of ensuring, when future letters of request are issued by foreign courts seeking the aid of this court, that the bankrupt is served with notice thereof and that evidence is given by the moving party as to the administration of the estate, including the assets and liabilities of the bankrupt and the countries in which the creditors reside. (583)

These observations are equally applicable to cases under s 135.

- 40 Section 135 does not prescribe a procedure for the Official Assignee in bankruptcy of a New Zealand bankrupt to apply to the court to request from a foreign court (whether in a Commonwealth country or not) assistance for a New Zealand bankruptcy. In practice, this issue has been addressed by making application to the High Court, under its inherent jurisdiction, for the issue of a letter of request under the hand of a judge of the High Court of New Zealand which details the aid sought.¹⁵ It is then necessary for a separate application to be made in the state in which aid is sought to determine whether that court should act in aid of and be auxiliary to the New Zealand bankruptcy.
- 41 There have been few New Zealand decisions which have applied s 135 and all are unreported. They are considered below in chronological sequence.
- 42 In *Re Beadle*, a request for aid was made by the Supreme Court of Queensland exercising jurisdiction in bankruptcy. After considering authorities under s 122 of the Bankruptcy Act 1914 (UK), Barker J concluded that aid should be granted to enable the Official Receiver of Mr Beadle's bankruptcy in Australia to have access to real property in New Zealand. Mr Beadle was not bankrupt in New Zealand. Neither were there any competing claims by unsecured creditors in New Zealand which may have justified the refusal of aid.
- 43 *Re Beadle (No 2)* (HC Auckland, 14 June 1982, B116/80) involved an issue of distribution of funds from the realisation of the land in New Zealand which had been the subject matter of the earlier decision of Barker J. It was necessary for the court to consider how the funds should be distributed. The issue was whether a charging

¹⁵ Some examples of cases where such orders were made (without reasons being given) are: *Re Ayres* (HC Auckland, 30 July 1980, B472/79); *Re Batty* (HC Tauranga, 21 November 1988, B13/87); *Re Cranston* (HC Hamilton, 30 March 1992, B156/91); *Re Wood* (HC Hamilton, 8 March 1998, 133/87). See also *Re Hemming* (HC Hamilton, 21 January 1997, M11/87) which is the only case in which reasons were given.

order over the land (registered to protect Mr Beadle's ex-wife in respect of moneys owing for arrears of maintenance) was a valid charge to be met out of the proceeds of sale, or whether it was void against the Official Receiver of the Australian bankruptcy as an incomplete execution. The issue turned on the meaning of s 135(1) of the Insolvency Act 1967 which, in part, states that

an order of [the requesting court] requesting aid shall be sufficient to enable the High Court to exercise in regard to the matter specified in the order such powers as the High Court might exercise in respect of the matter if it had arisen within its own jurisdiction.

Had the bankruptcy been a New Zealand bankruptcy the charging order would have been ineffective as a charge on the proceeds of sale of the property as a result of the application of the doctrine of "relation back". That doctrine applies so that all property and rights which vest in the Official Assignee on bankruptcy pass to him or her at the time of commencement of the bankruptcy, rather than at the date on which either a debtor's petition in bankruptcy is filed, or an order is made on a creditor's petition. This means that the Official Assignee takes title to assets at a time earlier than the date on which the bankruptcy actually occurred. (Generally, see *Laws NZ*, Insolvency, paras 245–251; in relation to foreign bankruptcies see also para 556.)

- 44 However, following the House of Lords' decision in *Galbraith v Grimshaw* [1910] AC 508, Vautier J concluded that the doctrine of relation back does not apply to a foreign bankruptcy. Further, Vautier J held that a foreign state's doctrine of relation back does not apply to a bankruptcy (or a notional bankruptcy as a result of an order in aid) in New Zealand: *Re Beadle (No 2)* 8–9. The test, in any particular case, is whether the bankrupt could have assigned to a trustee, as at the date on which a trustee's title to assets was to accrue, the debt or assets situated in the foreign jurisdiction: *Galbraith v Grimshaw*, 510–513.
- 45 As a matter of New Zealand domestic law movable property will be governed by the law of the domicile of the debtor, so that if a debtor ceases to be domiciled in the state of adjudication in bankruptcy the law of that state will not have any application to movable property acquired after bankruptcy that is situated in another state: *Hall v Woolf* (1908) 7 CLR 207, 211. A valid adjudication in bankruptcy in the bankrupt's state of domicile will pass the right to movable property of the bankrupt, wherever situate, to the Assignee in bankruptcy: *Strike v Gleich* (1879) OB & F (CA) 50; *Cleve v Jacomb* (1864) Mac 171; see *Laws NZ*, Insolvency, para 559.

46 In contrast, immovable property will be governed by the law of its place of locality. Accordingly, if an Assignee in Bankruptcy wishes to realise immovable property situate in a foreign state a step must be taken in the courts of the state where the immovable property is situated to endorse the Assignee's proposed action; for example, by appointing a receiver of the immovable property for the purpose of getting in the rents and profits: *Re Kooperman* [1928] WN 101; [1928] B & CR 49 *Re Osborn, ex parte Trustee* [1931–32] B & CR 189; *Re Beadle* (HC Auckland, 1 September 1980, B116/80); see also *Laws NZ, Insolvency*, para 560.

47 The next case to come before the courts was *Re Grose* (HC Christchurch, 21 September 1992, B404/92). In *Re Grose* the Trustee in Bankruptcy of Mr Grose's bankrupt estate in Australia sought aid from the New Zealand courts to assist in realising assets of Mr Grose situate in New Zealand. A complicating factor was that about 6 weeks before judgment Mr Grose was also adjudicated bankrupt, on his own petition, in New Zealand. Despite the New Zealand bankruptcy, Tipping J could not see any "possible reason why that should be a bar to an order under s 135" (3). The form of the order made by Tipping J enabled the Official Assignee in New Zealand to exercise the powers given to him under the order "subject to any prior claim validly and properly made in accordance with the laws of New Zealand, including applicable international law" (3). Tipping J then said:

In other words, valid claims in the New Zealand bankruptcy will have priority over the claims in the Australian bankruptcy when it comes to the exercise of the powers of the Official Assignee under the s.135 order. That seems to me to be entirely proper and I also agree with the slight expansion of the order as originally sought to make it clear, as was probably implicit anyway, that the prior claim must of course be a valid and proper one. (3)

48 The final case is *Re Hemming* (HC Hamilton, 21 January 1997, M11/97). *Re Hemming* dealt with the circumstances in which a New Zealand court may issue a letter of request seeking the aid of an overseas court for the purpose of assisting the Official Assignee in New Zealand to get in assets for the benefit of creditors of a New Zealand bankruptcy. Justice Hammond's judgment in *Hemming* implicitly endorsed the practice which had developed of requiring the bankrupt empowered by the inherent jurisdiction of the court to be served with either the application for the issue of a letter of request or with an application to the overseas court for an order that aid be granted. (The practice is discussed in *Laws NZ, Insolvency*, para 555; see also *Clunies-Ross v Totterdell* (1988) 98 ALR 245.)

SPECIFIC PROVISIONS RELATING TO PACIFIC ISLAND STATES

- 49 For completeness it is appropriate to mention a number of specific provisions affecting bankruptcy law in Pacific Island states. In summary those laws provide:
- A bankruptcy in New Zealand will have the same effect on property situated in the Cook Islands as if that property were situated in New Zealand: Cook Islands Act 1915 s 55(1).
 - A bankruptcy in New Zealand will have the same effect in respect of property situated in Niue as if the property was situated in New Zealand save that this provision does not extend to the interests of a Niuean in Niuean land: Niue Act 1966 s 722(1)–(2).
 - Tokelauan land or interests in such land may not be used for the payment of any debts of a Tokelauan on insolvency: Tokelauan Amendment Act 1967 s 25(1).

LIQUIDATION OF ASSETS OF OVERSEAS COMPANIES

- 50 There is no equivalent to s 135 of the Insolvency Act 1967 in the Companies Act 1993. This distinguishes the New Zealand position immediately from Australia and the United Kingdom. In Australia provisions akin to s 135 of the Insolvency Act 1967 are found in the Bankruptcy Act 1966 (s 29) and in the Corporations Law (s 581). In the United Kingdom, the provisions of s 426 of the Insolvency Act 1986 apply to both companies and to individuals.
- 51 An application may be made to the High Court under s 342 of the Companies Act 1993 for the liquidation of the assets of an overseas company in accordance with the provisions applicable to domestic companies.¹⁶ Section 342(2) of the Companies Act makes it clear that an application may be made whether or not the overseas company is registered as such or has been dissolved in its own jurisdiction. It has been held that the Registrar of Companies has standing to bring an application under this section: *McPherson v Industrial Banking Incorporation Limited* (1997) 8 NZ CLC, 261,420 at 261,424.

¹⁶ The term “overseas company” is defined by s 2 of the Companies Act 1993 as meaning a body corporate which is incorporated outside New Zealand; there is no further requirement for that overseas company to be registered in New Zealand.

52 Some immediate problems are caused by this approach: use of this provision could result in disparate treatment of local and overseas creditors of the same company for a number of reasons:

- Under s 342 of the Companies Act New Zealand creditors are entitled to invoke pooling rules contained in s 271 of the Act to reach New Zealand assets of a solvent foreign company related to the company in liquidation.
- A New Zealand creditor of an Australian company can (potentially) reach assets that the foreign company has in New Zealand in priority to other creditors.
- Local creditors in New Zealand might benefit from the preferential claims recognised by the 7th Schedule to the Companies Act which are, in material respects, at variance with those under, for example, Australian law.¹⁷

53 Some of these concerns may have been alleviated by the manner in which the New Zealand High Court dealt with the case of *Gavigan v Australasian Memory Pty Limited (In Liquidation)* (1997) 8 NZCLC 261,449. In that case Paterson J opined:

- it was desirable for any New Zealand liquidation of assets to be concurrent with and ancillary to the Australian liquidation with any positive benefits given by New Zealand law to creditors being retained by New Zealand creditors; and
- a liquidation of assets under s 342 would not preserve New Zealand assets for New Zealand creditors as the normal *pari passu* rule relating to distribution to unsecured creditors should apply universally and not on a regional basis.¹⁸

It is questionable whether those propositions are entirely consistent. Certainly, preferential New Zealand claims would deplete the available common fund before remaining creditors (both New Zealand and foreign) participate. If the Model Law were enacted in its proposed form, but s 342 of the Companies Act 1993 remained on the statute book, it would be necessary for a New Zealand court to make a choice as to which remedy was, in the particular circumstances, more appropriate.

¹⁷ These issues were raised by the Joint Insolvency Committee in response to Australian Law Reform Commission, *Legal Risk in International Transactions* (ALRC, Report 80, Canberra 1996), a paper on cross-border civil remedies.

¹⁸ *Gavigan v Australasian Memory Pty Limited* (1997) 8 NZCLC 261,449 at 261,452–261,453.

COMITY

- 54 Reference has already been made to the principles of comity in chapter 1 (paras 20–24). Two recent New Zealand cases have considered cross-border insolvency issues arising in the course of the exercise of the High Court’s jurisdiction under the Admiralty Act 1973: both cases were approached on the basis of comity – although different results were reached in each case.
- 55 In *Fournier v The Ship “Margaret Z”* [1997] 1 NZLR 629 Salmon J declined to apply the principles of comity to a case in which the owner of a vessel had been placed under the Chapter 11 Insolvency Regime of the United States Bankruptcy Code. Two reasons were advanced for this decision. First, Salmon J was satisfied that Guam, the foreign territory in which the owner was located, would treat seamen’s wages as being outside the reach of the Chapter 11 automatic stay. Second, Salmon J took the view that special considerations relating to an *in rem* claim by crew against a ship on which they sailed would have required the proceedings to be dealt with in the forum of the plaintiff’s choice.
- 56 In *Turners & Growers Exporters Limited v The Ship “Cornelis Verolme”* [1997] 2 NZLR 110 Williams J took the view that (assuming there was no positive New Zealand law to the contrary) the principles of comity required him to recognise
- the liquidation of a foreign company in its place of incorporation; and
 - the appointment of a foreign administrator
- unless the foreign proceedings were not final, were contrary to public policy, or in breach of natural justice (119). Accordingly, Williams J found that active assistance should be given to the liquidators appointed by a Belgian court. Justice Williams distinguished *Fournier* on a number of grounds, but principally because there was no issue involving Chapter 11 of the United States Bankruptcy Code: *Turners & Growers*, 119.
- 57 A comparison of *Fournier v The Ship Margaret Z* with *Turners & Growers Exporters Limited v The Ship “Cornelis Verolme”* demonstrates that principles of comity are simple to state but much more difficult to apply.
- 58 At common law all jurisdiction is territorial: *Gordon Pacific Developments Limited v Conlon* [1993] 3 NZLR 760, 765 applying *Re Trepca Mines Limited* [1960] 1 WLR 1273 (CA). But principles of comity will be applied where there is some connection with the jurisdiction asked to intervene: for example, residence or assets within the jurisdiction: *Kuwait Asia Bank EC v National Mutual Life Nominees*

Ltd [1990] 3 NZLR 513. Yet the need to modify territorial rules to deal adequately with a global economy has also been recognised. In *Gordon Pacific Developments Limited v Conlon* [1993] 3 NZLR 760, in answer to a submission that principles of comity should be extended to meet modern conditions, Henry J said:

Desirable and timely as change may be, the assumption and the recognition of extra-territorial jurisdiction of foreign Courts is better left to the governmental arm of state rather than ad hoc decisions of the Court. (767)

Concurrent bankruptcies

59 Concurrent bankruptcies occur when the same person is adjudged bankrupt in two or more states and those bankruptcies run concurrently. An example is Mr Grose having been adjudged bankrupt in both Australia and New Zealand: *Re Grose* (HC Christchurch, 1 September 1992, B404/92). A corporate example of concurrent bankruptcies occurred in the case of *Gavigan v Australasian Memory Pty Limited* (1997) 8 NZCLC 261,449. In that case there was a branch liquidation of an Australian company (in liquidation in Australia) by a New Zealand court.

60 Difficult issues are involved in determining the extent to which courts in one jurisdiction should yield to the domestic law of another jurisdiction to enable international disputes to be resolved. Three possible ways of dealing with concurrent bankruptcies were considered by the English Court of Appeal in *Artola Hermanos, ex parte Chale* (1890) 24 QBD 640 (CA) 648–649:

- First, each forum could administer assets situated locally on the basis that each forum would allow all creditors to prove wherever they were located. The doctrine of hotchpot¹⁹ would then be applied to produce equality between proofs of local and foreign creditors with the distribution being made under the law of the state of domicile of the debtor.²⁰
- Second, each forum could yield to the forum of domicile and act only in aid of and auxiliary to the forum of domicile. As such, the forum of domicile would be the only forum to which persons with claims against the estate may have recourse.

¹⁹ A creditor who not only obtains payment in respect of a debt in a foreign court but also claims in a domestic bankruptcy or liquidation must, in general, bring into the common fund any sum recovered abroad (Smart 1991, 173; see also 95).

²⁰ Note that as a matter of New Zealand domestic law the issue of domicile would be resolved by reference to the Domicile Act 1976.

- Third, it was suggested that the forum in which the debtor had assets and in which the debtor was first adjudicated bankrupt was entitled to claim assets in all other countries in which the debtor had assets.

None of these approaches has attracted universal approval.

- 61 Where concurrent bankruptcies exist there has been a tendency to allow priority claims contained in the domestic law of the jurisdiction from which aid is sought to be paid out of the assets situated in that jurisdiction in priority to other debts. Thus, while no authorities were discussed in Tipping J's judgment in *Re Grose*, the cases seem to support the view taken by the judge in that case. In *Re Tucker (a bankrupt), ex parte Bird* [1988] LRC (Comm) 995, 1008–1009 Hytner JA, sitting in the Staff of the Government Division of the Manx High Court, held that where competition between local and foreign creditors arose from concurrent bankruptcies, the court from which aid was sought had a discretion to limit aid, or impose conditions, so as to protect creditors in its jurisdiction. Hytner JA applied the case of *Osborn, ex parte Trustee* (1932) 15 B & CR 189, in which Farwell J said:

I think it is clear that I am bound in a proper case under section 122 [Bankruptcy Act 1914 (UK)] to assist the Court in the Isle of Man in the bankruptcy which is the bankruptcy under that jurisdiction. I think under the section it is plain that this Court must give such assistance as it can, but subject of course to the consideration which would arise if there was also a bankruptcy in this country as to the rights of the creditors and other persons in this country. There not being any such conflict I think this Court is bound to give all the assistance that it can. (citing page 194 of *Osborn* at 1008)

From that, Hytner JA was able to state:

If there is no conflict of interests resulting from two bankruptcies the section is mandatory. If there is such a conflict there is a discretion to limit assistance so as to protect the “home” creditors. (1008)

- 62 In keeping with the need for a healthy mix of principle and pragmatism in insolvency law many concurrent bankruptcies have, ultimately, been settled on commercial terms with court sanction being given to a settlement between competing Assignees or Trustees in Bankruptcy (for example, *Re P Macfadyen & Co, ex parte Vizianagram Co Limited* [1908] 1 KB 675 in which there were concurrent bankruptcies in England and India). We have considered whether it would be desirable to set out factors to be taken into account by a court when seeking to approve a compromise of this type. We have concluded that it would be inappropriate as

the circumstances in which commercial settlements may be sought are so varied that it would be difficult to articulate factors of use to the resolution of cases.²¹ We prefer an approach which gives the court a wide discretion to sanction settlements on commercial terms. There is no evidence to suggest that any difficulty has been caused by the current absence of guidelines. As Mr Gordon Marantz QC (President of INSOL International) stated in a submission on the draft of this report:

Once standards or factors are prescribed, that becomes the way things are done. It is restrictive of creativity. If one has faith in the judiciary and the process, the legislation should be as flexible as possible.

²¹ See Knecht, “The Drapery of Illusion of Section 304 – what lurks beneath: territoriality in the judicial application of section 304 of the Bankruptcy Code” (1992) 13 *University of Pennsylvania Journal of International Business Law* 287 for an interesting discussion of the differing United States interpretation of their s 304 factors.

3

Factors for and against reform

- 63 **I**N “THE JURISDICTIONAL LIMITS of Disclosure Orders in Transnational Fraud Litigation”, Campbell McLachlan pointed to the need to find a modern approach to private international law which deals adequately with three overall concerns:
- provision of functional responses to the modern international context of trade and commerce in which cross-border problems arise;
 - provision of effective and fair remedies in civil disputes where those disputes spill over national borders; and
 - resolution of the otherwise irreconcilable conflicts between national legal systems – not as an end in itself or solely as a means of finding comity among nations, but to do substantial justice between the private litigants involved (McLachlan 1998, 3).

We agree with those observations.

- 64 In this chapter we assess whether there is a need to reform New Zealand’s law on cross-border insolvency by reference to these criteria and by examining factors for and against reform of the law. We also consider whether the Model Law is the most appropriate method to achieve reform.
- 65 Three broad policy factors in favour of reform are:
- *The globalisation trend factor* – this factor recognises that consistent commercial laws are required to meet the challenges presented by the borderless global economy.
 - *The fiscal factor* – this is concerned with the fiscal consequences to the New Zealand economy and to New Zealand and foreign creditors which any reform of the law may cause.
 - *The efficiency and fairness factors* – these factors relate to the desirability of finding pragmatic, yet just, solutions which will avoid unnecessary, yet intricate, legal argument on cross-border

insolvency issues. Avoidance of unnecessary legal argument will:

- reduce the costs of obtaining a dividend; and
- lead to greater predictability of process and outcome in turn reducing the overall cost of litigation.

- 66 Factors which weigh against reform are:
- *The sovereignty factor* – the desirability of New Zealand having a regime which may better suit or protect local creditors.
 - *The adequacy of existing law* – whether New Zealand’s existing law is adequate to meet all needs and, therefore, is not in need of reform.

Each factor is examined in turn.

FACTORS IN FAVOUR OF REFORM

Globalisation trends

- 67 The ability to transact business globally and to move large amounts of money from state to state has created an economic borderless world which must, nevertheless, operate within the boundaries of sovereign nations. Many nations, although not yet having adopted the Model Law, have laws relating to cross-border insolvency which allow for recognition of insolvency regimes commenced in other states and for assistance to be given to foreign insolvency administrators.
- 68 A number of states have laws which require them to render assistance to foreign courts who request aid on behalf of insolvency administrators situated within the requesting states. Assistance may consist of such matters as:
- the remitting of funds from the realisation of locally situated assets;
 - suspending a creditor’s legal action against the debtor to protect against diminishment of a debtor’s assets where contrary to *pari passu* (ie, equal distribution between creditors);
 - the opening of local ancillary proceedings;
 - allowing the administrator to act on behalf of foreign creditors; and
 - allowing information gathering by examination on oath or affirmation.
- 69 States in regular trade with New Zealand merchants with specific legislative provision for the rendering of assistance similar to the New Zealand Insolvency Act 1967 s 135 include:
- Australia: Bankruptcy Act 1966 (Cth) s 29 and Corporations Law s 581

- England and Wales: Insolvency Act 1986 s 426
- United States of America: United States Bankruptcy Code s 304
- India: Provincial Insolvency Act 1909 s 77.

70 Other major trading partners of New Zealand, while having statutory provisions enabling a court to render assistance to a foreign insolvency administrator on an application for aid, make the obligation to give aid conditional upon reciprocity. Reciprocity means that the court petitioned for assistance must consider whether the court of the state requesting assistance would, had the positions been reversed, render assistance on the subject matter of the request. Examples of states with such provision are:

- Malaysia: Bankruptcy Act 1967 s 104
- Singapore: Bankruptcy Act 1955 s151.

71 A further category exists in which either

- there is no express statutory provision facilitating the giving of assistance to the foreign insolvency administrator; or
- there is provision for the giving of assistance but the state seeking aid is not a state stipulated in the statute as a state to which aid can be extended.

Malaysia and Singapore are examples of states where there is provision for giving assistance but the statutes do not stipulate states to which aid can be extended; both utilise the doctrine of comity to render assistance. France is an example of a state which will render assistance based on *exequatur* (the civil law equivalent of comity – see para 20).²²

72 Finally, there are some states whose domestic law on cross-border insolvency is based firmly on the principle of territoriality so that foreign courts are unable to gain any assistance. Examples of states which adopt the territorial approach are Chinese Taipei (Taiwan), Iran, South Korea, Saudi Arabia, and the People's Republic of China.

73 Japan also technically falls in the above category as it lacks legislation to assist a foreign representative and the insolvency legislation in place has territorialist foundations. Notwithstanding those features, Japanese courts have – in isolated cases – extended aid to foreign representatives (see Takeuchi 1994; in relation to

²² Of course many states will have specific legislative provision for the rendering of assistance as well as the ability to render assistance based upon the doctrine of comity. For a consideration of how Asian states deal with cross-border insolvencies refer to the 1997 text by Tomasic and Little, *Insolvency Law and Practice in Asia*; see also Tomasic and Kamarul 1998. For a discussion of French procedures see Wood 1995, 264.

assistance given in the BCCI and Barings Bank cases, see Miyake 1996). As stated by Koji Takeuchi, a Japanese practitioner:

Heretofore, we have seen that Japanese practice (or the law of practice) has essentially abandoned territorialism with respect to insolvency proceedings commenced in Japan. The question remains as to whether the law in practice will result in the same co-operative attitude upon the receipt of a request for co-operation in relation to a foreign insolvency proceeding. It seems likely that the Japanese courts will not selfishly pursue their own interests in view of the long passage to the present practical interpretations. However, it is still possible that such co-operation might be denied under the pretext of the lack of law or the protection of domestic creditors, thus provoking criticism from friendly nations. Fortunately, there has not been any instance in which a Japanese court has received a request deriving from a foreign proceeding to recognise the comprehensive power of execution in order to prohibit an individual creditor's actions in Japan; thus, so far, the law in practice appears seamless. (Takeuchi 1994, 80–81)

- 74 In other areas of commercial law the adoption of consistent legislation to cover international transactions is becoming increasingly common. Examples are the Sale of Goods (United Nations Convention) Act 1994 (which adopts the Vienna Sales Convention) and the Arbitration Act 1996 which adopts the UNCITRAL Model Law on arbitration, with modification. Also, the UNCITRAL Model Law on Electronic Commerce is presently under consideration in New Zealand (as discussed in our 1998 report, *Electronic Commerce Part One: A Guide for the Legal and Business Community* (NZLC R50)).
- 75 In the United States, the Model Law awaits reconsideration of other bankruptcy reforms in the Bill in which it has been placed (see para 28 and 81). A draft statute has been prepared for consideration in South Africa. Further, our inquiries have revealed that Australia, the United Kingdom and Canada are likely to consider adoption of the Model Law in the near future. States in Asia are likely to be persuaded to adopt the Model Law as part of the requirements of IMF assistance (see paras 78–84).

Fiscal considerations

- 76 The world economy is unstable. Since the first “post modern financial crises” (Arner 1998, 381) in 1994 there have been a number of financial crises throughout the world which have impacted in various ways on other economies. In a recent article, Douglas Arner stated:

Financial crises in Latin America and Asia since 1994 have drawn attention to the potential dangers of globalisation of the international

financial system. In order to prevent the collapse of the financial system of the countries involved and reduce the risk of potential contagion throughout the international financial system, international financial rescues of unprecedented proportions have been organised for Mexico, Thailand, Indonesia and South Korea. Including contributions from multilateral and bilateral creditors, these financing packages have totalled US\$48.8 billion for Mexico in 1995, and US\$17 billion for Thailand, US\$40 billion for Indonesia and US\$57 billion for South Korea in 1997. In these respective packages, the contribution of the International Monetary Fund (IMF) alone totalled US\$52.8 billion: US\$17.8 billion for Mexico, US\$4 billion for Thailand, US\$10 billion for Indonesia and US\$21 billion for South Korea.

...

The magnitude of these international financial rescue packages and the as yet indeterminate impact that they will have on the international financial system underlines a number of ongoing changes in the international financial system. These changes can be seen in respect of the potential dangers to emerging markets of international capital flows, the importance of international minimum standards and best practices in financial regulation, and in the changing role of the IMF. (Arner 1998, 380)

Taking Indonesia as an example, in July 1998 inflation was running at about 85 percent, interest rates were at about 65 percent and the government forecasted negative 10 percent Gross Domestic Product for the next 2 years (Dywer 1998, 14; see generally the International Monetary Fund, *International Capital Markets: Developments, Prospects and Key Policy Issues* (1998)).

- 77 Subsequently there has been a financial crisis in Russia, a recession in Japan, and predictions of further financial crises in Latin America.²³ Many states have sought assistance from the International Monetary Fund (IMF).

The IMF

- 78 A valuable overview of the work of the IMF is provided by Michel Camdessus, IMF Managing Director, in an address to the Economic

²³ For information about the Russian financial crisis and causes of the collapse of Russia's economy see "Russia's Financial Crisis" at www.edmondsun.com/krt/russia/. For discussion of the recession in Japan see "Early Economic Outlook: Japan: Another Recession, With the end not yet in sight" at www.emgmks.com/research/cibcr/G7/98july/980731.htm (July 31 1998). For information on the predicted financial crises in Latin America refer to Ortiz, "Market slide makes economics the priority at Latin America summit" at www.foxnews.com/news/international/0905/i_ap_0905_60.sml (September 5 1998).

Club of Washington DC in 1998: “Reflections on the IMF and the International Monetary System” (available at www.imf.org). The IMF is akin to a revolving fund. Each state allied to it subscribes resources to the Fund on an annual basis, without return, in exchange for the ability to draw upon funds when the need arises to finance a severe balance of payments deficit.²⁴ This arrangement enables the resources of members that are in strong balance of payments positions to be lent temporarily to other member states in need. Money borrowed from the Fund has to be repaid, but the loan terms are fluid and favourable, as compared with what would be available on the open market. The amount that can be borrowed is dependant upon:

- member states supporting an application for assistance; and
- the quantum of moneys that the state requesting funds has contributed to the Fund (Camdessus 1998, 3).

79 One of the criteria for eligibility to receive assistance is the existence of bankruptcy laws that treat foreign creditors fairly. If the domestic law of the state seeking assistance does not treat foreign creditors fairly, the IMF requires, as part of its loan conditions, that modern bankruptcy laws remedying the position are on the agenda of proposed reforms (Armev 1998; Camdessus 1998, 3).

80 Each state which contributes to the IMF has voting rights which are determined in accordance with the IMF’s internal rules. The United States contributes the greatest amount of money to the IMF which entitles it to around 18 percent of the voting rights. (Information on voting rights is available at www.IMF.org/external/np/exr/facts/quotas.htm: “IMF Quota and Quota Reviews”.)

81 The United States House of Representatives passed a Bill (HR 3579) entitled “An Act making emergency supplemental appropriations for the fiscal year ending September 30, 1998, and for other purposes” on March 31 1998. Amongst other things, that Act (available at <http://thomas.loc.gov/>) introduced into American law the following:

- (d) **BANKRUPTCY LAW REFORM** – The United States shall exert its influence with the International Monetary Fund and its members to encourage the International Monetary Fund to include as part of its conditions of assistance that the recipient country take action to adopt, as soon as possible, modern insolvency laws that –

²⁴ At present 82 countries have “voluntarily joined the IMF because they see the advantage of consulting with one another in this forum to maintain a stable system of buying and selling their currencies so that payments in foreign currencies can take place between countries smoothly and without delay” (Camdessus 1998, 3).

- (1) emphasize reorganization of business enterprises rather than liquidation whenever possible;
- (2) provide for a high degree of flexibility of action, in place of rigid requirements of form or substance, together with appropriate review and approval by a court and a majority of the creditors involved;
- (3) include provisions to ensure that assets gathered in insolvency proceedings are accounted for and put back into the market stream as quickly as possible in order to maximize the number of businesses that can be kept productive and increase the number of jobs that can be saved; and
- (4) promote international cooperation in insolvency matters by including –
 - (A) provisions set forth in the Model Law on Cross-Border Insolvency approved by the United Nations Commission on International Trade Law, including removal of discriminatory treatment between foreign and domestic creditors in debt resolution proceedings; and
 - (B) other provisions appropriate for promoting such cooperation.

82 When the Act was before the Senate in Bill form, Senator Stevens from Alaska said:

. . . I believe that it is crucially important to encourage the IMF to encourage nations which seek IMF economic assistance to implement meaningful bankruptcy and insolvency reforms. In fact, last year, I held extensive hearings on the subject of international bankruptcies. To my surprise, I learned that Wall Street analysts who assess how risky it is to invest in a particular developing country often look at the type of bankruptcy system in place. On the basis of these risk assessments, investors decide whether to invest in a particular country. In other words, bankruptcy reform will encourage private development and investment in emerging economies. My amendment has been developed to encourage the kind of bankruptcy reform which will in turn encourage increased private investment. (Congressional Record Amendment No. 2119: March 24 1998 (Senate))

Emphasis has been placed on this issue in the IMF's dealings with both Indonesia and Korea. (Letters of intent to the IMF from Indonesia and Korea are available at www.imf.org/external/np/loi/072998.htm and www.imf.org/external/np/loi/072498.htm respectively.)

83 The matters raised by Senator Stevens provide a useful reminder of the need to bear in mind aspects of insolvency law when considering both fiscal and business law policy – a point made more starkly by Wood who said, to quote him again, “bankruptcy is the most crucial indicator of the attitudes of a legal system . . .” (Wood 1995, 1).

- 84 In short, it is likely that countries seeking IMF funding will enact the Model law for three reasons:
- bankruptcy laws which treat foreigners fairly are a standard IMF condition;
 - the United States has a significant influence on the administration of the Fund; and
 - the United States is likely to adopt the Model Law.

For New Zealand this means that a number of our Asian neighbours, with whom we have considerable trade, are likely to enact the Model Law.

- 85 The IMF works in close co-operation with the World Bank, although they are distinct entities with disparate purposes underlying their provision of assistance (see Driscoll, “The IMF and the World Bank: How Do They Differ?”, available at www.imf.org). On 5 October 1998, the *Report of the Working Group on International Financial Crises* encouraged the wider use of the UNCITRAL Model Law or the adoption of similar mechanisms to facilitate the efficient resolution of cross-border insolvencies (available at www.worldbank.org).

- 86 This encouragement is consistent with recommendations made by the Group of Thirty in conjunction with INSOL International in the discussion draft, *International Insolvencies in the Financial Sector*. The summary of the draft states that legislation should enact

laws to ensure judicial co-operation, access and recognition in international financial insolvencies, preferably supporting the norms of universality. (Group of Thirty and INSOL International 1996, iii)

This recommendation was supported by the following comments

One element of the work by INSOL and UNCITRAL explores the possibility of legislation to ensure judicial co-operation, access and recognition. Some countries already have such laws. Others are considering legislation, and more may do so in the future. The advantage of legislation is that it reduces uncertainty about the initial steps in an international insolvency. And it need not remove all national discretion on the conduct of an insolvency: generally speaking, legislation that provides co-operation in cross-border insolvencies reserves the right to refuse recognition when that would conflict with legitimate public policy.

In the case of financial insolvencies, the first policy consideration should be the systemic risk. This tends to strengthen the case in favour of international co-operation rather than against it. Laws that acknowledge this fact would be beneficial; and the norms of universality, which call for a global approach to insolvency, should wherever possible be incorporated into new law for financial insolvencies. (7)

87 In the National Bureau of Economic Research's 1998 working paper, *An Economic Analysis of Transnational Bankruptcies*, Bebchuk and Guzman demonstrate that an approach based on universality is more economically efficient: under such a regime an investment decision by a foreign company will be based only on the expected return of the project. Under a territorialist approach an investment decision will also take into account the likelihood of payment being made if an insolvency ensues in the state in which the investment is made. Applying this to the New Zealand context, in the absence of legislation dealing with cross-border insolvency issues, doubts about recoverability (on bankruptcy) of loans made by offshore entities are likely to impact adversely on foreign investment in New Zealand.

A new world economy

88 The relationship between insolvency law and modern capitalism was also addressed by Joseph Stiglitz, Senior Vice President and Chief Economist of the World Bank, in "The Role of International Financial Institutions in the Current Global Economy" (a speech given to the Chicago Council on Foreign Relations on 27 February 1998, available at www.worldbank.org/html/extdr/extme/jssp022798.htm). Stiglitz commented:

A keystone in the development of modern capitalism has been limited liability and bankruptcy laws. Modern bankruptcy laws attempt to balance two considerations: promoting orderly workouts so that business values can be retained and production losses can be kept to a minimum, and providing appropriate incentives so that those engaged in risky behaviour bear the consequences of their actions.

In the absence of orderly workout procedures, countries may worry that unless they issue guarantees or assume private debts, the disruption to the economy will be unbearable. (22)

89 Concluding his speech Mr Stiglitz went on to say:

Today, we stand on the edge of a new world economy. But we do not have international institutions to play the role that the nation-States did in promoting and regulating trade and finance, competition and bankruptcy, corporate governance and accounting practices, taxation, and standards within their borders. Navigating these uncharted shoals will be a great challenge. But just as much of the prosperity of the past one hundred and fifty years can be related to the expansion of markets that those transformations afforded, so too the prosperity of the next century will depend in no small measure in our seizing the opportunities afforded by globalization.

In approaching the challenges of globalization, we must eschew ideology and over-simplified models. We must not let the perfect be

the enemy of the good. As one of my friends put it, in a downpour, it is better to have a leaky umbrella than no umbrella at all. I believe that there are reforms to the international economic architecture that can bring the advantages of globalization, including global capital markets, while mitigating their risks. Arriving at a consensus about those reforms will not be easy. But it is time for us to intensify the international dialogue on these issues. (25–26)

The New Zealand economy

- 90 Globalisation exposes the New Zealand economy to fluctuations in the world economy. As compared with other states, the outlook for the New Zealand economy is highly dependant on the fortunes of the global economy because of our dependence on international trade for income and the high degree of foreign investment (both debt and equity) in New Zealand. The recent recessionary state of New Zealand's economy is evidence of this susceptibility.
- 91 The New Zealand Treasury's September 1998 *Economic and Fiscal Outlook* noted that the New Zealand economy is dependent on overseas trade for the bulk of its income. In addition, the level of international investment in New Zealand far outweighs the level of New Zealand investment abroad.²⁵ The bulk of the country's trade is with Australia, Japan, the United States and the European community. Other than Japan, in Asia there are lesser but significant trading relationships with the People's Republic of China, Korea, Malaysia, Singapore, Taiwan and Thailand. Lesser trading relationships again exist with the Asian states of Hong Kong and Indonesia. Together the Asian states (including Japan) represent the final destination for approximately 37 percent of the total value of New Zealand's exports (this was the figure for the year ending June 1997; the Asian crisis will have depressed exports to that region) (Statistics New Zealand, *New Zealand Official Yearbook 1998*, 520–526).
- 92 New Zealand is also highly dependent on foreigners for their continued financial investment in New Zealand business. Ninety-five percent of registered banks which operate in New Zealand are foreign owned;²⁶ the only wholly owned New Zealand bank is now

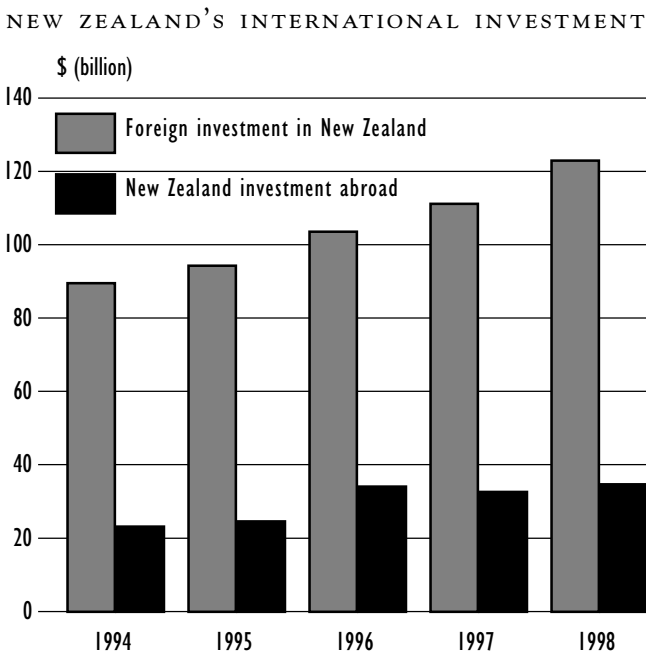
²⁵ Statistics New Zealand, *International Investment Position: 31 March 1998* states:

At 31 March 1998 New Zealand's net international investment position was negative \$89.5 billion. . . . On a balance sheet presentation basis New Zealand owes the rest of the world \$137.5 billion and has claims on the rest of the world of \$48.0 billion. (1)

²⁶ "The Role of the Reserve Bank of New Zealand in Supervising the Financial System" at www.rbnz.govt.nz/fin/sect1.htm.

the Taranaki Savings Bank. The May 1998 issue of the *Rural Bulletin*, in an article entitled “Asia’s Economic Crisis”, noted that overseas investors now own approximately 61 percent of the value of New Zealand’s share market, up 23 percent from 1992. Furthermore, as noted in the *International Investment Position: 31 March 1998*, foreign investment in New Zealand – the level of New Zealand’s financial liabilities owed to non-residents – increased significantly from \$113 billion in 1997 to 124.7 billion in 1998 (Statistics New Zealand 1998, 2). The 1989 foreign investment figure of \$51.3 billion illustrates the striking rise of foreign investment in New Zealand (“Rising Risk”, *Evening Post*, 16 May 1998). Foreign direct investment in New Zealand – that is, the total lending by the New Zealand direct investor to its overseas direct investment enterprise less the borrowing of the New Zealand direct investor from its overseas direct investment – increased \$10.3 billion in the year to March 1998 to stand at \$64.5 billion; this is the highest amount of direct foreign investment since the recording of foreign investment in New Zealand in 1988 (Statistics New Zealand 1998, *International Investment Position*, 1).

93 The graph below illustrates the gradual increase in foreign investment between 1994 and 1998.



Source: Statistics New Zealand, “International Investment Position, 31 March 1998”, available at www.stats.govt.nz

94 Each of the top ten listed companies is predominantly owned by overseas investors (“Rising Risk”, *Evening Post*, 16 May 1998). The “Overseas Investment Commission 1997 Figures” notes that the Commission approved 164 applications for foreign investment and declined only four (with a combined total of \$3.2 billion) in the six months to 31 December 1997 (figures available at [//oic.govt.nz/publicat.htm](http://oic.govt.nz/publicat.htm)).

95 At the time of Treasury’s 1998 *Economic and Fiscal Outlook*, the New Zealand economy was in recession, primarily as a result of the effects of the Asian financial crises. In presenting the 1998 Budget to Parliament, the then Treasurer, the Hon Winston Peters MP, made the following observations in relation to forecasts for export earnings:

- Forecasts for economic growth in Asia during 1998 has been revised down. Consequently, forecast growth for New Zealand’s top ten trading partners in 1998 had been lowered from 3.7 percent in October 1997 to 2.3 percent in April 1998.
- The most significant effect of the Asian downturn was expected to come through lower export prices, although the lower exchange rate would cushion the effect on exporters.
- Growth in export volumes was also expected to weaken, particularly for tourism and log exports (Budget, Economic and Fiscal Update 1998, AJHR 1993 B3, 10).

96 Subsequently, on 8 September 1998, revised estimates were presented by the Treasury in the *Economic and Fiscal Outlook*. That document made it clear that expected economic growth was down in the year to March 1999, as compared with the Budget predictions. Treasury said:

This reflects the weak start to 1998, a slower recovery, and a weaker outlook for world growth.

...

The changes in the near term reflect financial market volatility, lower confidence, larger-than-expected drought effects and a deeper and more broadly based downturn in Asia than expected. (*Economic and fiscal outlook*, 3)

97 Treasury went on to point out that

the outlook for the New Zealand economy is heavily dependent on the fortunes of the global economy. A key judgment is the extent to which developments in the world economy offset or support the competitive gains arising from the exchange rate depreciation. (9–10)

The 8 September forecast was based upon the following key judgments:

- monetary conditions are forecast to reach a trough by early 1999 as short-term interest rates ease;
- the US and Australia economies slow in 1999 but retain reasonable momentum; and
- the Asian region stabilises in 1999 (*Economic and fiscal outlook*, 10).

98 It is plain that New Zealand's economic growth is linked to recovery in Asia. In turn, recovery in Asia is linked to IMF assistance. Given the importance placed on corporate restructuring and cross-border insolvency law by the IMF, it is likely that an Asian recovery based on IMF funds will see adoption of the Model Law in that region.

99 The recent recessionary state of the New Zealand economy has tended to place a more immediate focus on the need to ensure that New Zealand exporters can recover moneys owed for the sale of goods or supply of services if the entities which they are trading with overseas are placed into a formal insolvency regime. As Bebchuk and Guzman have demonstrated, foreign investment may be undermined if a universalist approach to cross-border insolvency law is not adopted (Bebchuk and Guzman 1998, 15–23). From an exporter's perspective, the likelihood of being paid from a foreign insolvency must be assessed. The New Zealand Government has already recognised the need for a universalist approach in the area of electronic commerce: the 1998 paper released by the Ministry of Commerce identified the need to adapt to the global economy to make gains for New Zealand traders: "The 'Freezer Ship' of the 21st Century: Government Statement on Electronic Commerce".

100 The various matters discussed all impact on the ability to reduce transaction costs, promote trade and increase capital flows, and the ability to sell goods and provide services at competitive prices. These matters affect the general economic well-being of the New Zealand economy.

Fairness and efficiency

101 Predictability of outcome on any given factual base is an important policy objective in commercial law. With predictability of outcome there is less need for legal argument and, in that way, the overall costs of litigation are reduced. At present, when cross-border insolvency issues arise, the insolvency administrator's advisors assess both the ease with which an application for assistance may be made and the way in which courts in particular states are likely to respond to requests for aid.

- 102 Predictability of outcome and consistency of decision-making contribute to the provision of effective and fair procedures for individual litigants. Uniformity of procedure is a solid foundation for fairness of treatment of creditors and debtors alike. Adoption of a law that is likely to result in different states treating like cases alike, notwithstanding the fact that each state may have a different substantive insolvency law, is another indicator of fairness.
- 103 The Model Law enhances predictability of outcome in identifying the initial processes to be followed to seek assistance and in establishing mechanisms for recognition of judgments of overseas courts. Streamlining the rules to be applied to cross-border insolvency issues will, consequently, provide a springboard for uniform practice, and thereby avoid costs and increase the speed of resolution of cross-border disputes (which is, in itself, often a cost-saving measure). However, the flexibility of approach retained by the Model Law to respond to particular cases lessens the predictability of decision-making.

FACTORS AGAINST REFORM

Sovereignty

- 104 An argument against adoption of the Model Law is the need to preserve New Zealand's sovereignty to legislate as it thinks fit in respect of assets situated in New Zealand. The New Zealand Parliament could exercise its undoubted right to legislate in a manner which would better suit or protect domestic creditors who wish to gain access to assets in New Zealand. But, such an approach would be territorialist in nature and may act as a disincentive to foreign investment. In our view, a territorial approach is outweighed by the disadvantages which would flow from it. A global economy does exist of which New Zealand is part. It is unrealistic (and undesirable) for New Zealand to legislate in a manner inconsistent with global commercial trends. Because of its size, New Zealand is necessarily reactive to events overseas. The reverse is not true.
- 105 Furthermore, the force of this factor is diminished by the procedural nature of the Model Law; it does not purport to affect the substantive domestic law of insolvency applied in New Zealand. What it does do, however, is to change New Zealand's focus, in the international insolvency arena, to a view based on a more universalist approach.

Adequate legislation?

- 106 If New Zealand's legislation is considered adequate at present to deal with cross-border insolvency issues then that is a factor against reform and therefore adoption of the Model Law.
- 107 In respect of the insolvency of companies, the law has been identified as in need of reform. In December 1988 the Law Reform Division of the then Department of Justice issued a discussion paper, entitled *Insolvency Law Reform*. Chapter 19 dealt with what was described as "cross-frontier insolvency". Reference was made to s 135 of the Insolvency Act 1967 and to the lack of a companion provision in the Companies Act 1955. It was noted that Part XI of the 1955 Act provided for the winding-up of unregistered companies in a manner which could be applied to overseas companies.
- 108 The Law Reform Division proposed that the company law legislation should contain an equivalent of the bankruptcy "acting in aid" provisions. Further, it was suggested that efforts should be made to promote:
- a multilateral international treaty to deal with cross-border insolvency issues; and
 - bilateral treaties between states with similar bankruptcy laws.

In the latter regard, specific reference was made to the Australian and New Zealand Attorneys-General signing of a Memorandum of Understanding on 1 July 1988 regarding the harmonisation of business laws between the two states (*Insolvency Law Reform* 140–141).

- 109 It has been suggested to us that the addition of an "acting in aid" provision to New Zealand company law would provide New Zealand courts with the necessary flexibility to deal on a case-by-case basis with issues of cross-border insolvency. That may be so, but the real issue is whether such an approach is better suited to New Zealand's sovereign interests than adoption of the Model Law.
- 110 Although enactment of an "acting in aid" provision in New Zealand company law is likely to provide the necessary flexibility to deal with cross-border insolvency issues on a case by case basis, we believe that it would be more beneficial for New Zealand to be party to a global regime dealing with cross-border insolvency issues. It would be preferable for New Zealand to join the international regime when other countries adopt or signal adoption of the Model

Law. This can be effected by delaying repeal of existing cross-border insolvency laws and the bringing into force of a statute based on the Model Law until those events occur.

- 111 We believe that the company law provisions in New Zealand are inadequate to deal with modern cross-border insolvency issues. The accumulated wisdom of those who have had practical experience of cross-border insolvency cases has led to the provisions of the Model Law. We do not see this factor as tilting the balance against adoption of the Model Law.

CONCLUSION

- 112 In our view, the globalisation, fiscal and efficiency and fairness factors favour reform of New Zealand cross-border insolvency law and far outweigh those against. Further, adoption of the Model Law seems to be the most appropriate way to achieve reform. We have come to these conclusions for the following reasons:

- The increasing need to develop laws which are effective in the global market of which New Zealand is part. States must find ways in which to regulate the borderless economic world efficiently, within sovereign territorial boundaries. The Model Law strikes a neat balance in that it provides a uniform approach to the initiation of cross-border insolvency proceedings while allowing for flexibility of approach on a case-by-case basis to the finding of solutions.
- The Model Law's option of deference to a local proceeding was a political necessity accepted as part of the UNCITRAL process to accommodate concerns about potentially over-intrusive foreign proceedings dominating local insolvency systems. In short, even if universality is the most desirable underpinning for a cross-border insolvency regime to embody, the value of cross-border insolvency law lies in its adoption by many trading states, which would not be likely to occur if a truly universal approach was proposed.
- There are many economic factors favouring adoption of the Model Law. First, there is a need to address cross-border insolvency problems arising from the perpetration of fraud by electronic means: this is the problem to which Lord Millett has referred in *Tracing the Proceeds of Fraud* (1991) 107 LQR 71. Second, fair treatment of foreign creditors is likely to influence foreign investment favourably. Third, there is a likelihood that

the Model Law will be widely adopted as part of IMF relief packages to states in financial distress. The economic factors to which we have referred (paras 76–100) are likely to reduce transaction costs and promote trade and capital flows thereby improving the economic well-being of the New Zealand economy. Fourth, fair treatment of foreign creditors by New Zealand courts is likely to lead the courts of other States with which we trade to adopt a similar approach to New Zealand creditors who are in competition with their domestic creditors.

- It meets the problems identified in the United States National Bankruptcy Commission’s Report (see para 19).
- It is necessary for law governing international trade to reflect global trade developments. This has been touched upon by the courts but has been left to the legislature: see *Gordon Pacific Developments Limited v Conlon* [1993] 3 NZLR 760.
- Present domestic law is inadequate, particularly in dealing with corporate insolvencies (para 106–111). Adoption of the Model Law would prove a more satisfactory option as it would align New Zealand with other trading nations who adopt the Model Law.

113 In our view it is for these reasons that the interests of New Zealand will be enhanced by adoption of the Model Law. Adoption of the Model Law by some countries is likely to encourage adoption in other countries. While New Zealand should not be timid about being one of the first countries to enact the Model Law, it should also recognise that adoption of the Model Law by a number of our trading partners is necessary to bring about the benefits which we have identified. Accordingly, we take the view that the Model Law should be enacted but not brought into force in New Zealand until such time as the Government is satisfied that other States with which we have major trading relations have enacted the Model Law or will shortly enact the Model Law.

114 In para 9 we touched on an issue which arises from the possibility of the Model Law and other cross-border insolvency remedies being on the statute book concurrently. We referred to the analogy of a court determining whether approval of a Proposal filed under Part XV of the Insolvency Act 1967 or the making of an order of adjudication in bankruptcy was more appropriate, and noted the likelihood that the court would need to resolve which choice should be made between two available and alternative remedies.

- 115 The choice to be made by the legislature is whether to retain parallel remedies on the statute book or to repeal existing New Zealand law affecting cross-border insolvency issues so that the Model Law is the only statute under which a foreign insolvency proceeding may be recognised. If the first option is chosen, the courts will be given the power to make whatever order, under whichever of the relevant legislation, it considers appropriate. If the latter option is chosen, then recognition will only be granted under the Model Law.
- 116 Our review of this subject has led us to the conclusion that the Model Law should be the sole piece of legislation by which recognition of a foreign insolvency administration can be granted. In our view, s 135 of the Insolvency Act 1967 and s 342 of the Companies Act 1993 should be repealed contemporaneously with the bringing into force of the Model Law. The existence of one regime is likely to lead, particularly after an international body of case law has built up, to a more uniform approach throughout the world to cross-border insolvency issues. Hence, predictability of outcome will be enhanced if there is no parallel remedy available.
- 117 We do, however, suggest that consideration of express transitional provisions be deferred until such time as the Model Law is to be brought into force. We envisage that consideration will be given to this issue by the Ministry of Commerce which, of course, has responsibility for the administration of insolvency law in New Zealand. At this stage, our inquiries reveal few cross-border insolvency cases to be pending under the provisions to be repealed. Accordingly, specific transitional provisions may be unnecessary. But, the position could well change in the interim between consideration of this report and the date on which the Model Law is to come into force in New Zealand. It is for that reason that we suggest deferral of transitional issues.
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4

The Model Law

BACKGROUND

History

118 ORGANISATIONS SUCH AS COMMITTEE J of the International Bar Association's Section on Business Law, which deals with Insolvency and Creditors' Rights, and INSOL International (an international organisation of insolvency practitioners, both legal and accounting) have since the early 1980s been working on projects designed to deal with international insolvencies in the twenty-first century. The first step in the process was the drafting of the Model International Insolvency Co-operation Act, known generally as MICA (see Mears 1990).

119 In 1995, the International Bar Association formally approved a document known as a Concordat. As Bruce Leonard, the then Co-Chair of Committee J, stated in a paper delivered at the United Nations Commission on International Trade Cross-Border Insolvency Colloquium in Vienna, Austria in 1994:

The Concordat originated out of the common insolvency-community conclusion that cross border insolvencies and reorganisations would rarely be dealt with effectively through international treaties. The concept of the Concordat was to draw upon the experience of the insolvency community to develop a set of general guidelines which could be used in identifying solutions applicable to individual cross border insolvencies. The intention of the Concordat is to suggest rules which would be applicable to cross border insolvencies and reorganisations which participants in the reorganisations or the Courts could adopt as practical solutions to problems arising in the insolvency or reorganisational process.

The Concordat is based on the view that an insolvency regime in order to be supportive of international commerce must be reasonably predictable, fair and convenient. The Concordat begins with the view that international trade and commerce will be enhanced and facilitated by an understanding among nations that principles exist which, in the event of a business failure or reorganisation, will govern the proceedings. (10–11)

- 120 Subsequently, the Concordat was used to resolve a number of cross-border international problems even though, as a matter of law, it had no effect. Judges were prepared to act on the statements of principle contained in the Concordat as being internationally accepted principles sourced through practitioners experienced in the difficulties arising in the administration of a cross-border insolvency. Examples of cases in which the Concordat was applied are *Re Hackett* WL 422132.N3 (Bankr SDNY 1995) and *Re Commodore Electronics Limited & Commodore International Limited* (Supreme Court, Cth of the Bahamas, Equity Side, 27 March 1995, 473/1994).
- 121 In conjunction with INSOL International, UNCITRAL organised conferences to discuss cross-border insolvency problems. The background to the work ultimately taken by UNCITRAL is recorded in a report by Zulman J of the Supreme Court of Appeal of South Africa: *Final Report on Trans-National Insolvency*. As a person involved in discussions leading up to approval of the Model Law by the General Assembly of the United Nations, Zulman J's explanation of the process is illuminating:

UNCITRAL decided to undertake work on cross-border insolvency in response to suggestions made to it by practitioners directly concerned with the problem. At an UNCITRAL conference entitled "Uniform Commercial Law in the 21st Century" held in New York in May, 1992 [United Nations reference A/CN.9/SER.D/1] UNCITRAL decided to pursue these suggestions further [Official records of the General Assembly, 48th Session, Supplement No 17 (A/48/17), paras 302/306.] The background note on which UNCITRAL based its discussion is contained in document A/CN.9/378/Add.4. Subsequently, in order to assess the desirability and feasibility of work in the area, and to define appropriately the scope of the work, UNCITRAL and INSOL held a Colloquium on cross-border insolvency in Vienna in April 1994 involving practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders. [The report on this Colloquium is to be found in document A/CN.9/38].

The first UNCITRAL-INSOL Colloquium gave rise to the suggestion that work by the commission should, at least at that stage, have the limited but useful goal of facilitating judicial co-operation, court access for foreign administrators and recognition of foreign insolvency proceedings. Subsequently, an international meeting of judges was held specifically to illicit [sic] their views as to work by UNCITRAL in that area. This meeting took place in Toronto in March 1995. . . . The view taken by participating judges and government officials at that Colloquium was that it would be worthwhile for UNCITRAL to provide a legislative framework, for example by way of model legislative provisions, for judicial co-operation, court access for foreign insolvency administrators and recognition for foreign insolvency proceedings.

Working sessions of the group were held in New York in April 1996, in Vienna in October 1996, and in New York in January 1997. . . . (Zulman 1998, para 8.1; see also www.un.or.at/uncitral)

- 122 The advantage of legislation designed to reduce uncertainty about the initial steps in an international insolvency, while not removing all national discretion on the conduct of an insolvency, was recognised as valuable in the recommendations made by the Group of Thirty in its discussion paper *International Insolvencies in the Financial Sector* (August 1996).
- 123 The *Guide to Enactment* issued with the *Model Law on Cross-Border Insolvency* explains the purposes and provisions of the Model Law in detail. In this chapter we outline the purposes of the Model Law and then proceed to discuss a number of issues relevant to adoption of the Model Law in New Zealand. Our observations on these issues should be read in conjunction with the *Guide to Enactment* (set out in the appendix to this report with the Model Law) and the commentary on our draft legislation. The reference table at page xvi of this report should be used to ensure that all references to particular articles in the Model Law are captured.
- 124 Three points should be made immediately:
- The Model Law is designed to assist states to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency. This includes provision for cases where the insolvent debtor has assets in more than one state or where some of the creditors of the debtor are not from the state where the insolvency proceeding is taking place (*Guide to Enactment*, para 1).
 - The Model Law reflects practices of cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. The Model Law was designed not only for jurisdictions that currently have to deal with numerous cases of cross-border insolvency, but also those which wish to be well prepared for the increasing likelihood of such cases (*Guide to Enactment*, para 3).
 - The Model Law respects differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it offers solutions to help resolve cross-border problems (*Guide to Enactment*, para 3). These solutions are based on “best practice” distilled from the practical experiences of both courts and practitioners.
- 125 The Model Law reflects both the need for certainty in determining how to initiate a cross-border insolvency proceeding and the broad discretion which must necessarily be reposed in courts to enable

them to fashion practical solutions to cross-border insolvency problems. The Model Law provides a framework within which protocols can be approved, for example, those formulated as a result of co-operation between the United States' Bankruptcy Court, Southern District of New York, and the Chancery Division of the High Court in proceedings involving *Maxwell Communications Corp Plc*.²⁷ A further example of judicial co-operation is the recent case involving Chapter 11 proceedings in the United States (in New Mexico) and a Canadian proceeding (under the Companies' Creditors Arrangement Act) which resulted in a joint hearing being convened to discuss issues in the course of which both the Canadian and United States judges exchanged comments about the resolution of procedural and substantive issues.²⁸

Purposes

126 The purposes of the Model Law are set out in the Preamble which reads:

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximization of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

127 It is clear from the Preamble that it is designed to be all things to all people. The interests of creditors, the debtor and employees of the debtor are all emphasised to accommodate the different weight given to each of those factors by the domestic laws of individual states.

²⁷ The protocol is reproduced as Annex 1 to an article by Flashen and Silverman, "Maxwell Communication Corporation Plc, The Importance of Comity and Co-operation in Resolving International Insolvencies" 43 in Leonard and Besant 1994. See also *Re Maxwell Communications Corporation Plc (No 2)*, *Barclays Bank Plc v Homan* [1992] BCC 757.

²⁸ *Re Solv-Ex Canadian Limited* (Court of Queen's Bench of Alberta, Calgary, 28 January 1998, Case 970110022J) and *Re Solv-Ex Corporation* (US Bankruptcy Court New Mexico, 28 January 1998, Case 9714361).

- 128 The Preamble also emphasises co-operation between courts: this is something new. Mr Justice Farley, one of the senior judges sitting in the Commercial List of the Ontario Court of Justice (General Division) who has considerable experience in cross-border insolvency arrangements, recently stressed the need to avoid becoming bogged down in non-productive diversions that are destructive to the value of the enterprise. He stated: “[w]e in the judiciary must recognise the sovereignty of each country’s insolvency regime, but there are significant commonalities upon which to build” (Farley 1998, 12).
- 129 Other judicial guidance is found in the observations of Blair J in the case of *Olympia and York Developments v Royal Trust Company* (1993) 20 CBR (3d) 165 who, when considering a negotiated protocol between parties in order to harmonise matters arising under the Canadian Companies’ Creditors Arrangement Act and Chapter 11 of the United States Bankruptcy Code, said:

The Courts of the various jurisdictions should seek to co-operate amongst themselves, in my view, in facilitating the trans-border resolution of such disputes as a whole, where that can be done in a fashion consistent with their own fundamental principles of jurisprudence. The interests of international co-operation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less. (167)

STRUCTURE AND STYLE

- 130 There are five distinct parts of the Model Law:
- Articles 1–8 are introductory in nature and provide some general principles against which the balance of the Model Law can be interpreted.
 - Articles 9–14 make specific provisions for the right of a foreign representative of an insolvent entity to apply to the courts of the enacting state and for foreign creditors to participate in domestic insolvency proceedings.
 - Articles 15–24 set out provisions relating to the recognition of foreign insolvency proceedings, foreign insolvency representatives and relief which can be granted when cross-border insolvency issues arise.
 - Articles 25–27 deal with questions of co-operation between courts of different jurisdictions and insolvency representatives based in different jurisdictions.
 - Articles 28–32 deal with problems caused by concurrent proceedings and the rules which should apply to them.

- 131 Some of the provisions of the Model Law are drafted in a style which is different from that usually encountered in New Zealand statutes. Accordingly, an issue for consideration, if the Model Law is to be adopted, is the language to be employed in a New Zealand statute to reflect its provisions. Should the wording of the Model Law be adapted to reflect the style in which a New Zealand statute is usually worded?
- 132 In our view, because the Model Law is intended to be used internationally, it is desirable that consistent language be used. That will avoid any argument over whether a change from the Model Law's wording has changed the meaning originally intended by the Model Law. The aim is global consistency of approach to interpretation of the Model law and therefore predictability in outcome in any given case.
- 133 New Zealand's approach to statutory interpretation is consistent with the objective of consistency: as Keith J said in *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269:
- We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations, eg *Rajan v Minister of Immigration* [1996] 3 NZLR 543 at p551. That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text. (289)²⁹
- 134 More generally, it is desirable that there is consistency of approach by each enacting state, again to ensure consistent interpretation. In consequence, the case law, though domestic in nature, will acquire an international flavour. To date the only other states at the stage of drafting legislation are the United States and South Africa. In comparing the United States draft legislation with the Model Law, Glosband and Tobler consider few changes have been made to the structure while many changes have been made to the language; but "those changes were idiomatic, not substantive" (Glosband and Tobler 1998, 28). As for the South African draft, the South African Law Commission determined to make "as few changes as possible . . . in the proposed adaptation in order to strive for a satisfactory degree of harmonisation and certainty." ("Invitation to Comment on UNCITRAL Model Law on Cross-Border Insolvency", available at www.law.wits.ac.za/salc/media/cross-bininvite.html.) We favour the South African approach.

²⁹ See also the New Zealand Law Commission's report, *The Treaty Making Process Reform and the Role of Parliament* (NZLC R45), paras 40–41 and 91.

ADAPTATION OF THE MODEL LAW TO NEW ZEALAND

Scope of the Model Law

- 135 Article 1(2) of the Model Law leaves open the possibility of a particular state excluding particular types of entities from the ambit of the Model Law. Examples given in article 1(2) of the Model Law are banking and insurance. Aside from life insurance and banking industries, the general insolvency statutes in force in New Zealand apply across the board to individuals and companies.

Banks

- 136 The issue whether banks registered under the Reserve Bank of New Zealand Act 1989 (the Reserve Bank Act) should be subject to the Model Law is a unique one. First, the total assets of registered banks made up approximately 93 percent of the total assets of financial institutions in New Zealand at the end of 1997 (KPMG 1998 *Financial Institutions Performance Survey*). This survey included registered banks, finance companies, savings institutions and mortgage origination companies as “financial institutions”, but excluded financial institutions with total assets of less than \$30 million. Second, there is a very high degree of foreign ownership within the New Zealand banking system. As at the end of December 1997 there were 19 registered banks in New Zealand of which 18 were either branches or subsidiaries of overseas banks. This translates to over 95 percent of the total assets of banks in New Zealand being held by overseas-owned banks. Indeed, the only banks with any degree of local ownership are TSB Bank Limited (wholly owned by the TSB community trust and operating largely in the Taranaki region) and ASB Bank Limited (which is 25 percent owned by the ASB community trust). Although ASB Bank Limited started primarily as an Auckland-based bank, it now has branches in many other parts of New Zealand.
- 137 Foreign ownership creates the risk that an insolvency of a bank in New Zealand will emanate from overseas; in such a case, New Zealand authorities would have virtually no control over the timing of a bank failure. Such a failure could arise if a bank in New Zealand guaranteed obligations to its parent company (located overseas) and the parent company became insolvent requiring the New Zealand bank to pay on the guarantee. This raises peculiar problems about protection of the New Zealand financial system. For that reason we have devoted a separate chapter to the question of whether registered banks should be subject to the Model Law.

We discuss in chapter 5, particularly, the extent to which the Reserve Bank of New Zealand ought to be able to continue to exercise prudential management functions to avoid systemic financial failure as a result of the insolvency of a particular bank.

Life insurance companies

138 Life insurance companies are the only other form of company in New Zealand to have an industry-specific form of insolvency regime. That regime is the judicial management regime established under the Life Insurance Act 1908 Part iA as enacted by the Life Insurance Amendment Act 1985. As Barker J observed in *Re ACL Insurance Limited* [1991] 1 NZLR 211:

The scenario provided by Part iA of the Life Insurance Act is a variation on a fairly regular theme which has seen statutory managers imposed on a whole range of companies in the public interest. In recent troubled financial times, there has been frequent exercise of the powers of the Executive under the Companies Special Investigations Act 1958 . . . , and its successor, the Corporations (Investigation and Management) Act 1989. . . . The Reserve Bank of New Zealand Amendment Act 1989 . . . gives similar powers to the Reserve Bank in respect of registered banks. Virtually each statutory management ordered thus far has resulted in complex litigation. However, none of the other cognate statutes reposes the power of appointment of managers in this Court. Nor are any of the other kinds of manager called “judicial manager” with a duty to report to the Court. (214)

139 It may be doubted whether, under current market conditions, a separate insolvency regime for life insurance companies can be justified. Market conditions now are rather different from what they were when the judicial management procedure was enacted in 1983 before full deregulation of financial markets. It is difficult to see what can, in the current deregulated financial environment, distinguish a life insurance company from any other company engaged in investment management where, for example, citizens invest their money to provide for their retirement. A factor which supports the view that life insurance policies should not be treated any differently from any other form of retirement savings was the repeal, by s 4 of the Insurance Law Reform Act 1985, of the protection on life insurance policies passing to an Official Assignee on bankruptcy (see *Laws NZ*, Insolvency, para 254).

140 There may, however, come a time when the life insurance industry should be treated like banks. Banks are facing increasing competition in areas of traditional banking business, blurring traditional distinctions between banks and investment companies. For example, at the close of 1997 AMP/ERGO Mortgage and Savings

Limited had a mortgage portfolio of close to \$1 billion. While this portfolio is still much less than that carried by most banks it is, nevertheless, indicative of significant inroads being made into the residential mortgage market. There is a distinct possibility that financial institutions other than banks will become sufficiently active – in what have historically been core banking activities – to pose financial risks similar to those posed by the failure of a bank. For example, in Australia non-bank mortgage providers have expanded and now provide a significant share of the residential mortgage market.

- 141 Notwithstanding the anticipated entry of financial institutions into the activities of traditional banking, we are satisfied on current evidence that life insurance companies per se do not pose sufficient threat of systemic financial failure to warrant exclusion from the Model Law. The question whether a separate insolvency regime should continue for life insurance companies should be addressed in the Ministry of Commerce's forthcoming insolvency law review.

Method of exclusion

- 142 A practical question arises as to how the Model Law should refer to the types of insolvency regimes in force in New Zealand to which it would apply. There are a number of ways of achieving this objective:
- To insert a generic definition of insolvency laws such as we proposed in our 1998 report, *Some Insurance Law Problems* (NZLC R46). Section 11B(2)(a) of the draft Insurance Law Reform Amendment Act contained in that report proposed an amendment to Part III of the Law Reform Act 1936 in the following form:
 - a statutory or contractual regime under which the assets of the insured have been or are to be realised for the benefit of secured or unsecured creditors; . . .
 - To list New Zealand's statutes to which the Model Law would apply so as to avoid doubt as to their applicability. (This is, however, a cumbersome procedure which may require statutory amendment on a regular basis.)
 - Not to refer at all to the types of insolvency regimes in force in New Zealand to which the Model Law is intended to apply, but to rely on the courts to interpret the Model Law on a case-by-case basis.
 - To use a generic definition of the type mentioned above but, in addition, to exclude specifically those regimes to which the Model Law is not intended to apply.

143 On balance, we prefer the fourth option. The stating of exceptions to the Model Law is consistent with the approach recommended in the Guide at para 65. A generic definition when combined with specific exclusions would provide both sufficient predictability of outcome as well as efficiency in the sense that it will not require constant changes being made to the law.

Receiverships

144 The Model Law only applies to a foreign proceedings which are collective in nature (article 2(a)). Because of that prerequisite, a receivership commenced by a single secured creditor exercising powers under a floating charge should not fall within the Model Law for the following reasons:

- First, if the appointment of a receiver occurs for reasons other than insolvency there is no basis for the Model Law to apply.
- Second, if the appointment is based on insolvency the receivership is commenced as a self-help remedy pursuant to contractual terms agreed between debtor and creditor.
- Third, as a matter of New Zealand domestic insolvency law, secured creditors fall outside the insolvency regime and are left to exercise remedies under their security documents.
- Fourth, the receiver's duty is of a limited nature: there is no general obligation for a receiver to exercise his or her powers for the good of other creditors: *Downsview Nominees Limited v First City Corporation Limited* [1993] 1 NZLR 513 (PC).

145 Because a secured creditor's rights are not exercised for the collective benefit of creditors, we see no justification to extend procedures available under the Model Law to debenture holders.

146 However, we do not believe that there should be an exclusion of receiverships as a class from the Model Law's application as unnecessary definitional problems may be created due to some forms of receivership being "collective proceedings" for Model Law purposes (see also paras 160–162).

Public policy issues

Actions manifestly contrary to public policy

147 Article 6 of the Model Law expressly provides:

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

The Guide to article 6 states:

As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 6. (para 86)

- 148 The use of the term “manifestly” in article 6 emphasises that the public policy exception should be interpreted restrictively and that article 6 is only intended to be invoked in exceptional circumstances concerning matters of fundamental importance in the enacting state. We have considered whether it would be helpful to identify any aspects of public policy within a New Zealand statute but have come to the view that the courts should be free to consider and apply public policy rules in the particular circumstances of the case.
- 149 There are public policy reasons why a New Zealand court would decline to enforce a judgment given in a foreign court (eg, attempts to enforce foreign revenue and penal laws, judgments obtained by fraud and judgments given in breach of the rules of natural justice as applied in New Zealand: see *Electronic Commerce Part One: A Guide for the Legal and Business Community* (NZLC R50), para 301). However, in the area of cross-border insolvency those public policy considerations are not so clear cut as it is the collective interests of the creditors who will be affected by a decision not to grant relief rather than a particular creditor who has abused the judicial process. For example, a number of countries have moved from an absolute forbidding of enforcement of revenue claims (expressed in cases such as *Government of India v Taylor* [1955] AC 491 and *Peter Buchanan Limited v McVey* [1955] AC 516) to allowing revenue claims to be enforced when those claims form part of the debts of an insolvent debtor subjected to an insolvency regime: *Ayres v Evans* (1981) 39 ALR 129 (Australia); *re Tucker (A bankrupt)*, *ex parte Bird* [1988] LRC (Comm) 995 (Isle of Man); and *Priestly v Clegg* (1985) 3 SA 955 (South Africa). Based on these authorities, foreign taxation claims may sometimes be admitted to proof in a New Zealand bankruptcy or liquidation.
- 150 Article 13(2) of the Model Law requires the ranking of foreign claims to be determined. We propose that foreign claims will be ranked as ordinary unsecured creditors. This leaves open the question of foreign revenue debts which might be ruled inadmissible to proof as being contrary to public policy if the purpose of the application is indirectly to enforce a revenue debt.
- 151 We do, however, propose one minor modification to the Model Law. We propose that in any case where a question of public policy

is raised as a reason for refusing aid, the court be directed to consider whether it is necessary to serve the Solicitor-General with the proceedings so that the court can have the benefit of independent argument on behalf of the Crown on the public policy point. In addition to ensuring that the public policy interests of the state are properly argued in any given case, this provision may also serve to deter counsel from raising public policy objections which have little or no merit.

- 152 Commencement of the statutory management procedure under the Corporations (Investigation and Management) Act 1989 by Executive Order may cause foreign courts to decline relief on the ground that statutory management does not constitute an administrative procedure. We can see no public policy reason why corporations which are subject to statutory management under that Act should be excluded from the operation of the Model Law. Nor has any public policy reason been suggested to us. However, to avoid uncertainty as to whether other states might decline relief on the ground that statutory management is commenced executively rather than judicially, it might be prudent for the legislature to consider whether statutory management should be activated by judicial order (compare with Wood 1995, 222). This is a matter which, in our view, should be considered in the course of the Ministry of Commerce's insolvency law review.³⁰

Rights of foreign creditors

- 153 A court may give discretionary relief to foreign creditors under article 19 or 21 of the Model Law. Generally speaking, we are of the view that foreign creditors should rank equally with New Zealand creditors of equal priority in any distribution of funds unless either:
- New Zealand preferential creditors are entitled to payment before repatriation of funds to the jurisdiction of the insolvency representative seeking relief; or
 - any creditor has in some enforceable way under New Zealand domestic law, subordinated their claims to other creditors in which case effect should be given to that subordination (on subordination, see *Stotter v Ararimu Holdings Limited* [1994] 2 NZLR 655 (CA)).

³⁰ Generally, with regard to statutory management under the Corporations (Investigation and Management) Act 1989, see the April 1992 report by the Securities Commission on Part III of that Act, *Statutory Management*, paras 83–101.

154 We see no reason to legislate further. The Model Law reserves sufficient discretion in the courts to meet the needs of most cases. The court has a number of options available to it to dispose of an application with practical protection for New Zealand creditors. For example, it would be possible for a judge in New Zealand to insist on an application for assistance being supported by a calculation showing the notional realisation of assets among all creditors. It would be open to the judge to order return of sufficient assets to the state of the foreign representative making the application while leaving sufficient moneys in New Zealand to distribute among all New Zealand creditors. Any distribution in New Zealand could be made on the basis that those creditors no longer had a right to prove *pari passu* with other creditors in the jurisdiction of the main proceeding. In our view, practical solutions such as this are preferable to prescriptive legislation.

Which court should have jurisdiction?

155 It is necessary to consider which courts in New Zealand should have jurisdiction under the Model Law. The High Court retains exclusive jurisdiction in matters of insolvency save for some specific provisions which allow particular matters to be determined by a District Court (see *Laws NZ*, Insolvency, para 141). It is desirable that the High Court, as the specialist court dealing with insolvency issues in New Zealand, should have exclusive jurisdiction under the Model Law. This policy decision is reflected in s 5 of our draft legislation.

156 Procedurally, we recommend that application be made by way of originating application in the manner provided by Part IVA of the High Court Rules, without excluding the ability to make oral application in circumstances of unusual urgency. As the statute enacting the Model Law is likely to be the first point of reference for overseas practitioners it is desirable to incorporate jurisdiction and method of application to the High Court into the Act adopting the Model Law. In addition, we recommend that further procedural rules can be made by the Rules Committee under the High Court Rules 1985. This recommendation is reflected in s 6 of our draft legislation.

157 We have considered whether or not Masters should be granted jurisdiction to determine applications for assistance under the Model Law if, as we recommend, jurisdiction is vested in the High Court. In New Zealand, Masters of the High Court are senior judicial officers who exercise all jurisdiction of a judge in chambers and specific court jurisdiction entrusted to them under the Judicial

ture Act 1908, including a good deal of the court's insolvency jurisdiction. We think it desirable for Masters to be given the right to exercise High Court jurisdiction under the Model Law because of the considerable experience which Masters of the High Court have gained in insolvency related matters and because of the speed with which such matters may need to be considered. Any exercise of this jurisdiction by a Master should be stated, in the Judicature Act 1908, to be an exercise of court jurisdiction from which an appeal would lie to the Court of Appeal rather than a Chambers decision from which an application to review could be made to a High Court judge. It will always be open for a party to request that the case be transferred to a judge (see s 26N(1) Judicature Act 1908) on the grounds that the complexity of the matter so demands (see also *Laws NZ*, Civil Procedure: High Court, para 47). We have included in our draft legislation a provision which consequentially amends the Judicature Act to confer on Masters jurisdiction under the Model Law (see s 7).

Definitional issues

Foreign proceeding

- 158 The definition of “foreign proceeding” in article 2(a) of the Model Law refers to a “collective judicial or administrative proceeding”. As previously indicated, this will exclude a receivership commenced by the appointment of a receiver and manager by a single creditor holding a debenture. Rescue proceedings initiated through voluntary administration are not so problematic; specific reference is made in the definition of “foreign proceeding” to “reorganization” being within the Model Law’s purview.
- 159 Examples of voluntary administration regimes are found in both the United Kingdom and Australia. The United States equivalent is the Chapter 11 Bankruptcy regime. In New Zealand the doctrine of comity enables the courts to deal with these issues at present. It is sufficient to note our earlier discussion of decisions of the High Court in *Fournier v The Ship “Margaret Z”* [1997] 1 NZLR 629 and *Turners & Growers Exporters Limited v The Ship “Cornelis Verolme”* [1997] 2 NZLR 110 (see paras 55 and 57). It is plain that one of the objectives of the Model Law is to facilitate rescue procedures of which voluntary administration and Chapter 11 are examples.

Collective proceeding

- 160 We have considered whether there are any New Zealand insolvency regimes which may not be regarded as “collective” for the purposes of the definition of “foreign proceeding”. We do this to ascertain

whether a New Zealand insolvency administrator may face obstacles in seeking assistance under the Model Law as enacted in another state. In our view, both Parts XIV and XV of the Companies Act 1993 will pass muster as collective proceedings. Both of those regimes envisage collective proceedings and, to the extent that in any particular case they are single creditor compromises, they would not, as a matter of evidence, fall within the ambit of the Model Law.

- 161 Although statutory management under the Corporations (Investigation and Management) Act 1989 and the Reserve Bank Act are both commenced by Executive Order rather than judicial decision, it is unlikely that any difficulty would ensue for that reason alone: they are, nevertheless, collective proceedings. We consider public policy issues relating to statutory management separately.
- 162 Some forms of receivership may fall within the scope of the Model Law; others will not, for example, appointment by a debenture holder (see paras 144–146). There are circumstances in which a court will appoint a receiver under its equitable jurisdiction to act for the benefit of a particular body of creditors. If, as a matter of fact, the order appointing the receiver requires the receiver to act for a group of creditors, rather than one particular creditor, it is likely that the receivership will be regarded as a “collective” proceeding for the purposes of the Model Law. Much will turn on the nature and purpose of the appointment: for example, if the appointment of a receiver has been for the purposes of execution it is unlikely to be subject to the Model Law (see generally *Re Samco Sargent Consolidated Limited* (1977) 1 BCR 112 and *Rea v Chix Products (California) Limited* (1986) 3 NZCLC 99, 852). It should be noted that the statutory overlay set out in the Receiverships Act 1993 applies to all forms of receivership commenced in New Zealand.

Subject to control or supervision by a foreign court

- 163 The definition of the term “foreign proceeding” has a second limb. As well as being a “collective judicial or administrative proceeding” it must also be “subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation”.
- 164 A difficulty arises with the compromise provisions of Part XIV of the Companies Act 1993 as, in certain cases, those proceedings may not involve any court control or supervision. However, while it may not be necessary in any given case for the court to have a role in a compromise commenced under Part XIV of the 1993 Act, there are various functions in relation to the giving of directions

by a court which would, in our view, amount to “supervision” for the purposes of the Model Law. We refer, in particular, to ss 228(2), 232(1) and (3), 233 and 234 of the 1993 Act.

- 165 The definition of “compromise” in s 227 of the Companies Act 1993 is likely to cover either a reorganisation or a liquidation, depending upon the terms of the actual compromise.
- 166 Where a compromise is effected through Part XV of the Companies Act 1993 the compromise must be effected through the court: Companies Act 1993 s 236(1). In that case, provided the actual arrangement in question was one which fell within the meaning of either “reorganization” or “liquidation”, the procedure would be covered by the Model Law.

Foreign main proceeding

- 167 The term “foreign main proceeding” is defined by article 2(b) of the Model Law as

a foreign proceeding taking place in the State where the debtor has the *centre of its main interests*; . . . (emphasis added)

- 168 The term “centre of its main interests” has been taken from the European Convention on Insolvency Proceedings. The definition places emphasis on the centre of economic activity rather than on the place of incorporation or domicile. Particular problems will, no doubt, arise for entities which operate in cyberspace through means of the world-wide web. It may be difficult to answer the question as to where the place of the “centre of [those entities] interests” is. However, ultimately, this will be an issue to be dealt with by way of evidence and the court will need to draw inferences where necessary to determine the centre of the debtor’s main interests.
- 169 Mr Michael Steiner of London, an experienced insolvency law practitioner, reminded us of problems which arise in cases involving the perpetration of fraud where directors of the corporate entity have deliberately moved the “centre of its main interests” to what is perceived to be a “friendly” jurisdiction to avoid proper investigation of the affairs of the company and/or an effective liquidation of the company. An example of this type of situation is to be found in the judgment of the Supreme Court of Massachusetts in *Electric Mutual Liability Insurance Company Limited* 426 Mass 362 (1998).
- 170 While acknowledging that these types of problems will arise in cross-border insolvency cases, we are not persuaded that any amendment to the Model Law is required to deal with the issue. Ultimately, the question of what constitutes the centre of the main

interests of the debtor is a question of fact to be proved by evidence. If a court was satisfied that there had been a fraudulent movement of the centre of the main interests of the debtor to a “friendly” jurisdiction prior to the main insolvency proceeding being commenced that would be a factor which the court could take into account in determining whether or not to grant relief under the Model Law. Alternatively, the nature of relief could be circumscribed to fit the circumstances with which the court is faced. For example, if the court had doubt as to the bona fides of the foreign representative it would be open to the court to grant relief by requiring a New Zealand insolvency practitioner to be appointed to administer New Zealand assets (see article 21(i)(e) of the Model Law). It seems clear that any insolvency practitioner (whether a foreign representative or a New Zealand insolvency practitioner) appointed by the court to act under the Model Law would be an officer of the court to whom the rule in *ex parte James* (1874) LR9 Ch 609 would apply.

- 171 In our view no amendment is required to the Model Law in order to address the issue raised by Mr Steiner. We consider the terms of the Model Law give ample powers to the court to deal with any difficulties on a case by case basis. In particular, we refer to the wide powers given to the court under Article 21(1) of the Model Law and to the need for the court to be satisfied that the interests of creditors and other interested persons, including the debtor, are adequately protected when making, modifying or terminating any relief under either article 19 or article 21: see article 22 of the Model Law.

Procedural issues

Judicial co-operation

- 172 One of the distinctive features of the Model Law is the emphasis on and encouragement of judicial co-operation (articles 25, 26 and 27). Specific forms that co-operation may take are specified in article 27. Article 27(f) is left blank for the enacting state to “list additional forms or examples of cooperation”.
- 173 In our view it is not necessary to specify additional means of cooperation given the introductory clause to article 27: “Co-operation . . . may be implemented by any appropriate means, including . . .”. Clearly the court from whom assistance is sought would not be limited to forms of assistance set out in article 27. Neither the draft United States legislation nor the South African legislation specify forms of co-operation beyond those already set out by the Model Law.

- 174 In resolving cross-border insolvency issues, direct communication between judges in different jurisdictions is starting to occur and, for some time, indirect contact has been taking place through counsel appointed for the purpose of communication.³¹ This practice is likely to continue when resolving cross-border cases under the auspices of the Model Law. The issue arises as to whether any limitation should be placed upon informal communications. For example, is it necessary to set out any specific requirements in relation to observance of the principles of natural justice when judicial co-operation is taking place?
- 175 It is in our view unnecessary to set out any specific requirements to observe the principles of natural justice. There are three reasons why this is so:
- given the range of different procedures adopted by courts throughout the world it would be inappropriate (and probably impossible) to articulate procedures in a prescriptive manner;
 - no serious suggestion could be made that the High Court would be likely to err in dealing with cases involving natural justice principles; and
 - in any event, s 27(1) of the New Zealand Bill of Rights Act 1990 requires all courts and tribunals to act in accordance with the principles of natural justice unless legislation specifically excludes that obligation (see also ss 4, 5 and 6 of the Bill of Rights Act).
- 176 These issues are best dealt with by way of co-operation between counsel and the court. While specific protocols may need to be fashioned in particular cases to deal with communications between courts of different states there are many precedents available to assist counsel and judges to deal with these issues.

Adversarial or inquisitorial proceeding?

- 177 The Model Law is silent as to whether a proceeding under the Model Law should be dealt with on an adversarial basis or in an inquisitorial manner. That, in itself, is not surprising given that both common law and civil law states contributed to its drafting.
- 178 In our view it would be inappropriate to prescribe particular practices to be followed. The court should be allowed to develop appropriate procedures to deal with particular cases, subject always to the overriding need to comply with the rules of natural justice.

³¹ For example, the appointment of an examiner in *Re Maxwell Communication Corporation plc* by the Bankruptcy Court of the Southern District of New York on 15 January 1992; see the order set out in Leonard and Besant 1994, 48.

Relief available

- 179 Article 20 provides for certain consequences to flow automatically from the recognition of a foreign main proceeding (for example, stay of proceedings, stay of execution and suspension of right of debtor to transfer, encumber or otherwise dispose of assets). Article 20(2) allows the enacting state to specify exceptions and limitations to which the effects of recognition are subject. The Bill that is currently before the United States Congress and the draft South African legislation specify particular provisions in those states' insolvency laws which override the consequences of article 20.
- 180 We take the view that such an approach is not desirable in New Zealand. Each of the consequences which flow from article 20 would occur as a result of most formal insolvency regimes in New Zealand. The court is given a discretion to override the consequences of stay or suspension of rights: examples are s 32 of the Insolvency Act 1967 and s 247 of the Companies Act 1993.³² Article 20(2) should enable the High Court to exercise the same type of discretion as is reposed in that court by both s 32 of the Insolvency Act 1967 and s 247 of the Companies Act 1993.
- 181 Article 21(g) of the Model Law envisages an enacting state inserting into article 21 any additional relief that may be available to a duly appointed insolvency administrator under the law of the enacting state. With the aim of ensuring consistency of approach we have considered the approach adopted in the United States Bill and in the draft South African legislation. The United States

³² Section 32 provides:

[Subject to section 55 of the Apprenticeship Act 1983, upon] an adjudication being advertised, all proceedings to recover any debt provable in the bankruptcy shall be stayed, but the Court may, on application by any creditor or person interested, allow any proceedings commenced to be continued on such terms and conditions as it thinks just.

See further the guidance on the exercise of the discretion under s 32 of the Insolvency Act provided by Paterson J in *Saimei v McKay* (HC Auckland, 1 October 1998, CP543/96) 4–5. Section 247 provides: At any time after the making of an application to the Court under section 241(2)(c) of this Act to appoint a liquidator of a company and before a liquidator is appointed, the company or any creditor or shareholder of the company may,— (a) In the case of any application or proceeding against the company that is pending in the Court or Court of Appeal, apply to the Court or Court of Appeal, as the case may be, for a stay of the application or proceeding: (b) In the case of any other application or proceeding pending against the company in any court or tribunal, apply to the Court to restrain the application or proceeding – and the Court or Court of Appeal, as the case may be, may stay or restrain the application or proceeding on such terms as it thinks fit.

Bill permits additional relief but excludes certain types of relief under the Bankruptcy Code. In the South African draft statute additional powers are given which could have been exercised within South Africa by various classes of insolvency administrator who are expressly named.

- 182 In our view, no additional provisions are required: the court has a discretion whether to grant further relief which can be exercised in the circumstances of any given case and having regard to the nature of the insolvency administration (ie, whether corporate or individual). The power given to the court under article 21(1) is inclusive in nature. Accordingly, there is no need for a subparagraph (g) to be added to article 21(1).

Standing to initiate action to avoid antecedent transactions

- 183 Article 23(1) of the Model Law is designed to specify actions which a foreign representative may initiate in respect of antecedent transactions which could be attacked if one was acting under a domestic bankruptcy or liquidation. We have already shown that New Zealand's domestic insolvency law does not recognise the doctrine of "relation back" in the case of a foreign bankruptcy (see paras 43 and 44). We recommend that article 23 be modified to make it clear that that substantive rule of law will not be changed.
- 184 A problem with New Zealand adopting a prescriptive approach is that different rules apply to the setting aside of antecedent transactions depending upon whether the debtor is a corporate entity or an individual. An example is the comparison of s 292 of the Companies Act 1993 (transactions having preferential effect) with s 56 of the Insolvency Act 1967 (voidable preferences based on intention to prefer): *Tranz Rail Limited v Meltzer* (HC Auckland, 18 December 1998, M451/98). Because the Model Law is designed to cover both types of insolvency it would be difficult to articulate precisely what types of proceedings a foreign representative could initiate.
- 185 In the case of individuals who are subject to the Insolvency Act 1967, an order under s 135 of the Insolvency Act 1967 enables the High Court to exercise, in regard to the matter specified in the order, such powers as the High Court might exercise in respect of the matter if it had arisen within its own jurisdiction: s 135(1). By s 342(1) of the Companies Act 1993, an application for the liquidation of assets in New Zealand of an overseas company in accordance with Part XVI of the Companies Act 1993 (which relates to New Zealand company liquidations) is carried out, subject

to modifications and exclusions set out in Schedule 9 to that Act, in accordance with the rules which apply to New Zealand companies. Thus, under both bankruptcy and liquidation cross-border regimes, antecedent transactions may be attacked.

- 186 We therefore conclude that a foreign representative should under article 23(1) be able to initiate any proceedings to avoid or otherwise render ineffective transactions detrimental to creditors which would have been available had the insolvency proceeding been commenced in New Zealand. In determining the extent of the foreign representative's rights, the court will need to have regard to the type of insolvency and whether that type of insolvency regime would have given rise to any right to attack the transactions in issue under New Zealand domestic insolvency law.

FUTURE DEVELOPMENTS

- 187 If the Model Law is enacted thought should be given to development of conventions which would take precedence over the Model Law by virtue of article 3 of the Model Law. Such conventions could be entered into between particular states to formalise procedures to be adopted when applications involving only those states are made. For example, it is easy to see how a more detailed protocol would be of benefit to deal with cross-border insolvency applications brought under the Model Law between Australia and New Zealand. Such a convention could provide for a separate arbitral process to resolve any questions of preference or priority (or the like) which arise, thus avoiding the potential of conflicting court decisions.
- 188 The idea of individual bankruptcy treaties or conventions is not new. The European Union has developed its own Convention on Insolvency Proceedings. Unfortunately that Convention has not yet come into force due to ramifications from the ban on English meat exports following "mad cow" disease (Borch 1998). In addition, Scandinavian and Latin American countries have long been parties to treaties defining what will happen in cross-border insolvency cases in their geographic regions.³³

³³ For example, the Montevideo Treaties of 1889 and 1940 (which governed relations among Argentina, Bolivia, Columbia, Peru, Paraguay and Uruguay respectively); the Code Bustamante (Convention on Private International Law) of 1928 which governs certain types of bankruptcies involving 15 Central and South American States; and the Nordic Bankruptcy Convention of 1933 which governs relations among Denmark, Finland, Iceland, Norway and Sweden.

5 Banking

There can be little doubt that financial intermediation is becoming increasingly global. Technological advances and on-going liberalisation of financial markets have contributed to the development of increasingly integrated global capital markets dominated by global financial institutions. (Rodgers 1988, 112)

- 189 **A**RTICLE 1(2) OF THE MODEL LAW permits an enacting state to exclude particular types of entities from the scope of the Model Law. The commentary to article 1(2) highlights the need “to protect vital interests of a large number of individuals” and the need to allow “particularly prompt and circumspect” action as reasons for a state excluding types of entities from the Model Law. Thus, the emphasis is on protecting the national community interest in preference to the rights of individuals.
- 190 In our view, considerable justification is required to exclude an entity from the operation of the Model Law. To be effective, the Model Law should embrace all debtors, regardless of the nature of a debtor’s business. Accordingly, the Law Commission’s starting point is that banks should be included in the Model Law unless there are strong reasons which justify exclusion or modification of the Model Law’s application to them.
- 191 Factors to be addressed in considering whether banks require special treatment are:
- policy concerns underlying both the regulation and insolvency of banks;
 - the structure of New Zealand’s financial system; and
 - risks to the system arising from bank failure.

Banking regulation

- 192 There are in most countries two primary objectives motivating bank regulation. First, the preservation of a state’s financial system. Secondly, the protection of bank depositors from loss.

- 193 To achieve these objectives banks are typically subject to special regulation, not applied to business enterprises in general. This regulation takes the form of:
- ongoing supervision of banks' activities by a supervisory authority; and
 - a special insolvency regime designed to limit the adverse effects of a bank insolvency on the state's financial system.
- 194 When we speak of "bank" we mean "registered bank" as in New Zealand only those entities registered under s 69 of the Reserve Bank of New Zealand Act 1989 (the Reserve Bank Act) are entitled to use the word 'bank' in their name: Reserve Bank Act s 64.
- 195 New Zealand's approach to banking regulation differs from the approach generally taken in other states. The Reserve Bank reviewed its bank supervision arrangements and implemented a new approach in 1996. In comparison with overseas approaches, the New Zealand approach is much less prescriptive and requires considerably less monitoring by the bank supervisor.
- 196 The focus of banking regulation is on protection of the financial system. Unlike many other countries, there is no specific statutory protection of bank depositors. Section 68 of the Reserve Bank Act requires the Reserve Bank to carry out its bank registration and supervision functions for the purpose of:
- promoting the maintenance of a sound and efficient financial system; or
 - avoiding significant damage to the financial system that could result from the failure of a registered bank.
- 197 Consistent with the lack of a depositor protection objective, licensing of deposit-taking and other banking activities is not required: an institution may take deposits without being required to register as a bank under the Reserve Bank Act. Unregistered deposit takers are not subject to Reserve Bank supervision. Neither is there any official deposit insurance under which the losses of bank depositors in a bank failure are borne by an insurance fund. Moreover, under New Zealand's domestic insolvency law, bank depositors do not rank as preferential creditors.
- 198 According to the Reserve Bank's 1997 *Statement of Principles: Bank Registration and Supervision*, the bank supervision regime in New Zealand has a strong focus on utilising market disciplines and holding directors and management accountable for the prudent and responsible management of their banks' affairs (Reserve Bank

1997, 2). This is evident from the requirements that:

- banks publish disclosure statements containing a comprehensive range of financial, corporate and risk-related information; and
- directors attest to the accuracy of information contained in the disclosure statements, and attest to whether the bank has satisfactory risk management policies and whether those policies are being properly applied.

Placing responsibility on the market place for monitoring financial conditions of banks emphasises that it is not the Reserve Bank's role to provide a safety net for banks which become insolvent or to shelter depositors or any other creditors from loss.

199 The Reserve Bank is responsible for registering banks under Part IV of the Reserve Bank Act. The registration requirements are intended to limit the registration of banks to financial institutions of integrity and standing in the financial market. These institutions must be able to demonstrate their ability to carry on business in a prudent manner.

200 The Reserve Bank monitors the financial condition of banks every quarter from the information provided by banks' disclosure statements and from publicly available information. The Reserve Bank consults with the senior management of registered banks on an annual basis.

201 The Reserve Bank has an array of powers available to deal with a bank suffering financial distress or insolvency. Those powers include:

- the ability to recommend that a bank be de-registered (s 77);
- the ability to obtain information and documents from a bank (ss 95 and 99);
- the ability to seek a report on a bank's financial and accounting systems (s 95);
- the power to require a bank to consult (s 111);
- the power to give directions to a bank (s 113); and
- the power to recommend that a statutory manager be appointed over a bank (s 117).

“Statutory management”

202 Statutory management under the Reserve Bank Act is a discrete form of insolvency regime designed not only to protect the interests of creditors but also the interests of the financial system as a whole. A recommendation is made by the Reserve Bank to the Minister of Finance in order to place a bank into statutory management. The Minister of Finance will then give advice to the Governor-

General who will, if the advice is accepted, appoint a statutory manager by Order-in-Council. We return to discuss the powers of a statutory manager later (see para 209).³⁴

- 203 Statutory management is viewed as an option of last resort for dealing with a failing bank (White 1992, 192). Wherever possible, in our view, another viable solution to avoid the failure of a bank should be utilised. One such alternative, outside the operation of the Reserve Bank Act, is for a failed bank to be wound-up under the standard liquidation procedures contained in Part XVI of the Companies Act 1993.
- 204 Section 118 of the Reserve Bank Act sets out the grounds upon which the Reserve Bank may make a recommendation to the Minister of Finance that a statutory manager be appointed. Section 118(1) provides:
- (1) The Bank shall not make a recommendation under section 117 of this Act unless it is satisfied on reasonable grounds that –
 - (a) The registered bank is insolvent or is likely to become insolvent; or
 - (b) The registered bank has suspended, or is about to suspend, payment or is unable to meet its obligations as they fall due; or
 - (c) The registered bank or any associated person has failed to consult with the Bank pursuant to section 111 of this Act; or
 - (d) The registered bank or any associated person has failed to comply with a direction under section 113 of this Act; or
 - (e) The affairs of the registered bank or any associated person are being conducted in a manner prejudicial to the soundness of the financial system; or
 - (f) The circumstances of the registered bank or any associated person are such as to be prejudicial to the soundness of the financial system.
- 205 All of the Reserve Bank's powers under Part V of the Reserve Bank Act – which includes the power to recommend statutory management – are required to be exercised for the broad systemic purposes set out in s 68 of the Act. In the context of the statutory management regime, it seems to us that the purpose of “avoiding significant damage to the financial system that could result from the failure

³⁴ DFC New Zealand Ltd is the only financial institution to have been placed in statutory management under the Reserve Bank Act. DFC New Zealand was declared subject to statutory management on 3 April 1990 by Order-in-Council dated 26 March 1990: SR1990/70. A statutory manager was appointed by further Order-in-Council on 26 March 1990 to come into force 3 April 1990: SR1990/69.

of a registered bank” is of key importance. In our view s 118 when read in conjunction with s 68 of the Reserve Bank Act requires the Reserve Bank to be satisfied that there is, at least, a potential systemic threat arising from the bank failure before statutory management can be recommended.

206 This interpretation is supported by the need for the statutory manager, when exercising his or her powers under s 121, to have regard to both:

- the maintenance of public confidence in the operation and soundness of the financial system; and
- the need to avoid significant damage to the financial system.

(Note that the disjunctive forms of these concepts are expressed in s 68.) More generally, the intrusive nature of statutory management lends support to a minimum threshold of potential systemic threat to justify statutory management being imposed upon a bank.

207 Although the current wording of s 118 of the Reserve Bank Act (see para 204) does not make it plain that statutory management under the Reserve Bank Act should only occur when there is a potential of systemic financial failure, our view is that the potential of systemic financial failure is the only justification for the intrusive statutory management regime. Furthermore, the powers of the Reserve Bank under Part V of the Reserve Bank Act must be exercised for the broad systemic purposes set out in s 68. In our view to make the position clear an amendment is required to s 118 of the Reserve Bank Act to make clear the circumstances in which statutory management can be recommended. Our proposed amendment in s 8 of the draft legislation stipulates the minimum circumstances giving rise to systemic risk to the financial system.

208 Once a bank has been placed into statutory management the commercial activities of the bank are restricted. Upon commencement of statutory management a very wide “moratorium” applies under s 122. This freezes, for an indefinite period, the exercise or enforcement of a range of rights and claims against the bank such as proceedings, executions, liquidation applications, enforcement by secured creditors, repossessions of property and set-offs without leave of the High Court or the statutory manager: Reserve Bank of New Zealand Act 1989 s 122(2); see also *Krasemann v DFC New Zealand Limited* [1990] 3 NZLR 606. The moratorium is intended to prevent the bank’s affairs from rapidly falling into a state of disorder and so allows a breathing space within which the situation can be assessed and options considered.

- 209 In the meantime, the statutory manager takes full control of the bank and has wide ranging powers to manage and reorganise the bank's affairs. The manager's powers include the power to:
- sell the bank or the assets of the bank (ss 132 and 134);
 - negotiate an arrangement involving the compromise of creditors' claims (s 131); and
 - convert the branch of an overseas bank into a locally incorporated company (s 123).

A statutory manager is, however, under the supervision of the Reserve Bank that has power, under s 120, to direct on the conduct of the statutory management.

The New Zealand financial system

- 210 The structure of the New Zealand financial system is pertinent to:
- the likelihood of a bank failure having cross-border elements;
 - the types of cross-border risks to which the financial system is exposed; and
 - the types of institutions which could pose a systemic threat in the event of insolvency.

- 211 Two striking features about the financial system have been mentioned. One is the dominance of the system by registered banks and the other is the very high degree of foreign ownership in the banking industry (see para 92). In consequence, New Zealand is in the unique position of being almost completely a "host" to the banks operating here. It is therefore highly exposed to the risk of an insolvency of an overseas bank affecting its New Zealand branch or subsidiary operations. Also, we have noted the fact that New Zealand authorities will have no control over the timing of a bank failure which emanates from overseas. The Reserve Bank may be dependent on foreign regulators to supply it with information about an impending problem. A recent publication by the Reserve Bank notes the tendency towards banks effectively being managed from Australia even when the New Zealand bank is locally incorporated (see Rodgers 1998, 114).

Types of systemic risk

- 212 The failure of a New Zealand bank can significantly damage or in an extreme case lead to the collapse of the financial system. One possibility is contagion risk: ie the risk that the failure of the bank owing large amounts to other banks and institutions will cause severe losses and liquidity problems to those who are owed money.

Market disruption can arise where a bank is a party to a large volume of transactions in the wholesale financial markets, such as the foreign exchange and securities markets, or has initiated a large volume of payments through the payment system and subsequently fails to settle. The risk of a run on deposits is the risk of a bank failure causing a generalised panic among depositors. All of these are forms of systemic risk which should properly be controlled by the Reserve Bank through the statutory management process.

SHOULD BANKS UNDER STATUTORY MANAGEMENT BE EXCLUDED FROM THE MODEL LAW?

- 213 Let us assume that a bank operating in New Zealand, but managed out of another country, has been placed in a formal insolvency regime in that other state. Let us also assume that the Reserve Bank, applying the criteria set out in the Reserve Bank Act, has come to the view that insolvency of this bank creates a risk to the New Zealand financial system. The Reserve Bank then recommends that a statutory manager be appointed and the Minister of Finance acts on that recommendation. An Order-in-Council is subsequently issued to appoint the statutory manager. In these circumstances should the foreign insolvency representative of the bank be entitled to seek relief under the Model Law when the bank is also in statutory management in New Zealand?
- 214 The Reserve Bank Act is clear in reposing the right of recommendation to initiate statutory management in the Reserve Bank and in the Minister of Finance. The whole procedure, resting as it does in our view on potential systemic financial risk, does not lend itself readily to interplay with the Model Law.
- 215 We are clearly of the view that once a bank has been placed in statutory management under the Reserve Bank Act no application should be made or be able to be continued under the Model Law. The assets of the bank in New Zealand should be managed by the statutory managers in accordance with the design of the Reserve Bank Act to protect the nation's financial system.
- 216 Complete exclusion of statutory management of banks from the application of the Model Law achieves two goals. First, it prevents foreign representatives from seeking assistance under the Model Law when a bank is subject to the statutory management regime. Second, it effectively revokes any recognition granted under the Model Law to a foreign proceeding at any time after the appoint-

ment of a statutory manager. Thus, the statutory manager is left to fulfil obligations under the Reserve Bank Act without the possibility of intrusion from foreign representatives.

- 217 While a foreign representative would be prevented from seeking assistance in New Zealand, the converse would not necessarily be true. A statutory manager of a bank in New Zealand could still seek assistance under the Model Law as enacted in another state provided there was no requirement enacted in that state for reciprocity under the Model Law. But there may be a difficulty because statutory management is commenced by Executive Order rather than by a judicial act. This point has already been noted in the context of statutory management commenced under the Corporations (Investigation and Management) Act 1989 (see para 152).
- 218 We recommend that banks which are subject to statutory management under the Reserve Bank Act be expressly excluded from the operation of the Model Law. The important point, in our view, is that if there is a bank insolvency in New Zealand which is likely to cause systemic financial failure it is necessary for New Zealand regulators to retain control of assets in New Zealand so that systemic difficulties can be minimised.
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Draft Cross-Border Insolvency Act 200–

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	<i>Other amendments</i>		
7	Master may exercise certain powers of the Court		<i>Schedule 1</i> <i>Model Law on</i> <i>Cross-Border Insolvency</i>

A BILL INTITULED

**An Act to give effect to the provisions of the
Model Law on Cross-Border Insolvency
(adopted by the United Nations Commission on
International Trade Law) as they relate to
New Zealand**

BE IT ENACTED by the Parliament of New Zealand as follows:

1 Short Title and commencement

- (1) This Act may be cited as the Cross-Border Insolvency Act 200-.
- (2) This Act comes into force on a date to be appointed by the Governor-General by Order in Council.

*Model Law***2 Meaning of Model Law**

In this Act

Model Law means the Model Law on Cross-Border Insolvency (adopted by the United Nations Commission on International Trade Law on 30 May 1997 and approved by the General Assembly of the United Nations on 15 December 1997) which has been amended and supplemented in order to apply to New Zealand and which is set out in the Schedule.

3 Act to bind the Crown

This Act binds the Crown.

4 Model Law to have force of law

The provisions of the Model Law have the force of law in New Zealand.

5 Applications under Model law

- (1) An application under the Model Law is to be made to the High Court by an originating application in the manner provided for by Part IVA of the High Court Rules.
- (2) Subsection (1) does not prevent the High Court from exercising its inherent power to make an order on an oral application in circumstances of unusual urgency.

6 Rules

Rules may be made for the purposes of this Act under section 51C of the Judicature Act 1908.

COMMENTARY

- C1 The following commentary is intended to complement that already provided with the Model Law in its *Guide to Enactment*. In this absence of commentary to a particular article, or for more detailed explanation, readers are directed to the reproduction of the Model Law and commentary in the appendix to this report (see pages 99–140) and the reference table at page xvi.

Section 1

- C2 *Section 1(2)* provides that the draft Act is to come into force on a date to be appointed by the Governor-General by Order-in-Council. It is envisaged that the draft Act will not be brought into effect until the New Zealand Government is satisfied that the Model Law is, or shortly will be, enacted by a number of states with which New Zealand has major trading relationships. This will also allow s 135 of the Insolvency Act 1967 and s 342 of the Companies Act 1993 to continue in effect until such time as the Cross-Border Insolvency Act comes into force (see *sections 9 and 10* of the draft Act which repeal those provisions).

Section 2

- C3 This provision defines the Model Law as the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law as adapted for New Zealand conditions and set out in the schedule to the draft Act.

Section 3

- C4 The draft Act binds the Crown.

Section 4

- C5 The provisions of the Model Law as set out in the schedule to the draft Act are given the force of law in New Zealand.

Section 5

- C6 This section provides for the procedure to bring an application under the Model Law.

Section 6

- C7 This section enables rules to be made for the purposes of the Cross-Border Insolvency Act under s 51C of the Judicature Act 1908. These Rules can provide detailed requirements, if necessary, for the making of applications under the Cross-Border Insolvency Act.

*Other amendments***7 Master may exercise certain powers of the Court**

Section 261 (2) of the Judicature Act 1908 is amended by adding the following paragraph:

“(k) The Model Law on Cross-Border Insolvency as set out in the Schedule of the Cross-Border Insolvency Act 200–.”

8 Grounds on which registered bank may be declared to be subject to statutory management

Section 118 of the Reserve Bank of New Zealand Act 1989 is amended by repealing subsection (1), and substituting the following subsections:

“(1) The Bank may not make a recommendation under section 117 unless it is satisfied on reasonable grounds that–

- (a) It is necessary to appoint a statutory manager in order to
 - (i) Promote the maintenance of a sound and efficient financial system; or
 - (ii) Avoid significant damage to the financial system that could result from the failure of a registered bank; and
- (b) One or more of the circumstances in subsection (1A) are met.

(1A) The circumstances referred to in subsection (1) are as follows:

- (a) The registered bank is insolvent or is likely to become insolvent; or
- (b) The registered bank has suspended, or is about to suspend, payment or is unable to meet its obligations as they fall due; or
- (c) The registered bank or any associated person has failed to consult with the Bank pursuant to section 111; or
- (d) The registered bank or any associated person has failed to comply with a direction under section 113; or
- (e) The affairs of the registered bank or any associated person are being conducted in a manner prejudicial to the soundness of the financial system; or
- (f) The circumstances of the registered bank or any associated person are such as to be prejudicial to the soundness of the financial system.”

*Repeals***9 High Court to act in aid of overseas courts**

Section 135 of the Insolvency Act 1967 is repealed.

10 Liquidation of assets in New Zealand

Section 342 of the Companies Act 1993 is repealed.

Section 7

- C8 The amendment to s 26I(2) of the Judicature Act 1908 made by *section 7* enables a Master of the High Court to exercise all powers under the Model Law in open court. Thus, any appeal from a decision of the Master would be made directly to the Court of Appeal.
- C9 The right to apply to transfer a proceeding from a Master to a judge remains under s 26N of the Judicature Act 1908.

Section 8

- C10 *Section 8* amends s 118 of the Reserve Bank of New Zealand Act 1989 to make it clear that a recommendation for the appointment of a statutory manager under that Act can only be made by the Reserve Bank if the Reserve Bank is satisfied, on reasonable grounds, that it is necessary:
- to promote the maintenance of a sound and official financial system; or
 - to avoid significant damage to the financial system that could result from the failure of a registered bank.

Otherwise, the terms of s 118 of the Reserve Bank Act remain intact.

Section 9

- C11 This section repeals s 135 of the Insolvency Act 1967 so that the only procedure which will be available for cross-border insolvency applications in cases of personal bankruptcy will be via the Cross-Border Insolvency Act.

Section 10

- C12 This section repeals s 342 of the Companies Act 1993 so that from the date of commencement of the Cross-Border Insolvency Act all applications of a cross-border insolvency nature relating to companies will need to be made under the Cross-Border Insolvency Act.

SCHEDULE
MODEL LAW ON CROSS-BORDER INSOLVENCY

[The provisions of this Schedule correspond, for the most part, to the provisions of the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on 30 May 1997, and approved by the General Assembly of the United Nations on 15 December 1997. Certain changes have been made to amend or supplement the provisions of the Model Law in its application to New Zealand. The following table of provisions is not part of the Model Law on Cross-Border Insolvency and is included for convenience.]

TABLE OF PROVISIONS

Art 1	Scope of application	Art 19	Urgent relief available
Art 2	Definitions	Art 20	Effects of recognition of foreign main proceeding
Art 3	International obligations of New Zealand	Art 21	Relief on recognition of foreign proceeding
Art 4	High Court to have jurisdiction	Art 22	Protection of creditors and other interested persons
Art 5	Insolvency administrator may act in foreign State	Art 23	Actions to avoid acts detrimental to creditors
Art 6	Public policy exception	Art 24	Intervention by foreign representative in New Zealand proceeding
Art 7	Additional assistance under other laws	Art 25	Co-operation and communication by High Court
Art 8	Interpretation	Art 26	Co-operation and communication by insolvency administrator
Art 9	Right of direct access	Art 27	Forms of co-operation
Art 10	Limited jurisdiction	Art 28	Commencement of New Zealand proceeding after recognition
Art 11	Application by foreign representative to commence New Zealand proceeding	Art 29	Co-ordination of foreign proceeding and New Zealand proceeding
Art 12	Participation of foreign representative in New Zealand proceeding	Art 30	Co-ordination of several foreign proceedings
Art 13	Access of foreign creditors to New Zealand proceeding	Art 31	Presumption of insolvency if foreign main proceeding recognised
Art 14	Notification to foreign creditors of New Zealand proceeding	Art 32	Rule of payment in concurrent proceedings
Art 15	Application for recognition of foreign proceeding		
Art 16	Presumptions concerning recognition		
Art 17	Recognition of foreign proceeding		
Art 18	Subsequent information relating to recognition application		

Preamble

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximization of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Article 1. Scope of application

- (1) Except as provided in paragraph (2) of this article, this Law applies where:
 - (a) assistance is sought in New Zealand by a foreign court or a foreign representative in connection with a foreign proceeding; or
 - (b) assistance is sought in a foreign State in connection with a New Zealand insolvency proceeding; or
 - (c) a foreign proceeding and a New Zealand insolvency proceeding in respect of the same debtor are taking place concurrently; or
 - (d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a New Zealand insolvency proceeding.
- (2) This Law does not apply to a registered bank within the meaning of section 2 of the Reserve Bank of New Zealand Act 1989 that is subject to statutory management under that Act.

Article 1

- C13 *Article 1(2)* makes it clear that the Model Law cannot apply to a registered bank within the meaning of s 2 of the Reserve Bank of New Zealand Act 1989 which is subject to statutory management under that Act. *Article 1(1)* is prefaced with the words “except as provided in paragraph (2) of this article” to make it clear that *article 1(2)* takes precedence over *article 1(1)*. It is envisaged that placement of a bank into statutory management under the Reserve Bank Act after the making of an order under the Model Law would provide the basis for an application to terminate any such order under *article 22*.

Article 2. Definitions

For the purposes of this Law

- (a) **foreign proceeding** means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;
- (b) **foreign main proceeding** means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) **foreign non-main proceeding** means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;
- (d) **foreign representative** means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
- (e) **foreign court** means a judicial or other authority competent to control or supervise a foreign proceeding;
- (f) **establishment** means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;
- (g) **High Court** or **Court** means the High Court of New Zealand;
- (h) **insolvency administrator** means
 - (i) a judicial manager appointed under section 40A of the Life Insurance Act 1908; or
 - (ii) the Official Assignee within the meaning of section 2 of the Insolvency Act 1967; or
 - (iii) a statutory manager appointed under section 38 of the Corporations (Investigation and Management) Act 1989; or
 - (iv) a receiver within the meaning of section 2 of the Receiverships Act 1993; or
 - (v) a liquidator appointed under Part XVI of the Companies Act 1993 or under any other Act;
- (i) **New Zealand insolvency proceeding** means a collective judicial or administrative proceeding pursuant to the law in New Zealand relating to the bankruptcy, liquidation, receivership, judicial management, or statutory management of a debtor, or the reorganisation of the debtor's affairs, where, in all cases, the assets of the debtor are or will be realised for the benefit of secured or unsecured creditors.

Article 2

- C14 “Foreign representative” is defined by *article 2(d)* as a person authorised in a foreign proceeding concerning insolvency. The corollary provision is *article 17* which sets out when a foreign proceeding will be recognised. *Article 17(1)(b)* requires the foreign representative applying for recognition to be a person or body within the meaning of *article 2(d)*. Together the two provisions bestow upon the foreign Court an unfettered discretion to determine whether the person or body seeking assistance is to be recognised as a foreign representative. Given the absence of a formal registration or licensing regime for liquidators or other insolvency practitioners in New Zealand (see generally s 280 Companies Act 1993 and s 5 Receiverships Act 1993), this approach does not seem to cause any difficulties. In any event a New Zealand court can entrust realisation of New Zealand assets to a person other than the foreign representative: *article 21(1)(e)*.
- C15 The term “insolvency administrator” has been defined in *article 2(h)* to mean certain types of insolvency administrators who can be appointed under present legislation in New Zealand.
- C16 The term “New Zealand insolvency proceeding” has been defined in *article 2(i)* in a generic way. The emphasis is on the collective judicial or administrative nature of the proceeding with the law having to relate to bankruptcy, liquidation, receivership, judicial management, statutory management, or reorganisation of a debtor. While the term “reorganisation” is not commonly in use in New Zealand insolvency statutes, it does cover such things as Proposals under Part XV of the Insolvency Act 1967 and compromises and arrangements under Part XIV and XV of the Companies Act 1993.

Article 3. International obligations of New Zealand

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

Article 4. High Court to have jurisdiction

The functions referred to in this Law relating to recognition of foreign proceedings and co-operation with foreign courts shall be performed by the High Court.

Article 5. Insolvency administrator may act in foreign State

An insolvency administrator is authorised to act in a foreign State on behalf of a New Zealand insolvency proceeding, as permitted by the applicable foreign law.

Article 6. Public policy exception

- (1) Nothing in this Law prevents the High Court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of New Zealand.
- (2) Before the Court refuses to take an action under paragraph (1) of this article, the Court shall consider whether it is necessary for the Solicitor-General to appear and be heard on the question of the public policy of New Zealand.

Article 7. Additional assistance under other laws

Nothing in this Law limits the power of a court or an insolvency administrator authorised to act to provide additional assistance to a foreign representative under other laws of New Zealand.

Article 8. Interpretation

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

Article 9. Right of direct access

A foreign representative is entitled to apply directly to the High Court.

Article 10. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to the High Court by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the Court for any purpose other than the application.

Article 4

- C17 This article vests all jurisdiction under the Model Law in the High Court of New Zealand. Jurisdiction can be exercised either by a High Court Judge or by a Master (see *section 7*).

Article 6

- C18 *Article 6(2)* is new. It enables the court to consider whether it is necessary to hear from the Solicitor-General on any question of public policy of New Zealand raised in the course of any proceeding under the Model Law. The court must consider whether the Solicitor-General should be served before refusing an application under the Model Law on grounds of public policy.

**Article 11. Application by foreign representative
to commence New Zealand proceeding**

A foreign representative is entitled to apply to commence a New Zealand insolvency proceeding if the conditions for commencing such a proceeding are otherwise met.

**Article 12. Participation of foreign representative
in New Zealand proceeding**

Upon recognition by the High Court of a foreign proceeding, the foreign representative is entitled to participate in a New Zealand insolvency proceeding regarding the debtor.

**Article 13. Access of foreign creditors
to New Zealand proceeding**

- (1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a New Zealand insolvency proceeding as creditors in New Zealand.
- (2) Paragraph (1) of this article does not affect the ranking of claims in a New Zealand insolvency proceeding or the exclusion of foreign tax and social security claims from such a proceeding.

**Article 14. Notification to foreign creditors
of New Zealand proceeding**

- (1) Whenever under a New Zealand insolvency proceeding notification is to be given to creditors in New Zealand, such notification shall also be given to the known creditors that do not have addresses in New Zealand. The High Court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.
- (2) Such notification shall be made to the foreign creditors individually, unless the Court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.
- (3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:
 - (a) indicate a reasonable time period for filing claims and specify the place for their filing;
 - (b) indicate whether secured creditors need to file their secured claims; and
 - (c) contain any other information required to be included in such a notification to creditors pursuant to the law of New Zealand and the orders of the Court.

Article 13

- C19 Foreign creditors are given the same rights regarding commencement of and participation in a New Zealand insolvency proceeding as creditors in New Zealand. A “New Zealand insolvency proceeding” is defined in *article 2(h)* of the Model Law. However, nothing in *article 13(1)* affects the ranking of claims in a New Zealand insolvency proceeding or the exclusion of foreign tax and social security claims from such a proceeding. The reason for this is dealt with in paras 149 and 150 of the text.

Article 14

- C20 This article provides for notification to be given to foreign creditors who have claims in a New Zealand insolvency proceeding. The term “New Zealand insolvency proceeding” is defined in *article 2(h)* of the Model Law.

Article 15. Application for recognition of foreign proceeding

- (1) A foreign representative may apply to the High Court for recognition of the foreign proceeding in which the foreign representative has been appointed.
- (2) An application for recognition shall be accompanied by:
 - (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
 - (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
 - (c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.
- (3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
- (4) The Court may require a translation of documents supplied in support of the application for recognition into an official language of New Zealand.

Article 16. Presumptions concerning recognition

- (1) If the decision or certificate referred to in article 15(2) indicates that the foreign proceeding is a proceeding within the meaning of article 2(a) and that the foreign representative is a person or body within the meaning of article 2(d), the High Court is entitled to so presume.
- (2) The Court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised.
- (3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

Article 15

- C21 *Article 15(4)* has been modified to allow for translations into an official language of New Zealand (ie, either English or Maori – see the Māori Language Act 1987 s 3).

Article 17. Recognition of foreign proceeding

- (1) Subject to article 6, a foreign proceeding shall be recognised if:
 - (a) the foreign proceeding is a proceeding within the meaning of article 2(a);
 - (b) the foreign representative applying for recognition is a person or body within the meaning of article 2(d);
 - (c) the application meets the requirements of article 15(2); and
 - (d) the application has been submitted to the High Court.
- (2) The foreign proceeding shall be recognised:
 - (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.
- (3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
- (4) As soon as practicable, after the Court recognises the foreign proceeding under paragraph (1) of this article, the foreign representative shall notify the debtor, in the prescribed form, that the application has been recognised.
- (5) The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

**Article 18. Subsequent information
relating to recognition application**

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the High Court promptly of:

- (a) Any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and
- (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 19. Urgent relief available

- (1) From the time of filing an application for recognition until the application is decided upon, the High Court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:
 - (a) staying execution against the debtor's assets;
 - (b) entrusting the administration or realisation of all or part of the debtor's assets located in New Zealand to the foreign representative or another person designated by the Court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
 - (c) any relief mentioned in article 21(1)(c) and (d).
- (2) As soon as practicable, after the Court grants relief under paragraph (1) of this article, the foreign representative shall notify the debtor, in the prescribed form, of the relief that has been granted.
- (3) Unless extended under article 21(1)(f), the relief granted under this article terminates when the application for recognition is decided upon.
- (4) The Court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Article 20. Effects of recognition of foreign main proceeding

- (1) Upon recognition by the High Court of a foreign proceeding that is a foreign main proceeding:
 - (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
 - (b) execution against the debtor's assets is stayed; and
 - (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
- (2) Paragraph (1) of this article does not prevent the Court, on the application of any creditor or interested person, from making an order, subject to such conditions as the Court thinks fit, that the stay or suspension does not apply in respect of any particular action or proceeding, execution, or disposal of assets.
- (3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.
- (4) Paragraph (1) of this article does not affect the right to request the commencement of a New Zealand insolvency proceeding or the right to file claims in such a proceeding.

Article 21. Relief on recognition of foreign proceeding

- (1) Upon recognition by the High Court of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including:
 - (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 20(1)(a);
 - (b) staying execution against the debtor's assets to the extent it has not been stayed under article 20(1)(b);
 - (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under article 20(1)(c);
 - (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
 - (e) entrusting the administration or realisation of all or part of the debtor's assets located in New Zealand to the foreign representative or another person designated by the Court;
 - (f) extending relief granted under article 19(1).
- (2) Upon recognition by the High Court of a foreign proceeding, whether main or non-main, the Court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in New Zealand to the foreign representative or another person designated by the Court, provided that the Court is satisfied that the interests of creditors in New Zealand are adequately protected.
- (3) In granting relief under this article to a representative of a foreign non-main proceeding, the High Court must be satisfied that the relief relates to assets that, under the law of New Zealand, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Commentary (continued)

Article 21

C22 *Article 21(1)(g)* has been deleted for reasons given in paras 181 and 182 of the text.

Article 22. Protection of creditors and other interested persons

- (1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph (3) of this article, the High Court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.
- (2) The Court may subject relief granted under article 19 or 21 to conditions it considers appropriate.
- (3) The Court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.
- (4) If
 - (a) an application for recognition has been made in respect of a debtor that is a registered bank within the meaning of section 2 of the Reserve Bank of New Zealand Act 1989; and
 - (b) the High Court has granted that application or the Court has granted relief under article 19; and
 - (c) the debtor is placed in statutory management after that application or relief has been granted,the Court shall, on application of the statutory manager, terminate the relief granted under article 19 or article 21.

Article 23. Actions to avoid acts detrimental to creditors

- (1) Upon recognition by the High Court of a foreign proceeding, the foreign representative has standing to initiate any action that an insolvency administrator may take in respect of a New Zealand insolvency proceeding that relates to any transaction (including any gifts or improvement of property or otherwise), security, or charge that is voidable or may be set aside or altered.
- (2) When the foreign proceeding is a foreign non-main proceeding, the Court must be satisfied that the action relates to assets that, under the law of New Zealand, should be administered in the foreign non-main proceeding.
- (3) To avoid any doubt, nothing in paragraph (1) of this article affects the application of the law in New Zealand as it relates to the determination of any action referred to in that paragraph.

OR

- (3) To avoid any doubt, nothing in paragraph (1) of this article affects the doctrine of relation back as it is applied in New Zealand.

Article 23

- C23 *Article 22(2)* has been added so that a statutory manager of a registered bank appointed under the Reserve bank Act can readily obtain termination of relief granted prior to commencement of statutory management (see *article 1(2)* and para 215).
- C24 *Article 23(3)* states, for the avoidance of doubt, that nothing in *article 23(1)* affects the doctrine of relation back as applied in New Zealand. This preserves the current law set out in paras 43–44 of the text.

**Article 24. Intervention by foreign representative
in New Zealand proceeding**

Upon recognition by the High Court of a foreign proceeding, the foreign representative may, provided the requirements of the law of New Zealand are met, intervene in any proceedings in which the debtor is a party.

Article 25. Co-operation and communication by High Court

- (1) In matters referred to in article 1, the High Court shall co-operate to the maximum extent possible with foreign courts or foreign representatives, either directly or through an insolvency administrator.
- (2) The Court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

**Article 26. Co-operation and communication
by insolvency administrator**

- (1) In matters referred to in article 1, an insolvency administrator shall, in the exercise of its functions and subject to the supervision of the High Court, co-operate to the maximum extent possible with foreign courts or foreign representatives.
- (2) The insolvency administrator is entitled, in the exercise of its functions and subject to the supervision of the Court, to communicate directly with foreign courts or foreign representatives.

Article 27. Forms of co-operation

Co-operation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

- (a) appointment of a person or body to act at the direction of the High Court;
- (b) communication of information by any means considered appropriate by the Court;
- (c) co-ordination of the administration and supervision of the debtor's assets and affairs;
- (d) approval or implementation by courts of agreements concerning the co-ordination of proceedings; and
- (e) co-ordination of concurrent proceedings regarding the same debtor.

Article 25

- C25 *Article 25(1)* allows the High Court to co-operate either directly or through an insolvency administrator. The term “insolvency administrator” is defined in *article 2(i)* of the Model Law. The manner in which the court co-operates or communicates would need to be in accordance with principles of natural justice as required by the New Zealand Bill of Rights Act 1990 s 25.

Article 26

- C26 This article, requiring an insolvency administrator as defined in *article 2(i)* to co-operate to the maximum extent possible with foreign courts or foreign representatives, is subject to the supervision of the High Court. For the avoidance of doubt it is stated in *article 26(2)* that the insolvency administrator may communicate directly with foreign courts or foreign representatives.

Article 27

- C27 No additional form of co-operation has been added as contemplated by *article 27(f)* of the Model Law. As the article is expressed in inclusive terms, it is not thought necessary to add any additional forms of co-operation.

**Article 28. Commencement of New Zealand proceeding
after recognition**

After recognition by the High Court of a foreign main proceeding, a New Zealand insolvency proceeding may be commenced only if the debtor has assets in New Zealand; the effects of that proceeding shall be restricted to the assets of the debtor that are located in New Zealand and, to the extent necessary to implement co-operation and co-ordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of New Zealand, should be administered in that proceeding.

**Article 29. Co-ordination of foreign proceeding
and New Zealand proceeding**

Where a foreign proceeding and a New Zealand insolvency proceeding are taking place concurrently regarding the same debtor, the High Court shall seek co-operation and co-ordination under articles 25, 26 and 27, and the following shall apply:

- (a) when the New Zealand insolvency proceeding is taking place at the time the application for recognition of the foreign proceeding is filed-
 - (i) any relief granted under article 19 or 21 must be consistent with the New Zealand insolvency proceeding; and
 - (ii) if the foreign proceeding is recognised in New Zealand as a foreign main proceeding, article 20 does not apply;
- (b) when the New Zealand insolvency proceeding commences after recognition, or after the filing of the application for recognition, of the foreign proceeding-
 - (i) any relief in effect under article 19 or 21 shall be reviewed by the Court and shall be modified or terminated if inconsistent with the New Zealand insolvency proceeding; and
 - (ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in article 20(1) shall be modified or terminated pursuant to article 20(2) if inconsistent with the New Zealand insolvency proceeding;
- (c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the Court must be satisfied that the relief relates to assets that, under the law of New Zealand, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 29

C28 This deals with concurrent foreign and New Zealand insolvency proceedings.

Article 30. Co-ordination of several foreign proceedings

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the High Court shall seek co-operation and co-ordination under articles 25, 26 and 27, and the following shall apply:

- (a) any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
- (b) if a foreign main proceeding is recognised after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the Court and shall be modified or terminated if inconsistent with the foreign main proceeding;
- (c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised, the Court shall grant, modify or terminate relief for the purpose of facilitating co-ordination of the proceedings.

Article 31. Presumption of insolvency if foreign main proceeding recognised

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a New Zealand insolvency proceeding, proof that the debtor is insolvent.

Article 32. Rule of payment in concurrent proceedings

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

APPENDIX

Provisions of the Model Law on Cross-Border Insolvency

THIS APPENDIX reproduces the UNCITRAL Model Law on Cross-Border Insolvency as well as the relevant commentary paragraphs from the Model Law's *Guide to Enactment* (commencing with the commentary to the preamble at para 54).

Preamble

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximization of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

54 The Preamble gives a succinct statement of the basic policy objectives of the Model Law. It is not intended to create substantive rights, but rather to give a general orientation for users of the Model Law as well as to assist in the interpretation of the Model Law.

55 In States where it is not customary to set out preambular statements of policy in legislation, consideration might be given to including the statement of objectives either in the body of the statute or in a separate document, so as to preserve a useful tool for the interpretation of the law.

“State”

56 The expression “State”, as used in the preamble and throughout the Model Law, refers to the entity that enacts the Law (the “enacting State” in the Guide). The term should not be understood as referring, for example, to a state in a country with a federal system.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 136–139 (Commission, 30th session)
A/CN.9/432, para. 100 (Working Group, 21st session)
A/CN.9/433, paras. 22–28 (Working Group, 20th session)
A/CN.9/422, paras. 19–23 (Working Group, 19th session)

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CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

- (1) This Law applies where:
 - (a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
 - (b) assistance is sought in a foreign State in connection with a proceeding under *[identify laws of the enacting State relating to insolvency]*; or
 - (c) a foreign proceeding and a proceeding under *[identify laws of the enacting State relating to insolvency]* in respect of the same debtor are taking place concurrently; or
 - (d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under *[identify laws of the enacting State relating to insolvency]*.
- (2) This Law does not apply to a proceeding concerning *[designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law]*.

Paragraph (1)

- 57 Article 1(1) outlines the types of issues that may arise in cases of cross-border insolvency and for which the Model Law provides solutions: (a) inward-bound requests for recognition of a foreign proceeding; (b) outward-bound requests from a court or administrator in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) coordination of proceedings taking place concurrently in two or more States; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State.
- 58 The expression “this State” is used in the preamble and throughout the Model Law to refer to the State that is enacting the text. The national statute may use another expression that is customarily used for this purpose.
- 59 “Assistance” in paragraph (1)(a) and (b) is meant to cover various situations, dealt with in the Model Law, in which a court or an insolvency administrator in one State may make a request directed to a court or an insolvency administrator in another State for taking a measure encompassed in the Model Law. Some of those measures the Law specifies (e.g. in art. 19(1)(a) and (b); art. 21(1)(a) to (f) and (2); or art. 27(a) to (e)), while other possible measures are covered by a broader formulation such as the one in article 21(1)(g).

Paragraph (2) (Specially regulated insolvency proceedings)

- 60 In principle, the Model Law was formulated to apply to any proceeding that meets the requirements of article 2(a), independently of the nature of the debtor or its particular status under national law. The only possible exceptions contemplated in the text of the Model Law itself are indicated in paragraph (2) (see, however, below, para. 66, for considerations regarding “consumers”).
- 61 Banks or insurance companies are mentioned as examples of entities that the enacting State might decide to exclude from the scope of the Model Law. The reason for the exclusion would typically be that the insolvency of such entities gives rise to the particular need to protect vital interests of a large number of individuals, or that the insolvency of those entities usually requires particularly prompt and circumspect action (for instance to avoid massive withdrawals of deposits). For those reasons, the insolvency of such types of entities is in many States administered under a special regulatory regime.
- 62 Paragraph (2) indicates that the enacting State might decide to exclude the insolvency of entities other than banks and insurance companies; the State might do so where the policy considerations underlying the special insolvency regime for those other types of entities (e.g. public utility companies) call for special solutions in cross-border insolvency cases.
- 63 It is not advisable to exclude all cases of insolvency of the entities mentioned in paragraph (2). In particular, the enacting State might wish to treat, for recognition purposes, a foreign insolvency proceeding relating to a bank or an insurance company as an ordinary insolvency proceeding, if the insolvency of the branch or of the assets of the foreign entity in the enacting State do not fall under the national regulatory scheme. The enacting State might also wish not to exclude the possibility of recognition of a foreign proceeding involving one of those entities, if the law of the State of origin does not make that proceeding subject to special regulation.
- 64 In enacting paragraph (2), the State may wish to make sure that it would not inadvertently and undesirably limit the right of the insolvency administrator or court to seek assistance or recognition abroad of an insolvency proceeding conducted in the territory of the enacting State, merely because that insolvency is subject to a special regulatory regime. Moreover, even if the particular insolvency is governed by special regulation, it is advisable, before generally excluding those cases from the Model Law, to consider whether it would be useful to leave certain features of the Model Law (e.g. on cooperation and coordination and possibly on certain types of discretionary relief) applicable also to the specially regulated insolvency proceedings.
- 65 In any case, with a view to making the national insolvency law more transparent (for the benefit of foreign users of the law based on the Model Law), it is advisable that exclusions from the scope of the law be expressly mentioned by the enacting State in paragraph (2). Non-traders or natural persons
- 66 In those jurisdictions that have not made provision for the insolvency of consumers, or whose insolvency law provides special treatment for the insolvency of non-traders, the enacting State might wish to exclude from the scope of application of the Model Law those insolvencies that relate to

natural persons residing in the enacting State whose debts have been incurred predominantly for personal or household purposes, rather than for commercial or business purposes, or those insolvencies that relate to non-traders. The enacting State might also wish to provide that such exclusion would not apply in cases where the total debts exceed a certain monetary ceiling.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 141–150 (Commission, 30th session)
A/CN.9/435, paras. 102–106, 179 (Working Group, 21st session)
A/CN.9/433, paras. 29–32 (Working Group, 20th session)
A/CN.9/422, paras. 24–33 (Working Group, 19th session)

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Article 2. Definitions

For the purposes of this Law:

- (a) “foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- (b) “foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) “foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;
- (d) “foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;
- (e) “foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding;
- (f) “establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Subparagraphs (a) to (d)

- 67 Since the Model Law will be embedded in the national insolvency law, article 2 only needs to define the terms specific to cross-border scenarios. Thus, the Model Law contains definitions of the terms “foreign proceeding” (subparagraph (a)) and “foreign representative” (subparagraph (d)), but not of the person or body that may be entrusted with the administration of the assets of the debtor in an insolvency proceeding in the enacting State. To the extent that it would be useful to define in the national statute the term used for such a person or body (rather than just using the term commonly employed to refer to such persons), this may be added to the definitions in the law enacting the Model Law.

- 68 By specifying required characteristics of the “foreign proceeding” and “foreign representative”, the definitions limit the scope of application of the Model Law. For a proceeding to be susceptible to recognition or cooperation under the Model Law and for a foreign representative to be accorded access to local courts under the Model Law, the foreign proceeding and the foreign representative must have the attributes of subparagraphs (a) and (d).
- 69 The definitions in subparagraphs (a) and (d) cover also an “interim proceeding” and a representative “appointed on an interim basis”. In a State where interim proceedings are either not known or do not meet the requisites of the definition the question may arise whether recognition of a foreign “interim proceeding” creates a risk of allowing potentially disruptive consequences under the Model Law that the situation does not warrant. It is advisable that, irrespective of the way interim proceedings are treated in the enacting State, the reference to “interim proceeding” in subparagraph (a) and to a foreign representative appointed “on an interim basis” in subparagraph (d) be maintained. The reason is that in the practice of many countries insolvency proceedings are often, or even usually, commenced on an “interim” or “provisional” basis. Except for being labelled as interim, those proceedings meet all the other requisites of the definition in article 2(a). Such proceedings are often conducted for weeks or months as “interim” proceedings under the administration of persons appointed on an “interim” basis, and only some time later would the court issue an order confirming the continuation of the proceedings on a non-interim basis. The objectives of the Model Law apply fully to such “interim proceedings” (provided the requisites of subparagraphs (a) and (d) are met); therefore, these proceedings should not be distinguished from other insolvency proceedings merely because they are of an interim nature. The point that an interim proceeding and the foreign representative must meet all the requirements of article 2 is emphasised in article 17(1), according to which a foreign proceeding may only be recognised if “the foreign proceeding is a proceeding within the meaning of article 2(a)” and “the foreign representative applying for recognition is a person or body within the meaning of article 2(d)”.
- 70 Article 18 addresses a case where, after the application for recognition or after recognition, the foreign proceeding or foreign representative, whether interim or not, ceases to meet the requirements of article 2(a) and (d). Article 18 obligates the foreign representative to inform the court promptly, after the time of filing the application for recognition of the foreign proceeding, of “any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative’s appointment”. The purpose of the obligation is to allow the court to modify or terminate the consequences of recognition.
- 71 The definitions of proceedings or persons emanating from foreign jurisdictions avoid the use of expressions that may have different technical meaning in legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition, and to avoid unnecessary conflict with terminology used in the laws of the enacting State. As noted above in paragraph 50, the term “insolvency” is an example of a term that may have a technical meaning in some legal systems, but which is intended in subparagraph (a) to refer broadly to companies in severe financial distress.
- 72 The expression “centre of main interests” in subparagraph (b) to define a foreign main proceeding is used also in the European Union Convention on Insolvency Proceedings.

- 73 Subparagraph (c) requires that a “foreign non-main proceeding” take place in the State where the debtor has an “establishment”. Thus, a foreign non-main proceeding susceptible to recognition under article 17(2) may be only a proceeding commenced in a State where the debtor has an establishment in the meaning of article 2(f). This rule does not affect the provision in article 28, namely, that an insolvency proceeding may be commenced in the enacting State if the debtor has assets there. It should be noted, however, that the effects of an insolvency proceeding commenced on the basis of the presence of assets only are normally restricted to the assets located in that State; if other assets of the debtor located abroad should, under the law of the enacting State, be administered in that insolvency proceeding (as envisaged in article 28), that cross-border issue is to be dealt with as a matter of international cooperation and coordination under articles 25 to 27 of the Model Law.

Subparagraph (e)

- 74 A foreign proceeding that meets the requisites of article 2(a) should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial or administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of “foreign court” in subparagraph (e) includes also non-judicial authorities. Subparagraph (e) follows a similar definition contained in article 2(d) of the European Union Convention on Insolvency Proceedings.

Subparagraph (f)

- 75 The definition of the term “establishment” (subparagraph (f)) has been inspired by article 2(h) of the European Union Convention on Insolvency Proceedings. The term is used in the definition of “foreign non-main proceeding” (art. 2(c)) and in the context of article 17(2), according to which, for a foreign non-main proceeding to be recognized, the debtor must have an establishment in the foreign State (see also above, para. 73).

Prior discussion in the Commission and the Working Group
A52/17, paras. 152–158 (Commission, 30th session)
A/CN.9/435, paras. 108–113 (Working Group, 21st session)
A/CN.9/433, paras. 33–41, 147 (Working Group, 20th session)
A/CN.9/422, paras. 34–65 (Working Group, 19th session)
A/CN.9/419, paras. 95–117 (Working Group, 18th session)

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Article 3. International obligations of this State

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

- 76 Article 3, expressing the principle of supremacy of international obligations of the enacting State over internal law, has been modelled on similar provisions in other model laws prepared by UNCITRAL.
- 77 In enacting the article, the legislator may wish to consider whether it would be desirable to take steps to avoid an unnecessarily broad interpretation of international treaties. Namely, the article might result in giving precedence

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

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

Prior discussion in the Commission and the Working Group
A/52/17, paras. 160–162 (Commission, 30th session)
A/CN.9/435, paras. 114–117 (Working Group, 21st session)
A/CN.9/433, paras. 42–43 (Working Group, 20th session)
A/CN.9/422, paras. 66–67 (Working Group, 19th session)

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Article 4. [Competent court or authority]^a

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

^a A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in this State governing the authority of *[insert the title of the government-appointed person or body]*.

- 79 If in the enacting State any of the functions mentioned in article 4 are performed by an authority other than a court, the State would insert in article 4 and in other appropriate places in the enacting legislation the name of the competent authority.
- 80 The competence for the various judicial functions dealt with in the Model Law may lie with different courts in the enacting State, and the enacting

State would tailor the text of the article to its own system of court competence. The value of article 4, as enacted in a given State, would be to increase the transparency and ease of use of the insolvency legislation for the benefit of, in particular, foreign representatives and foreign courts.

- 81 It is important to note that, in defining jurisdiction in matters mentioned in article 4, the implementing legislation should not unnecessarily limit the jurisdiction of other courts in the enacting State, in particular to entertain requests by foreign representatives for provisional relief.

Footnote

- 82 In a number of States, insolvency legislation has entrusted certain tasks relating to the general supervision of the process of dealing with insolvency cases in the country to government-appointed officials who are typically civil servants or judicial officers and who carry out their functions on a permanent basis. The names under which they are known vary and include, for example, “official receiver”, “official trustee” or “official assignee”. The activities, and the scope and nature of their duties, vary from State to State. The Model Law does not restrict the authority of such officials, a point that some enacting States may wish to clarify in the law, as indicated in the footnote. However, depending on the wording that the enacting State uses in articles 25 and 26 in referring to the “*title of the person or body administering a reorganization or liquidation under the law of the enacting State*”, these officials may be subjected to the duty to cooperate as provided under articles 25 to 27.
- 83 In some jurisdictions, officials referred to in the preceding paragraph may also be appointed to act as administrators in individual insolvency cases. To the extent that that occurs, such officials would be covered by the Model Law.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 163–166 (Commission, 30th session)
A/CN.9/435, paras. 118–122 (Working Group, 21st session)
A/CN.9/433, paras. 44–45 (Working Group, 20th session)
A/CN.9/422, paras. 68–69 (Working Group, 19th session)
A/CN.9/419, para. 69 (Working Group, 18th session)

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Article 5. Authorization of [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to act in a foreign State

A [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law.

- 84 The intent of article 5 is to equip administrators or other authorities appointed in insolvency proceedings commenced in the enacting State to act abroad as foreign representatives of those proceedings. The lack of such authorization in some States has proved to be an obstacle to effective international cooperation in cross-border cases. An enacting State in which

administrators are already equipped to act as foreign representatives may decide to forgo inclusion of article 5, although even such a State might want to keep article 5 so as to provide clear statutory evidence of that authority.

- 85 It may be noted that article 5 is formulated to make it clear that the scope of the power exercised abroad by the administrator would depend upon the foreign law and courts. Actions that the administrator appointed in the enacting State may wish to take in a foreign country will be actions of the type that are dealt with in the Model Law, but the authority to act in a foreign country does not depend on whether that country has enacted legislation based on the Model Law.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 167–169 (Commission, 30th session)
A/CN.9/435, paras. 123–124 (Working Group, 21st session)
A/CN.9/433, paras. 46–49 (Working Group, 20th session)
A/CN.9/422, paras. 70–74 (Working Group, 19th session)
A/CN.9/419, paras. 36–39 (Working Group, 18th session)

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Article 6. Public policy exception

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

- 86 As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 6.
- 87 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. However, in many States the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in these States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when that would contravene those fundamental principles.
- 88 For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, and the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if public policy would be understood in an extensive manner broadly. [as encompassing essentially the mandatory law of the country.]
- 89 The purpose of the expression “manifestly”, used also in many other international legal texts as a qualifier of the expression “public policy”, is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 170–173 (Commission, 30th session)
A/CN.9/435, paras. 125–128 (Working Group, 21st session)
A/CN.9/433, paras. 156–160 (Working Group, 20th session)
A/CN.9/422, paras. 84–85 (Working Group, 19th session)
A/CN.9/419, para. 40 (Working Group, 18th session)

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Article 7. Additional assistance under other laws

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

- 90 The purpose of the Model Law is to increase and harmonize cross-border assistance available in the enacting State to foreign representatives. However, since the law of the enacting State may, at the time of enacting the Law, already have in place various provisions under which a foreign representative could obtain cross-border assistance, and since it is not the purpose of the Law to displace those provisions to the extent they provide assistance that is additional to or different from the type of assistance dealt with in the Model Law, the enacting State may consider whether article 7 is needed to make that point clear.

Prior discussion in the Commission
A/52/17, para. 175 (Commission, 30th session)

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Article 8. Interpretation

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

- 91 A provision similar to the one contained in article 8 appears in a number of private-law treaties (e.g. art. 7(1) of the United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980). More recently, it has been recognized that also in a non-treaty text such as a model law such a provision would be useful in that a State enacting a model law also has an interest in its harmonized interpretation. Article 8 has been modelled on article 3(1) of the UNCITRAL Model Law on Electronic Commerce (1996).
- 92 Harmonized interpretation of the Model Law will be facilitated by the information system CLOUT (“Case Law on UNCITRAL Texts”), a system under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and model laws emanating from the work of the Commission. (For further information about the system, see below, para. 202.)

Prior discussion in the Commission
A/52/17, para. 174 (Commission, 30th session)

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CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE

Article 9. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

- 93 The article is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular actions. Article 4 deals with court competence in the enacting State for providing relief to the foreign representative.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 176–178 (Commission, 30th session)

A/CN.9/435, paras. 129–133 (Working Group, 21st session)

A/CN.9/433, paras. 50–58 (Working Group, 20th session)

A/CN.9/422, paras. 144–151 (Working Group, 19th session)

A/CN.9/419, paras. 77–79; 172–173 (Working Group, 18th session)

* * *

Article 10. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

- 94 The provision constitutes a “safe conduct” rule aimed at ensuring that the court in the enacting State would not assume jurisdiction over all the assets of the debtor on the sole ground of the foreign representative having made an application for recognition of a foreign proceeding. The article also makes it clear that the application alone is not sufficient ground for the court of the enacting State to assert jurisdiction over the foreign representative as to matters unrelated to insolvency. The provision responds to concerns of foreign representatives and creditors about exposure to all-embracing jurisdiction triggered by an application under the (Model) Law.
- 95 The limitation on jurisdiction over the foreign representative embodied in article 10 is not absolute. It is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. It does so by providing that an appearance in the courts of the enacting State for the purpose of requesting recognition would not expose the entire estate under the supervision of the foreign representative to the jurisdiction of those courts. Other possible grounds for jurisdiction under the laws of the enacting State over the foreign representative or the assets are not affected. For example, a tort or a misconduct committed by the foreign representative may provide grounds for jurisdiction to deal with the consequences of such an action by the foreign representative. Furthermore, the foreign representative who applies for relief in the enacting State will be subject to conditions which the court may order in connection with relief granted (art. 22(2)).
- 96 The article may appear superfluous in States where the rules on jurisdiction do not allow a court to assume jurisdiction over a person making an appli-

cation to the court on the sole ground of the applicant's appearance. Nevertheless, also in those States it would be useful to enact the article so as to eliminate possible concerns of foreign representatives or creditors over the possibility of jurisdiction based on the sole ground of applying to the court.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 179–182 (Commission, 30th session)
A/CN.9/435, paras. 134–136 (Working Group, 21st session)
A/CN.9/433, paras. 68–70 (Working Group, 20th session)
A/CN.9/422, paras. 160–166 (Working Group, 19th session)

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

A foreign representative is entitled to apply to commence a proceeding under [*identify laws of the enacting State relating to insolvency*] if the conditions for commencing such a proceeding are otherwise met.

- 97 Many national laws, in enumerating persons who may request the commencement of an insolvency proceeding, do not mention a representative of a foreign insolvency proceeding; under those laws, it might be doubtful whether a foreign representative is among those that may make such a request.
- 98 Article 11 is designed to ensure that the foreign representative (of a foreign main or non-main proceeding) has standing (or “procedural legitimation”) for requesting the commencement of an insolvency proceeding. However, the article makes it clear (by the words “if the conditions for commencing such a proceeding are otherwise met”) that it does not otherwise modify the conditions under which an insolvency proceeding may be commenced in the enacting State.
- 99 The foreign representative has this right without prior recognition of the foreign proceeding, because the commencement of an insolvency proceeding might be crucial in cases of urgent need for preserving the assets of the debtor. The article recognizes that not only a representative of a foreign main proceeding but also a representative of a foreign non-main proceeding may have a legitimate interest in the commencement of an insolvency proceeding in the enacting State. Sufficient guarantees against abusive applications are provided by the requirement that the other conditions for commencing such a proceeding under the law of the enacting State have to be met.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 183–187 (Commission, 30th session)
A/CN.9/435, paras. 137–146 (Working Group, 21st session)
A/CN.9/433, paras. 71–75 (Working Group, 20th session)
A/CN.9/422, paras. 170–177 (Working Group, 19th session)

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

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under *[identify laws of the enacting State relating to insolvency]*.

- 100 The purpose of the provision is to ensure that, when an insolvency proceeding concerning a debtor is taking place in the enacting State, the foreign representative of a proceeding concerning that debtor will be given procedural standing (or “procedural legitimation”) to make petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding.
- 101 Notably, the article is limited to giving the foreign representative standing and does not vest the foreign representative with any specific powers or rights. The provision does not specify the kinds of motions the foreign representative might make and does not affect the provisions in the insolvency law of the enacting State that govern the fate of the motions.
- 102 If the law of the enacting State uses a term other than “participate” to express the concept, such other term may be used in enacting the provision. However, if the legislator proposes that the other term should be “intervene”, it should be noted that article 24 already uses the term “intervene” to refer to a case where the foreign representative takes part in an individual action by or against the debtor (as opposed to a collective insolvency proceeding).

Prior discussion in the Commission and the Working Group
A/52/17, paras. 188–189 (Commission, 30th session)
A/CN.9/435, paras. 147–150 (Working Group, 21st session)
A/CN.9/433, para. 58 (Working Group, 20th session)
A/CN.9/422, paras. 114–115, 147, 149 (Working Group, 19th session)

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

- (1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under *[identify laws of the enacting State relating to insolvency]* as creditors in this State.
- (2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than *[identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims]*.^b

^b The enacting State may wish to consider the following alternative wording to replace article 13(2):

- (2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]* or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than *[identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims]*.
- 103 With the exception contained in paragraph (2), the article embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such proceeding, should not be treated worse than local creditors.
- 104 Paragraph (2) makes it clear that the principle of non-discrimination embodied in paragraph (1) leaves intact the provisions on the ranking of claims in insolvency proceedings, including any provisions that might assign a special ranking to claims of foreign creditors. It may be noted that few States currently have provisions assigning a special ranking to foreign creditors. However, lest the non-discrimination principle should be emptied of its meaning by provisions giving the lowest ranking to foreign claims, paragraph (2) establishes the minimum ranking for claims of foreign creditors: the rank of general unsecured claims. The exception to that minimum ranking is provided for the cases where the claim in question, if it were of a domestic creditor, would be ranked lower than general unsecured claims (such low-rank claims may be, for instance, those of a State authority for financial penalties or fines, claims whose payment is deferred because of a special relationship between the debtor and the creditor, or claims that have been filed after the expiry of the time period for doing so). Those special claims may rank below the general unsecured claims, for reasons other than the nationality or location of the creditor, as provided in the law of the enacting State.
- 105 The alternative provision in the footnote differs from the provision in the text only in that it provides wording for States that refuse to recognise foreign tax and social security claims to continue to discriminate against such claims.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 190–192 (Commission, 30th session)
A/CN.9/435, paras. 151–156 (Working Group, 21st session)
A/CN.9/433, paras. 77–85 (Working Group, 20th session)
A/CN.9/422, paras. 179–187 (Working Group, 19th session)

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

- (1) Whenever under *[identify laws of the enacting State relating to insolvency]* notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

- (2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.
- (3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:
 - (a) indicate a reasonable time period for filing claims and specify the place for their filing;
 - (b) indicate whether secured creditors need to file their secured claims; and
 - (c) contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

Paragraphs (1) and (2)

- 106 The main purpose of notifying foreign creditors as provided in paragraph (1) is to inform them of the commencement of the insolvency proceeding and of the time-limit to file their claims. Furthermore, as a corollary to the principle of equal treatment established by article 13, article 14 requires that foreign creditors should be notified whenever notification is required for creditors in the enacting State.
- 107 States have different provisions or practices regarding the methods for notifying creditors; those may be, for example, publication in the official gazette or in local newspapers, individual notices, affixing notices within the court premises or a combination of such procedures. If the form of notification were to be left to national law, foreign creditors would be in a less advantageous situation than local creditors, since they typically do not have direct access to local publications. For that reason, paragraph (2) in principle requires individual notification for foreign creditors, but nevertheless leaves discretion to the court to decide otherwise in a particular case (e.g. if individual notice would entail excessive cost or would not seem feasible under the circumstances).
- 108 With regard to the form of individual notification, States may use special procedures for notifications that have to be served in a foreign jurisdiction (e.g. sending of notifications through diplomatic channels). In the context of insolvency proceedings, those procedures would often be too cumbersome and time-consuming and their use would typically not provide foreign creditors timely notice concerning insolvency proceedings. It is therefore advisable for those notifications to be effected by such expeditious means that the court considers adequate. Those considerations are the reason for the provision in paragraph (2) that “no letters rogatory or other, similar formality is required”.
- 109 Many States are party to bilateral or multilateral treaties on judicial co-operation, which often contain provisions on procedures for communicating judicial or extrajudicial documents to addressees abroad. A multilateral treaty of this kind is the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1965), adopted under the auspices of the Hague Conference on Private International Law. While the procedures envisaged by those treaties may constitute a simplification as compared to traditional communication via diplomatic channels, they would often be, for reasons stated in the preceding paragraph, in-

appropriate for cross-border insolvency cases. The question may arise whether paragraph (2), which allows the use of letters rogatory or similar formalities to be dispensed with, is compatible with these treaties. Each State would have to consider that question in light of its treaty obligations, but generally it may be said that the provision in paragraph (2) would not be in conflict with the international obligations of the enacting State, because the purpose of the treaties alluded to above is typically to facilitate communication and not to preclude use of notification procedures that are even simpler than those established by the treaty; for example, article 10 of the above-mentioned Convention states that

“Provided the State of destination does not object, the present Convention shall not interfere with—

- a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
- b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
- c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.”

To the extent that there might still exist a conflict between the second sentence of paragraph (2) of this article and a treaty, article 3 of the Model Law provides the solution.

- 110 While paragraph (2) mentions letters rogatory as a formality that is not required for a notification under article 14, it may be noted that in many States such notifications would never be transmitted in the form of a letter rogatory. A letter rogatory in those States would be used for other purposes, such as to request evidence in a foreign country or to request permission to perform some other judicial act abroad. Such use of letters rogatory is governed, for example, by the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970), adopted under the auspices of the Hague Conference on Private International Law.

Paragraph (3)

- 111 In some legal systems a secured creditor who files a claim in the insolvency proceeding is deemed to have waived the security or some of the privileges attached to the credit, while in other systems failure to file a claim results in a waiver of such security or privilege. Where such a situation may arise, it would be appropriate for the enacting State to include in paragraph (3)(b) a requirement that the notification should include information regarding the effects of filing, or failing to file, secured claims.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 193–198 (Commission, 30th session)
A/CN.9/435, paras. 157–164 (Working Group, 21st session)
A/CN.9/433, paras. 86–98 (Working Group, 20th session)
A/CN.9/422, paras. 188–191 (Working Group, 19th session)
A/CN.9/419, paras. 84–87 (Working Group, 18th session)

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CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 15. Application for recognition of a foreign proceeding

- (1) A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
- (2) An application for recognition shall be accompanied by:
 - (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
 - (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
 - (c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.
- (3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
- (4) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article as a whole

- 112 The article defines the core procedural requirements for an application by a foreign representative for recognition. In incorporating the provision into national law, it is desirable not to encumber the process with additional requirements beyond those referred to. With article 15, in conjunction with article 16, the Model Law provides a simple, expeditious structure for a foreign representative to obtain recognition.

Paragraph (2) and article 16(2)

- 113 The Model Law presumes that documents submitted in support of the application for recognition need not be authenticated in any special way, in particular by legalization: according to article 16(2), the court is entitled to presume that those documents are authentic whether or not they have been legalized. “Legalization” is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.
- 114 It follows from article 16(2) (according to which the court “is entitled to presume” the authenticity of documents accompanying the application for recognition) that the court retains discretion to decline to rely on the presumption of authenticity or to conclude that evidence to the contrary prevails. This flexible solution takes into account the fact that the court may be able to assure itself that a particular document originates from a particular court even without it being legalized, but that in other cases the

court may be unwilling to act on the basis of a foreign document that has not been legalized, particularly when documents emanate from a jurisdiction with which it is not familiar. The presumption is useful because legalization procedures may be cumbersome and time-consuming (e.g. also because in some States they involve various authorities at different levels).

- 115 In respect of the provision relaxing any requirement of legalization, the question may arise whether this is in conflict with the international obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents, such as the Convention Abolishing the Requirement of Legalisation for Foreign Documents (1961), adopted under the auspices of the Hague Conference on Private International Law, which provides specific simplified procedures for the legalization of documents originating from signatory States. However, similarly as noted above with respect to the use of letters rogatory and similar formalities, the treaties on legalization of documents in many instances leave in effect laws and regulations that have abolished or simplified legalization procedures; therefore a conflict is unlikely to arise. For example, the Hague Convention referred to provides in article 3(2):

“However, [legalisation] mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more contracting States have abolished or simplified it, or exempt the document itself from legalisation.”

To the extent there might still exist a conflict between the Model Law and a treaty, according to article 3 of the Model Law, the treaty will prevail.

Paragraph (2)(c)

- 116 In order not to prevent recognition because of non-compliance with a mere technicality (e.g. where the applicant is unable to submit documents that in all details meet the requirements of paragraph (2)(a) and (b)), it is allowed by paragraph (2)(c) to take into account evidence other than that specified in subparagraphs (a) and (b); this provision, however, does not compromise the court's power to insist on the presentation of evidence acceptable to it. It is advisable to maintain that flexibility in enacting the Model Law. Article 16(2), which provides that the court “is entitled to presume” the authenticity of documents accompanying the application for recognition, applies also to documents submitted under paragraph (2)(c) (see above, paras. 114–115).

Paragraph (3)

- 117 Paragraph (3) requires that an application for recognition must be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. That information is needed by the court not so much for the decision on recognition itself but for any decision granting relief in favour of the foreign proceeding. Namely, in order to tailor such relief appropriately and make sure that relief is consistent with any other insolvency proceeding concerning the same debtor, the court needs to be aware of all foreign proceedings concerning the debtor which may be under way in third States.
- 118 An express provision establishing this duty to inform is useful, firstly, because the foreign representative is likely to have more comprehensive information about the debtor's affairs in third States than the court and, secondly, because the foreign representative may be primarily concerned with obtaining relief in favour of his or her foreign proceeding and less concerned about co-

ordination with another foreign proceeding. (The duty to inform the court about a foreign proceeding that becomes known to the foreign representative after the decision on recognition is set out in article 18; as to coordination of more than one foreign proceeding, see article 30).

Paragraph (4)

- 119 Paragraph (4) entitles, but does not compel, the court to require a translation of some or all documents accompanying the application for recognition. If this discretion is compatible with the procedures of the court, it is useful since it allows, when the court understands the documents, to shorten the time needed for a decision on recognition and reduces costs.

Notice

- 120 Different solutions exist also as to whether the court is required to issue notice of an application for recognition. In a number of jurisdictions, fundamental principles of due process, in some cases enshrined in the constitution, may be understood as requiring that a decision of the importance of the recognition of a foreign insolvency proceeding could only be made after hearing the affected parties. However, in other States it is considered that applications for recognition of foreign proceedings require expeditious treatment (as they are often submitted in circumstances of imminent danger of dissipation or concealment of the assets) and that, because of this need for expeditiousness, the issuance of notice prior to any court decision on recognition is not required. In that vein of thinking, imposing the requirement would cause undue delay and would be inconsistent with article 17(3), which provides that an application for recognition of a foreign proceeding should be decided upon at the earliest possible time.
- 121 Procedural matters related to such notice are not resolved by the Model Law and are thus governed by other provisions of law of the enacting State. The absence of an express reference to notice of the filing of an application for recognition or of the decision to grant recognition does not preclude the court from issuing such notice, where legally required, in pursuance of its own rules on civil or insolvency proceedings. By the same token, there is nothing in the Model Law that would mandate the issuance of such notice, where such requirement does not exist.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 199–209 (Commission, 30th session)
A/CN.9/435, paras. 165–173 (Working Group, 21st session)
A/CN.9/433, paras. 59–67, 99–104 (Working Group, 20th session)
A/CN.9/422, paras. 76–93, 152–159 (Working Group, 19th session)
A/CN.9/419, paras. 62–69, 178–189 (Working Group, 18th session)

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Article 16. Presumptions concerning recognition

- (1) If the decision or certificate referred to in article 15(2) indicates that the foreign proceeding is a proceeding within the meaning of article 2(a) and that the foreign representative is a person or body within the meaning of article 2(d), the court is entitled to so presume.
- (2) The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

- (3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.
- 122 The article establishes presumptions that allow the court to expedite the evidentiary process; at the same time they do not prevent, in accordance with the applicable procedural law, calling for, or assessing, other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party.
- 123 For comments on paragraph (2), which dispenses with the requirement of legalization, see above, paragraphs 113 to 115.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 204–206 (Commission, 30th session)
A/CN.9/435, paras. 170–172 (Working Group, 21st session)

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Article 17. Decision to recognize a foreign proceeding

- (1) Subject to article 6, a foreign proceeding shall be recognized if:
- (a) the foreign proceeding is a proceeding within the meaning of article 2(a);
 - (b) the foreign representative applying for recognition is a person or body within the meaning of article 2(d);
 - (c) the application meets the requirements of article 15(2); and
 - (d) the application has been submitted to the court referred to in article 4.
- (2) The foreign proceeding shall be recognized:
- (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.
- (3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
- (4) The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Paragraphs (1) to (3)

- 124 The purpose of the article is to indicate that, if recognition is not contrary to the public policy of the enacting State, and if the application meets the requirements set out in the article, recognition will be granted as a matter of course.
- 125 It is noteworthy that, apart from the public policy exception (see article 6), the conditions for recognition do not include those that would allow the court considering the application to evaluate the merits of the foreign court's decision by which the proceeding has been commenced or the foreign representative appointed. The foreign representative's ability to obtain early recognition (and the consequential ability to invoke in particular articles 20, 21, 23 and 24) is often essential for the effective protection of the assets

of the debtor from dissipation and concealment. For that reason, paragraph (3) obligates the court to decide on the application “at the earliest possible time” and the court should in practice be able to conclude the recognition process within such a short period of time.

- 126 The article draws in paragraph (2) the basic distinction between foreign proceedings categorized as “main” proceedings and those foreign proceedings that are not so characterized, depending upon the jurisdictional basis of the foreign proceeding (see above, para. 75). The relief flowing from recognition may depend upon the category into which a foreign proceeding falls. For example, recognition of a “main” proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor (art. 20(1)(a) and (b)) and an automatic “freeze” of those assets (art. 20(1)(c)), subject to certain exceptions referred to in article 20(2).
- 127 It is not advisable to include more than one criterion for qualifying a foreign proceeding as a “main” proceeding and provide that on the basis of any of those criteria a proceeding could be deemed a main proceeding. Such a “multiple criteria” approach would raise the risk of competing claims from foreign proceedings for recognition as the main proceeding.
- 128 With regard to paragraph (2)(b), it has been pointed out above, in paragraph 73, that the Model Law does not envisage recognition of a proceeding commenced in a foreign State in which the debtor has assets but no establishment as defined in article 2(c).

Paragraph (4)

- 129 A decision to recognize a foreign proceeding would normally be subject to review or rescission, as any other court decision. Paragraph (4) clarifies that the question of revisiting the decision on recognition, if grounds for granting it were fully or partially lacking or have ceased to exist, is left to the procedural law of the enacting State other than the provisions implementing the Model Law.
- 130 Modification or termination of the recognition decision may be a consequence of a change of circumstances after the decision on recognition, for instance, if the recognized foreign proceeding has been terminated or its nature has changed (e.g. a reorganization proceeding might be transformed into a liquidation proceeding). Also, new facts might arise which require or justify a change of the court’s decision, for example, if the foreign representative disregarded the conditions under which the court granted relief.
- 131 A decision on recognition may also be subject to review as to whether in the decision-making process the requirements for recognition were observed. Some appeal procedures under national laws give the appeal court the authority to review the merits of the case in its entirety, including factual aspects. It would be consistent with the purpose of the Model Law, and with the nature of the decision granting recognition (which is limited to verifying whether the applicant fulfilled the requirements of article 17), if an appeal of the decision would be limited to the question whether the requirements of articles 15 and 16 were observed in deciding to recognize the foreign proceeding.

Notice of decision to recognize foreign proceedings

- 132 As noted above (paras. 120–121), procedural matters regarding requirements of notice of the decision to grant recognition are not dealt with by the

Model Law and are left to other provisions of law of the enacting State.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 29–33 and 201–202 (Commission, 30th session)
A/CN.9/435, paras. 167 and 173 (Working Group, 21st session)
A/CN.9/433, paras. 99–104 (Working Group, 20th session)
A/CN.9/422, paras. 76–93 (Working Group, 19th session)
A/CN.9/419, paras. 62–69 (Working Group, 18th session)

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Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

- (a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Subparagraph (a)

- 133 It is possible that, after the application for recognition or after recognition, changes occur in the foreign proceeding that would have affected the decision on recognition or the relief granted on the basis of recognition. For example, the foreign proceeding may be terminated or transformed from a liquidation proceeding into a reorganization proceeding, or the terms of the appointment of the foreign representative may be modified or the appointment itself terminated. Subparagraph (a) takes into account the fact that technical modifications in the status of the proceedings or the terms of the appointment are frequent, but that only some of those modifications are such that they would affect the decision granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information of “substantial” changes. The court would likely be particularly anxious to be kept so informed when its decision on recognition concerns a foreign “interim proceeding” or a foreign representative has been “appointed on an interim basis” (see art. 2(a) and (d)).

Subparagraph (b)

- 134 Article 15(3) requires that an application for recognition be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. Subparagraph (b) extends that duty to the time after the application for recognition has been filed. That information will allow the court to consider whether relief already granted should be coordinated with the existence of the insolvency proceedings that have been commenced after the decision on recognition (see article 30).

Prior discussion in the Commission
A/52/17, paras. 113–116, 201–202, 207 (Commission, 30th session)

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Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

- (1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:
 - (a) staying execution against the debtor's assets;
 - (b) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
 - (c) any relief mentioned in article 21(1)(c), (d) and (g).
- (2) *[Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]*
- (3) Unless extended under article 21(1)(f), the relief granted under this article terminates when the application for recognition is decided upon.
- (4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Paragraph (1)

- 135 Article 19 deals with “urgently needed” relief that may be ordered at the discretion of the court and is available as of the moment of the application for recognition (unlike relief under article 21, which is also discretionary but which is available only upon recognition).
- 136 Article 19 authorizes the court to grant the type of relief that is usually available only in collective insolvency proceedings (i.e. the same type of relief available under article 21), as opposed to the “individual” type of relief that may be granted before the commencement of insolvency proceedings under rules of civil procedure (i.e. measures covering specific assets identified by a creditor). However, the discretionary “collective” relief under article 19 is somewhat more narrow than the relief under article 21.
- 137 The reason for the availability of collective measures, albeit in a restricted form, is that relief of a collective nature may be urgently needed already before the decision on recognition in order to protect the assets of the debtor and the interests of the creditors. Exclusion of collective relief would frustrate those objectives. On the other hand, recognition has not yet been granted and, therefore, the collective relief is restricted to urgent and provisional measures. The urgency of the measures is alluded to in the opening words of paragraph (1), while paragraph (1)(a) restricts the stay to execution proceedings, and the measure referred to in paragraph (1)(b) is restricted to perishable assets and assets susceptible to devaluation or otherwise in jeopardy. Otherwise, the measures available under article 19 are essentially the same as those available under article 21.

Paragraph (2)

- 138 Laws of many States contain requirements for notice to be given (either by the insolvency administrator upon the order of the court or by the court itself) when relief of the type mentioned in article 19 is granted. Paragraph (2) is the location where the enacting State should make appropriate provision for such notice.

Paragraph (3)

- 139 Relief available under article 19 is provisional in that, as provided in paragraph (3), the relief terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure, as provided in article 21(1)(f). The court might wish to do so, for example, to avoid a hiatus between the provisional measure issued before recognition and the measure issued after recognition.

Paragraph (4)

- 140 Paragraph (4) pursues the same objective as the one underlying article 30(a), namely that, if there is a foreign main proceeding pending, any relief granted in favour of a foreign non-main proceeding must be consistent (or should not interfere) with the foreign main proceeding. In order to foster such coordination of pre-recognition relief with any foreign main proceeding, the foreign representative applying for recognition is required, by article 15(3), to attach to the application for recognition a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 34–46 (Commission, 30th session)

A/CN.9/435, paras. 17–23 (Working Group, 21st session)

A/CN.9/433, paras. 110–114 (Working Group, 20th session)

A/CN.9/422, paras. 116, 119, 122–123 (Working Group, 19th session)

A/CN.9/419, paras. 174–177 (Working Group, 18th session)

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Article 20. Effects of recognition of a foreign main proceeding

- (1) Upon recognition of a foreign proceeding that is a foreign main proceeding,
- (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
 - (b) execution against the debtor's assets is stayed; and
 - (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
- (2) The scope, and the modification or termination, of the stay and suspension referred to in paragraph (1) of this article are subject to *[refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph (1) of this article]*.

- (3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.
- (4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] or the right to file claims in such a proceeding.
- 141 While relief under articles 19 and 21 is discretionary, the effects provided by article 20 are not, i.e. they flow automatically from recognition of the foreign main proceeding. Another difference between discretionary relief under articles 19 and 21 and the effects under article 20 is that discretionary relief may be issued in favour of main as well as non-main proceedings, while the automatic effects apply only to main proceedings.
- 142 In the States where an appropriate court order is needed for the effects of article 20 to become operative, the enacting State, in order to achieve the purpose of the article, should include (perhaps in the opening words of paragraph (1)) language directing the court to issue an order putting into effect the consequences specified in subparagraphs (a), (b) and (c) of paragraph (1).
- 143 The automatic consequences envisaged in article 20 are necessary to allow taking steps for organizing an orderly and fair cross-border insolvency proceeding. In order to achieve those benefits, it is justified to impose on the insolvent debtor the consequences of article 20 in the enacting State (i.e. the country where it maintains a limited business presence), even if the State where the centre of the debtor's main interests is situated poses different (possibly less stringent) conditions for the commencement of insolvency proceedings or even if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20 in the enacting State. This approach reflects a basic principle underlying the Model Law according to which recognition of foreign proceedings by the court of the enacting State grants effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency. Recognition, therefore, has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State. If recognition should in a given case produce results that would be contrary to the legitimate interests of an interested party, including the debtor, the law of the enacting State should provide possibilities for protecting those interests, as indicated in article 20(2) (and discussed below, in para. 149).
- 144 By virtue of article 2(a), the effects of recognition extend also to foreign "interim proceedings". That solution is necessary since, as explained above in paragraph 69, interim proceedings (provided they meet the requisites of article 2(a)), should not be distinguished from other insolvency proceedings merely because they are of an interim nature. If after recognition the foreign "interim proceeding" ceases to have a sufficient basis for the automatic effects of article 20, the automatic stay could be terminated pursuant to the law of the enacting State, as indicated in article 20(2). (See also article 18, which deals with the obligation of the foreign representative "to inform the court promptly of any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment").

- 145 Paragraph (1)(a), by not distinguishing between various kinds of individual actions, also covers actions before an arbitral tribunal. Thus, article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement. This limitation is added to other possible limitations restricting the freedom of the parties to agree to arbitration which may exist in a national law (e.g. limits as to arbitrability or as to the capacity to conclude an arbitration agreement). Such limitations are not contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). However, bearing in mind the particularities of international arbitration, in particular its relative independence from the legal system of the State where the arbitral proceeding takes place, it might not always be possible, in practical terms, to implement the automatic stay of arbitral proceedings. For example, if the arbitration does not take place in the enacting State and perhaps also not in the State of the main proceeding it may be difficult to enforce the stay of the arbitral proceedings. Apart from that, the interests of the parties may be a reason for allowing an arbitral proceeding to continue, a possibility that is envisaged in paragraph (2) and left to the provisions of law of the enacting State.
- 146 Paragraph (1)(a) refers not only to “individual actions” but also to “individual proceedings” in order to cover, in addition to “actions” instituted by creditors in a court against the debtor or its assets, also enforcement measures initiated by creditors outside the court system, measures that creditors are allowed to take under certain conditions in some States. Paragraph (1)(b) has been added to make it abundantly clear that executions against the assets of the debtor are covered by the stay.
- 147 The Model Law does not deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under paragraph 20(1)(c). Those sanctions vary among legal systems, and might include criminal sanctions, penalties and fines, or the acts themselves might be void or capable of being set aside. It should be noted that, from the viewpoint of creditors, the main purpose of such sanctions is to facilitate recovery for the insolvency proceeding of any assets improperly transferred by the debtor and that, for that purpose, the setting aside of such transactions is preferable to the imposition of criminal or administrative sanctions on the debtor.

Paragraph (2)

- 148 Notwithstanding the “automatic” or “mandatory” nature of the effects under article 20, it is expressly provided that the scope of those effects depends on exceptions or limitations that may exist in the law of the enacting State. Those exceptions may be, for example, the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, initiation of court actions for claims that have arisen after the commencement of the insolvency proceeding (or after recognition of a foreign main proceeding), or completion of open financial-market transactions.
- 149 Sometimes it may be desirable for the court to modify or terminate the effects of article 20. The rules governing the power of the court to do so vary. In some legal systems the courts are authorized to make individual exceptions upon request by an interested party, under conditions prescribed by local law, while in others the courts do not have that power, in line with the principle that, in general, courts do not have the power to set aside the application of a statutory rule of law. If courts are to be given such a power,

some legal systems would normally require setting out grounds on which the court could modify or terminate the mandatory effects of recognition under article 20(1). In view of that situation, article 20(2) provides that the modification or termination of the stay and the suspension provided in the article is subject to the provisions of law of the enacting State relating to insolvency.

- 150 Generally, it is useful for persons that are adversely affected by the stay or suspension under article 20(1) to have an opportunity to be heard by the court, which should then be allowed to modify or terminate those effects. It would be consistent with the objectives of the Model Law if the enacting State would spell out, or refer to, the provisions that govern this question.

Paragraph (3)

- 151 The Model Law does not address the question whether the limitation period for a claim ceases to run when the claimant is unable to commence individual proceedings as a result of article 20(1)(a). A harmonized rule on that question would not be feasible. However, since it is necessary to protect creditors from losing their claims because of a stay pursuant to article 20(1)(a), paragraph (3) has been added to authorize the commencement of individual actions to the extent necessary to preserve claims against the debtor. Once the claim has been preserved, the action continues to be covered by the stay.
- 152 Paragraph (3) might seem unnecessary in a State where a demand for payment or performance served by the creditor on the debtor causes the cessation of the running of the limitation period or where the stay of the kind envisaged in paragraph (1)(a) triggers such cessation. However, also in such States paragraph (3) may still be useful because the question of the cessation of the running of the limitation period might, pursuant to conflict-of-laws rules, be governed by the law of a State other than the enacting State; furthermore, the paragraph would be useful as assurance to foreign claimants that their claims would not be prejudiced in the enacting State.

Paragraph (4)

- 153 Paragraph (4) merely clarifies that the automatic stay and suspension pursuant to article 20 do not prevent anyone, including the foreign representative or foreign creditors, from requesting the commencement of a local insolvency proceeding and to participate in that proceeding. The right to apply to commence a local insolvency proceeding and to participate in it is in a general way dealt with in articles 11, 12 and 13. If a local proceeding is indeed initiated, article 29 deals with the coordination of the foreign and the local proceedings.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 47–60 (Commission, 30th session)
A/CN.9/435, paras. 24–48 (Working Group, 21st session)
A/CN.9/433, paras. 115–126 (Working Group, 20th session)
A/CN.9/422, paras. 94–110 (Working Group, 19th session)
A/CN.9/419, paras. 137–143 (Working Group, 18th session)

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Article 21. Relief that may be granted upon recognition of a foreign proceeding

- (1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:
 - (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 20(1)(a);
 - (b) staying execution against the debtor's assets to the extent it has not been stayed under article 20(1)(b);
 - (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under article 20(1)(c);
 - (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
 - (e) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
 - (f) extending relief granted under article 19(1);
 - (g) granting any additional relief that may be available to *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* under the laws of this State.
- (2) Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.
- (3) In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

154 Post-recognition relief under article 21 is discretionary, as is pre-recognition relief under article 19. The types of relief listed in paragraph (1) are those that are typical or most frequent in insolvency proceedings; however, the list is not exhaustive in order not to restrict the court unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case.

155 The explanation relating to the use of the expressions "individual actions" and "individual proceedings" in article 20(1)(a) and to coverage of execution proceedings (see above, paras. 145–146) applies also to article 21(1)(a).

- 156 It is in the nature of discretionary relief that the court may tailor it to the case at hand. This idea is reinforced by article 22(2), according to which the court may subject the relief granted to conditions it considers appropriate.

Paragraph (2)

- 157 The “turnover” of assets to the foreign representative (or another person), as envisaged in paragraph (2), is discretionary. It should be noted that the Model Law contains several safeguards designed to ensure the protection of local interests, before assets are turned over to the foreign representative. Those safeguards include: the general statement of the principle of protection of local interests in article 22(1); the provision in article 21(2) that the court should not authorize the turnover of assets until it is assured that the local creditors’ interests are protected; and article 22(2), according to which the court may subject the relief it grants to conditions it considers appropriate.

Paragraph (3)

- 158 One salient factor to be taken into account in tailoring the relief is whether it is for a foreign main or non-main proceeding. It is necessary to bear in mind that the interests and the authority of a representative of a foreign non-main proceeding are typically narrower than the interests and the authority of a representative of a foreign main proceeding, who normally seeks to gain control over all assets of the insolvent debtor. Paragraph (3) reflects that idea by providing (a) that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding, and (b) if the foreign representative seeks information concerning the debtor’s assets or affairs, the relief must concern information required in that proceeding. The objective is to admonish the court that relief in favour of a foreign non-main proceeding should not give unnecessarily broad powers to the foreign representative and that such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.
- 159 The proviso “under the law of this State” reflects the principle underlying the Model Law that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State. Rather, recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State.
- 160 The idea underlying article 21(3) has been reflected also in article 19(4) (pre-recognition relief), article 29(c) (coordination of a foreign proceeding with a local proceeding) and article 30 (coordination of more than one foreign proceeding).

Prior discussion in the Commission and the Working Group
A/52/17, paras. 61–73 (Commission, 30th session)
A/CN.9/435, paras. 49–61 (Working Group, 21st session)
A/CN.9/433, paras. 127–134, 138–139 (Working Group, 20th session)
A/CN.9/422, paras. 111–113 (Working Group, 19th session)
A/CN.9/419, paras. 148–152, 154–166 (Working Group, 18th session)

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Article 22. Protection of creditors and other interested persons

- (1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph (3) of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.
- (2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.
- (3) The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

161 The idea underlying article 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief. This balance is essential to achieve the objectives of cross-border insolvency legislation.

162 The reference to the interests of creditors, the debtor and other interested parties in paragraph (1) provides useful elements to guide the court in exercising its powers under article 19 or 21. In order to allow the court to tailor better the relief, the court is clearly authorized to subject the relief to conditions (para. (2)) and to modify or terminate the relief granted (para. (3)). An additional feature of paragraph (3) is that it expressly gives standing to the parties who may be affected by the consequences of articles 19 and 21 to petition the court to modify and terminate those consequences. Apart from that, the article is intended to operate in the context of the procedural system of the enacting State.

163 In many cases the affected creditors will be “local” creditors. Nevertheless, in enacting article 22, it is not advisable to attempt to limit it to local creditors. Any express reference to local creditors in paragraph (1) would require a definition of those creditors. An attempt to draft such a definition (and to establish criteria according to which a particular category of creditors might receive special treatment) would not only show the difficulty of crafting such a definition but would also reveal that there is no justification for discriminating creditors on the basis of criteria such as place of business or nationality.

164 Protection of all interested persons is linked to provisions in national laws on notification requirements; those may be general publicity requirements, designed to apprise potentially interested persons (e.g. local creditors or local agents of a debtor) that a foreign proceeding has been recognized, or there may be requirements for individual notifications which the court, under its own procedural rules, has to issue to persons that would be directly affected by recognition or relief granted by the court. National laws vary as to the form, time and content of notice required to be given of the recognition of foreign proceedings, and the Model Law does not attempt to modify those laws (see also above, para. 132).

Prior discussion in the Commission and the Working Group
A/52/17, paras. 82–93 (Commission, 30th session)
A/CN.9/435, paras. 72–78 (Working Group, 21st session)
A/CN.9/433, paras. 140–146 (Working Group, 20th session)
A/CN.9/422, para. 113 (Working Group, 19th session)

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Article 23. Actions to avoid acts detrimental to creditors

- (1) Upon recognition of a foreign proceeding, the foreign representative has standing to initiate *[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation]*.
 - (2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.
- 165 Under many national laws both individual creditors and insolvency administrators have a right to bring actions to avoid or otherwise render ineffective acts detrimental to creditors. Such a right, insofar as it pertains to individual creditors, is often not governed by insolvency law but by general provisions of law (such as the Civil Code); the right is not necessarily tied to the existence of an insolvency proceeding against the debtor so that the action may be instituted prior to the commencement of such a proceeding. The person having such a right is typically only an affected creditor and not another person such as the insolvency administrator. Furthermore, the conditions for these individual-creditor actions are different from the conditions applicable to similar actions that might be initiated by an insolvency administrator. It should be noted that the procedural standing conferred by article 23 extends only to actions that are available to the local insolvency administrator in the context of an insolvency proceeding, and that the article does not equate the foreign representative with individual creditors who may have similar rights under a different set of conditions. Such actions of individual creditors fall outside the scope of article 23.
- 166 The Model Law expressly provides that a foreign representative has “standing” (a concept in some systems referred to as “active procedural legitimation”, “active legitimation” or “legitimation”) to initiate actions to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is drafted narrowly in that it does not create any substantive right regarding such actions and also does not provide any conflict-of-laws solution. The effect of the provision is that a foreign representative is not prevented from initiating such actions by the sole fact that the foreign representative is not the insolvency administrator appointed in the enacting State.
- 167 Granting procedural standing to the foreign representative to institute such actions is not without difficulty. In particular, such actions might not be looked upon favourably because of their potential for creating uncertainty about concluded or performed transactions. However, since the right to commence such actions is essential to protect the integrity of the assets of the debtor and is often the only realistic way to achieve such protection, it has been considered important to ensure that such right would not be denied to a foreign representative on the sole ground that he or she has not been locally appointed.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 210–216 (Commission, 30th session)
A/CN.9/435, paras. 62–66 (Working Group, 21st session)
A/CN.9/433, para. 134 (Working Group, 20th session)

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Article 24. Intervention by a foreign representative in proceedings in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

- 168 The purpose of the article is to avoid the denial of standing to the foreign representative “to intervene” in proceedings merely because the procedural legislation may not have contemplated the foreign representative among those having such standing. The article applies to foreign representatives of both main and non-main proceedings.
- 169 The word “intervene” in the context of article 20 is intended to refer to the case where the foreign representative appears in court and makes representations in proceedings, whether those proceedings be individual court actions or other proceedings (including extrajudicial proceedings) instituted by the debtor against a third party, or proceedings instituted by a third party against the debtor. The proceedings where the foreign representative might intervene could only be those that have not been stayed under articles 20(1)(a) or 21(1)(a).
- 170 The article, limited to providing procedural standing, makes it clear (by stating “provided the requirements of the law of this State are met”) that all other conditions of the local law for a person to be able to intervene remain intact.
- 171 Many if not all national procedural laws contemplate cases where a party (the foreign representative in this article) who demonstrates a legal interest in the outcome of a dispute between two other parties may be permitted by the court to be heard in the proceedings. Those procedural laws refer to such situations by different expressions, among which the expression “intervention” is frequently used. If the enacting State uses another expression for that concept, the use of such other expression in enacting article 24 would be appropriate.
- 172 It should be noted that the expression “participate” as used in the context of article 12 refers to a case where the foreign representative makes representations in a collective insolvency proceeding (see above, para. 102), whereas the expression “intervene” as used in article 24 covers a case where the foreign representative takes part in proceedings concerning an individual action by or against the debtor.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 117–123 (Commission, 30th session)

A/CN.9/435, paras. 79–84 (Working Group, 21st session)

A/CN.9/433, paras. 51, 58 (Working Group, 20th session)

A/CN.9/422, paras. 148–149 (Working Group, 19th session)

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CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

- (1) In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]*.
- (2) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26. Cooperation and direct communication between the *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* and foreign courts or foreign representatives

- (1) In matters referred to in article 1, a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.
- (2) The *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

- (a) appointment of a person or body to act at the direction of the court;
- (b) communication of information by any means considered appropriate by the court;
- (c) coordination of the administration and supervision of the debtor's assets and affairs;
- (d) approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) coordination of concurrent proceedings regarding the same debtor;
- (f) *[the enacting State may wish to list additional forms or examples of cooperation]*.

Chapter IV as a whole

- 173 Chapter IV (arts. 25–27) on cross-border cooperation is a core element of the Model Law. Its objective is to enable courts and insolvency administrators from two or more countries to be efficient and achieve optimal results. Cooperation as described in the chapter is often the only realistic way, for example, to prevent dissipation of assets; to maximise the value of assets (e.g. when items of production equipment located in two States are worth more if sold together than if sold separately); or to find the best solutions for the reorganization of the enterprise.
- 174 Articles 25 and 26 not only authorize cross-border cooperation, they also mandate it by providing that the court and the insolvency administrator “shall cooperate to the maximum extent possible”. These articles are designed to overcome a widespread lack in national laws of rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies. Enactment of such a legal basis would be particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. However, even in jurisdictions in which there is a tradition of wider judicial latitude, enactment of a legislative framework for cooperation has proven to be useful.
- 175 To the extent that cross-border judicial cooperation in the enacting State is based on principles of comity among nations, the enactment of articles 25 to 27 offers an opportunity for making this principle more concrete and adapted to the particular circumstances of cross-border insolvencies.
- 176 In the States in which the proper legal basis for international cooperation in the area of cross-border insolvency is not the principle of “comity”, but an international agreement (e.g. a bilateral or multilateral treaty or an exchange of letters between the cooperating authorities) based on the principle of reciprocity, chapter IV of the Model Law may serve as a model for the elaboration of such international cooperation agreements.
- 177 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 administrators. For a court (or a person or body referred to in articles 25 and 26) to cooperate with a foreign court or a foreign representative regarding a foreign proceeding, the Model Law does not require a previous formal decision to recognize that foreign proceeding.
- 178 The ability of courts, with appropriate involvement of the parties, to communicate “directly” and to request information and assistance “directly” from foreign courts or foreign representatives is intended to avoid the use of time consuming procedures traditionally in use, such as letters rogatory. This ability is critical when the courts consider that they should act with urgency. In order to emphasize the flexible and potentially urgent character of cooperation, the enacting State may find it useful to include in the enactment of the Model Law an express provision that would authorize the courts, when they engage in cross-border communications under article 25, to forgo use of the formalities (e.g. communication via higher courts, letters rogatory or other diplomatic or consular channels) that are inconsistent with the policy behind the provision.
- 179 The importance of granting the courts flexibility and discretion in cooperating with foreign courts or foreign representatives was emphasized at the Second UNCITRAL–INSOL Multinational Judicial Colloquium on Cross-Border Insolvency. At that Colloquium, reports of a number of cases

in which judicial cooperation in fact occurred were given by the judges involved in the cases. From those reports a number of points emerged, which might be summarized as follows: (a) communication between courts is possible, but should be done carefully and with appropriate safeguards for the protection of substantive and procedural rights of the parties; (b) communication should be done openly, with advance notice to the parties involved and in the presence of those parties, except in extreme circumstances; (c) communications that might be exchanged are various and include: exchanges of formal court orders or judgments; supply of informal writings of general information, questions and observations; and transmission of transcripts of court proceedings; (d) means of communication include, for example, telephone, facsimile, electronic-mail facilities and video; and (e) where communication is necessary and is intelligently used, there could be considerable benefits for the persons involved in, and affected by, the cross-border insolvency. The Colloquium was held from 22 to 23 March 1997 in conjunction with the 5th World Congress of the International Association of Insolvency Practitioners (INSOL) (New Orleans, 23 to 26 March 1997). A brief account of the Colloquium appears in document A/52/17, paragraphs 17–22.

Article 26

- 180 Inclusion of article 26 on international cooperation between persons who are appointed to administer assets of insolvent debtors reflects the important role that such persons can play in devising and implementing cooperative arrangements, within the parameters of their authority. The provision makes it clear that an insolvency administrator acts under the overall supervision of the competent court (by stating “in the exercise of its functions and subject to the supervision of the court”). The Model Law does not modify the rules already existing in the insolvency law of the enacting State on the supervisory functions of the court over the activities of the insolvency administrator. Generally, a certain degree of latitude and initiative of administrators, within the broad confines of judicial supervision, are mainstays of cooperation in practical terms; it is therefore advisable that the enacting State does not change that in enacting the Model Law. In particular, there should be no suggestion that ad hoc authorization would be needed for each communication between the administrator and a foreign body.

Article 27

- 181 Article 27 is suggested to be used by the enacting State to provide courts with an indicative list of the types of cooperation that are authorized by articles 25 and 26. Such an indicative listing may be particularly helpful in States with a limited tradition of direct cross-border judicial cooperation, and in States where judicial discretion has traditionally been limited. Any listing of forms of possible cooperation should not purport to be exhaustive, as this might inadvertently preclude certain forms of appropriate cooperation.
- 182 The implementation of cooperation would be subject to any mandatory rules applicable in the enacting State; for example, in the case of requests for information, rules restricting the communication of information (e.g. for reasons of protection of privacy) would apply.
- 183 Subparagraph (f) of article 27 is a slot where the enacting State may include additional forms of possible cooperation. Those might include, for example, suspension or termination of existing proceedings in the enacting State.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 124–129 (Commission, 30th session)
A/CN.9/435, paras. 85–94 (Working Group, 21st session)
A/CN.9/433, paras. 164–172 (Working Group, 20th session)
A/CN.9/422, paras. 129–143 (Working Group, 19th session)
A/CN.9/419, paras. 75–76, 80–83, 118–133 (Working Group, 18th session)

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CHAPTER V. CONCURRENT PROCEEDINGS

Article 28. Commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] after recognition of a foreign main proceeding

After recognition of a foreign main proceeding, a proceeding *under [*identify laws of the enacting State relating to insolvency*]* may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

- 184 Article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of a local insolvency proceeding concerning the same debtor as long as the debtor has assets in the State.
- 185 The position taken in article 28 is in substance the same as the position taken in a number of States. However, in some States for the court to have jurisdiction to commence a local insolvency proceeding, the mere presence of assets in the State is not sufficient. For such jurisdiction to exist, the debtor must be engaged in an economic activity in the State (to use the terminology of the Model Law, the debtor must have an “establishment” in the State, as defined in article 2(f)). The Model Law opted in this article for the less restrictive solution in a context where the debtor is already involved in a foreign main proceeding. While the solution leaves a broad ground for commencing a local proceeding after recognition of a foreign main proceeding, it serves the purpose of indicating that if the debtor has no assets in the State there is no jurisdiction for commencing an insolvency proceeding.
- 186 Nevertheless, the enacting State may wish to adopt the more restrictive solution, i.e. allowing the initiation of the local proceeding only if the debtor has an “establishment” in the State. The rationale may be that, when the assets in the enacting State are not part of an establishment, the commencement of a local proceeding would typically not be the most efficient way to protect the creditors, including local creditors. By tailoring relief to be granted to the foreign main proceeding and cooperating with the foreign court and foreign representative, the court in the enacting State would have sufficient opportunities to ensure that the assets in the State would be administered in such a way that local interests would be adequately protected. Therefore, the enacting State would act in line with the philosophy of the Model Law if it enacts the article by replacing the words “only if the debtor has assets in this State”, as they currently appear in article 28, with the words “only if the debtor has an establishment in this State”.

187 Ordinarily, the local proceeding of the kind envisaged in the article would be limited to the assets located in the State. However, in some situations a meaningful administration of the local insolvency proceeding may have to include certain assets abroad, especially when there is no foreign proceeding necessary or available in the State where the assets are situated (for example: where the local establishment would have an operating plant in a foreign jurisdiction; where it would be possible to sell the debtor's assets in the enacting State and the assets abroad as a "going concern"; or where assets were fraudulently transferred abroad from the enacting State). In order to allow such limited cross-border reach of a local proceeding, the article includes at the end of paragraph (1) the words "and such other property as may be appropriately administered within the proceedings in this State". Two restrictions have been included in the article concerning the possible extension of effects of a local proceeding to assets located abroad: firstly, the extension is permissible "to the extent necessary to implement co-operation and coordination under articles 25, 26 and 27", and, secondly, those foreign assets must be subject to administration in the enacting State "under the law of [the enacting State]". Those restrictions are useful in order to avoid creating an open-ended faculty to extend the effects of a local proceeding to assets located abroad, a faculty that would generate uncertainty as to the application of the provision and may lead to conflicts of jurisdiction.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 94–101 (Commission, 30th session)
A/CN.9/435, paras. 180–183 (Working Group, 21st session)
A/CN.9/433, paras. 173–181 (Working Group, 20th session)
A/CN.9/422, paras. 192–197 (Working Group, 19th session)

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Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

Where a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

- (a) when the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,
 - (i) any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and
 - (ii) if the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;
- (b) when the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,
 - (i) any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and
 - (ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in article 20(1) shall be

modified or terminated pursuant to article 20(2) if inconsistent with the proceeding in this State;

- (c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

188 The article gives guidance to the court that deals with cases where the debtor is subject to a foreign proceeding and a local proceeding at the same time. The opening words of the provision direct the court that in all such cases it must seek cooperation and coordination pursuant to chapter IV of the Model Law, i.e. articles 25, 26 and 27.

189 The salient principle embodied in this article is that the commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. This principle is essential for achieving the objectives of the Model Law in that it allows the court in the enacting State in all circumstances to provide relief in favour of the foreign proceeding.

190 However, the article maintains a pre-eminence of the local proceeding over the foreign proceeding. This has been done in the following ways: firstly, any relief to be granted to the foreign proceeding must be consistent with the local proceeding (subpara. (a)(1)); secondly, any relief that has already been granted to the foreign proceeding must be reviewed and modified or terminated to ensure consistency with the local proceeding (subpara. (b)(1)); thirdly, if the foreign proceeding is a main proceeding, the automatic effects pursuant to article 20 are to be modified and terminated if inconsistent with the local proceeding (those automatic effects do not terminate automatically since they may be beneficial, and the court may wish to maintain them) (subpara. (b)(ii)); fourthly, where a local proceeding is pending at the time a foreign proceeding is recognized as a main proceeding, the foreign proceeding does not enjoy the automatic effects of article 20 (subpara. (a)(ii)). The article avoids establishing a rigid hierarchy between the proceedings since that would unnecessarily hinder the ability of the court to cooperate and exercise its discretion under articles 19 and 21. It is desirable not to restrict that latitude of the court when the article is enacted.

191 Subparagraph (c) incorporates the principle that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding or must concern information required in that proceeding. This principle is expressed in article 21(3) (which deals in a general way with the type of relief that may be granted to a foreign representative) and is restated in this article (which deals with coordination of local and foreign proceedings). Article 19(4) (on pre-recognition relief) and article 30 (on coordination of more than one foreign proceeding) are inspired by the same principle. (See also comments above, para. 140).

Prior discussion in the Commission and the Working Group
A/52/17, paras. 106–110 (Commission, 30th session)
A/CN.9/435, paras. 190–191 (Working Group, 21st session)

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Article 30. Coordination of more than one foreign proceeding

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

- (a) any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
- (b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;
- (c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

192 The article deals with cases where the debtor is subject to insolvency proceedings in more than one foreign State and foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State. The provision applies whether or not an insolvency proceeding is pending in the enacting State. If in addition to two or more foreign proceedings there is a proceeding in the enacting State, the court will have to act pursuant to both articles 29 and 30.

193 The objective of article 30 is similar to the objective of article 29 in that the key issue in the case of concurrent proceedings is to promote cooperation, coordination and consistency of relief granted to different proceedings. Such consistency will be achieved by appropriate tailoring of relief to be granted or by modifying or terminating relief already granted. Unlike article 29 (which as a matter of principle gives primacy to the local proceeding), article 30 gives preference to the foreign main proceeding if there is one. In the case of more than one foreign non-main proceeding, the provision does not *a priori* treat any foreign proceeding preferentially. Priority for the foreign main proceeding is reflected in the requirement that any relief in favour of a foreign non-main proceeding (whether already granted or to be granted) must be consistent with the foreign main proceeding (subparas. (a) and (b)).

Prior discussion in the Commission
A/52/17, paras. 111–112 (Commission, 30th session)

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

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

- 194 In some jurisdictions proof that the debtor is insolvent is required for the commencement of insolvency proceedings. In other jurisdictions insolvency proceedings may be commenced under specific circumstances defined by law which do not necessarily mean that the debtor is in fact insolvent; those circumstances may be, for example, cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissipation of its assets or abandonment of its establishment.
- 195 In jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of a foreign main proceeding, a rebuttable presumption of insolvency of the debtor for the purposes of commencing an insolvency proceeding in the enacting State. The presumption does not apply if the foreign proceeding is a non-main proceeding. The reason is that an insolvency proceeding commenced in a State other than the State where the debtor has the centre of its main interests does not necessarily mean that the debtor is to be subject to laws relating to insolvency in other States.
- 196 For the national laws where proof that the debtor is insolvent is not required for the commencement of insolvency proceedings, the presumption established in article 31 may be of little practical significance and the enacting State may decide not to enact it.
- 197 The article would have particular significance when proving insolvency as the prerequisite for an insolvency proceeding would be a time-consuming exercise and of little additional benefit bearing in mind that the debtor is already in an insolvency proceeding in the State where it has the centre of its main interests and the commencement of a local proceeding may be urgently needed for the protection of local creditors. Nonetheless, the court of the enacting State is not bound by the decision of the foreign court, and local criteria for demonstrating insolvency remain operative, as is clarified by the words “in the absence of evidence to the contrary”.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 94, 102–105 (Commission, 30th session)
A/CN.9/435, paras. 180, 184 (Working Group, 21st session)
A/CN.9/433, paras. 173, 180–189 (Working Group, 20th session)
A/CN.9/422, para. 196 (Working Group, 19th session)

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Article 32. Rule of payment in concurrent proceedings

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

class is proportionately less than the payment the creditor has already received.

- 198 The rule set forth in article 32 (sometimes referred to as the “hotchpot” rule) is a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to avoid situations in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. For example, an unsecured creditor has received 5 percent of its claim in a foreign insolvency proceeding; that creditor also participates in the insolvency proceeding in the enacting State, where the rate of distribution is 15 percent; in order to put the creditor in the equal position as the other creditors in the enacting State, the creditor would receive 10 percent of its claim in the enacting State.
- 199 The article does not affect the ranking of claims as established by the law of the enacting State, and is solely intended to establish the equal treatment of creditors of the same class. To the extent claims of secured creditors or creditors with rights *in rem* are paid in full (a matter that depends on the law of the State where the proceeding is conducted), those claims are not affected by the provision.
- 200 The expression “secured claims” is used to refer generally to claims guaranteed by particular assets, while the words “rights *in rem*” are intended to indicate rights relating to a particular property that are enforceable also against third parties. A given right may fall within the ambit of both expressions, depending on the classification and terminology of the applicable law. The enacting State may use another term or terms for expressing these concepts.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 130–134 (Commission, 30th session)
A/CN.9/435, paras. 96, 197–198 (Working Group, 21st session)
A/CN.9/433, paras. 182–183 (Working Group, 20th session)
A/CN.9/422, paras. 198–199 (Working Group, 19th session)
A/CN.9/419, paras. 89–93 (Working Group, 18th session)

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VI. ASSISTANCE FROM THE UNCITRAL SECRETARIAT

(a) Assistance in drafting legislation

- 201 The UNCITRAL Secretariat may assist States with technical consultations for the preparation of legislation based on the Model Law. Further information may be obtained from: the UNCITRAL Secretariat, Vienna International Centre, P.O. Box 500, A-1400 Vienna, Austria; telephone (43–1) 21345–4060; fax (43–1) 21345–5813 (but note that some time during 1998 the number 21345 will be changed to 26060); electronic mail: uncitral@unov.un.or.at; Internet home page: <http://www.un.or.at/uncitral>.

(b) Information on interpretation of legislation based on the Model Law

- 202 Once enacted, the Model Law will be included in the system for collecting and disseminating information on case law relating to the Conventions and Model Laws that have emanated from the work of the Commission

(Case Law on UNCITRAL Texts (CLOUT)). The purpose of the system is to promote international awareness of the legislative texts formulated by the Commission and to facilitate their uniform interpretation and application. The Secretariat publishes, in the six languages of the United Nations, abstracts of decisions and makes available, against reimbursement of copying expenses, the original decisions on the basis of which the abstracts were prepared. The system is explained in document A/CN.9/SER.C/GUIDE/1, available from the Secretariat and at the Internet home page indicated in the preceding paragraph.

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