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Insolvency Law

Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency

1. At its forty-third session (2010), the Commission heard a proposal by the Secretariat which noted that participants in the judicial colloquia that had been held by UNCITRAL in cooperation with INSOL and the World Bank had indicated a desire for information and guidance for judges on cross-border related issues and in particular on the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law). To that end, the Commission was informed that the Secretariat had been working on the preparation of a draft text that provided a judicial perspective on the use and interpretation of the Model Law. The Commission agreed that the Secretariat should be mandated to develop that text in the same flexible manner, resources permitting, as was achieved with respect to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. That would involve consultation, principally with judges, but also with insolvency practitioners and professionals; consideration, at an appropriate stage, by Working Group V; and finalization and adoption by the Commission, possibly in 2011.[1]

2. The text set forth below as The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective responds to that mandate and was developed in consultation with judges and insolvency experts. It was considered by Working Group V at its thirty-ninth session in December 2010[2] and by the 9th Multinational Judicial Colloquium, jointly sponsored by UNCITRAL, INSOL and the World Bank,

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 261.

[2] A/CN.9/715, paras. 110-116.

held in Singapore on 12-13 March 2011.[3] The introduction to the text explains its purpose and the manner in which the material is organized.

3. It is proposed that the text of the judicial materials be updated on a regular basis to ensure that it reflects the latest jurisprudence, such as with respect to the use and interpretation of "centre of main interests", in as many jurisdictions as possible and is thus of continuing relevance to judges using and interpreting the Model Law. That updating could be undertaken by the Secretariat in consultation with judges and, as appropriate, other insolvency experts, in much the same way as the text was developed and would maintain the same approach to the presentation of the information. The time frame for completing the updating could be determined in accordance with available resources and bearing in mind the occurrence of any significant changes in jurisprudence that should be reported.

4. The Commission may therefore wish to request the Secretariat to update the judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency on a regular basis, taking into account developing jurisprudence in diverse jurisdictions, in the same flexible manner, resources permitting, as was used to develop the judicial materials and in keeping with their intended purpose.

[3] The reports of these judicial colloquiums are available at www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html.

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

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(*Continued in A/CN.9/732/Add.1*)

Introduction

A. Purpose and scope

1. This text discusses the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) from a judge's perspective. Recognizing that some enacting States have amended the Model Law to suit local circumstances, different approaches might be required if a judge concludes that the omission or modification of a particular article from the text as enacted necessitates that course. This text is based on the Model Law as endorsed by the General Assembly of the United Nations in December 1997. It makes no reference to or expresses views on the various adaptations to the Model Law made in some enacting States.

2. Although this text makes references to decisions given in a number of jurisdictions, no attempt is made to critique the decisions, beyond pointing out issues that another judge may want to consider should a similar case come before him or her. Nor has any attempt been made to provide references to all relevant decisions touching on the interpretation issues raised by the Model Law. Rather, the intention is to use decided cases solely to illustrate particular strands of reasoning that might be adopted in addressing specific issues. In each case, the judge will determine the case at hand on the basis of domestic law, including the terms of legislation enacting the Model Law.

3. This text does not purport to instruct judges on how to deal with applications for recognition and relief under the legislation enacting the Model Law. As a matter of principle, such an approach would run counter to principles of judicial independence. In addition, in practical terms, no single approach is possible or desirable. Flexibility of approach is all important in an area where the economic dynamics of a situation may change suddenly. All that can be offered is general guidance on the issues a particular judge might need to consider, based on the intentions of those who crafted the Model Law and the experiences of those who have used it in practice.

4. Deliberately, this text is ordered to reflect the sequence in which particular decisions would generally be made by the receiving court, under the Model Law, as distinct from an article by article analysis.

B. Glossary

1. Terms and explanations

5. The following paragraphs explain the meaning and use of certain expressions that appear frequently in this document. Many of these terms are common to the UNCITRAL Model Law, the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.[4] Their use in this document is consistent with their use in those texts.

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[4] These UNCITRAL texts are available from www.uncitral.org/uncitral/en/uncitral_texts.html.

(a) CLOUT: References to CLOUT are to the Case Law on UNCITRAL Texts reporting system. Abstracts of cases are available in the six United Nations languages from www.uncitral.org/uncitral/en/case_law/abstracts.html;

(b) "Cross-border agreement": An oral or written agreement intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest;[5]

(c) "Enacting State": A State that has enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency;

(d) "Insolvency representative": A person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or liquidation of the insolvency estate;

(e) "Judge": A judicial officer or other person appointed to exercise the powers of a court or other competent authority having jurisdiction under legislation based on the Model Law;

(f) "Receiving court": The court in the enacting State from which recognition and relief is sought.

2. Reference material

(a) References to cases

6. References to specific cases are included throughout this text and particularly in the footnotes. In general, those references are to cases included in the summaries provided in the Annex, so only a short-form reference is included in the text, e.g. *Bear Stearns* refers to the proceedings concerning *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd*. References to page or paragraph numbers in association with those cases are references to the relevant portion of the version of the judgement cited in the Annex.

(b) References to texts

7. This text includes references to several texts on cross-border insolvency, including:

(a) "UNCITRAL Model Law": UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997);

(b) "Guide to Enactment": The Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency;

(c) "UNCITRAL Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004);

(d) "UNCITRAL Practice Guide": UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);

(e) "EC Regulation": European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings;

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[5] These agreements are discussed in some detail in the Practice Guide.

(f) "European Convention": European Union Convention on insolvency proceedings;

(g) "Virgos Schmit Report": M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996, available from http://global.abi.org/sites/global.abi.org/files/insolvency_report.pdf.

I. Background

A. Scope and application of the UNCITRAL Model Law

8. In December 1997, the General Assembly of the United Nations endorsed the Model Law on Cross-Border Insolvency, developed and adopted by the United Nations Commission on International Trade Law (UNCITRAL).

9. The Model Law does not purport to address substantive domestic insolvency law. Rather, it provides procedural mechanisms to facilitate more efficient disposition of cases in which an insolvent debtor has assets or debts in more than one State. As at the end of March 2011, 19 States had enacted legislation based on the Model Law.[6]

10. The Model Law is designed to apply where:[7]

(a) Assistance is sought in a State (the enacting State) by a foreign court or a foreign representative in connection with a foreign insolvency proceeding;

(b) Assistance is sought in the foreign State in connection with a specified insolvency proceeding under the laws of that State;

(c) A foreign proceeding and an insolvency proceeding under specified laws of the enacting State are taking place concurrently, in respect of the same debtor;

(d) Creditors or other interested persons are requesting the commencement of, or participation in, an insolvency proceeding under specified laws of the enacting State.

The Model Law anticipates that a representative (the foreign representative) will have been appointed to administer the insolvent debtor's assets in one or more States or to act as a representative of the foreign proceedings, at the time an application under the Model Law is made.[8]

11. The Model Law requires an enacting State to specify the court or other competent authority that has power to deal with issues arising under it.[9] Acknowledging that some States will nominate administrative bodies rather than

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[6] Australia (2008), British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000) and the United States of America (2005).

[7] UNCITRAL Model Law, art. 1(1).

[8] See also UNCITRAL Model Law, art. 5 as to the ability of an enacting State to specify those representatives who may seek recognition and relief in a foreign court.

[9] Ibid., art. 4.

courts, the definition of "foreign court" includes both judicial and other authorities competent to control or supervise a foreign proceeding.[10]

12. The Model Law envisages that particular entities, such as banks or insurance companies, the failure of which might create systemic risks within the enacting State, may be excluded from the operation of the Model Law.[11]

13. There are four principles on which the Model Law is built. They are:

(a) *The "access" principle*: This principle establishes the circumstances in which a "foreign representative"[12] has rights of access to the court (the receiving court) in the enacting State from which recognition and relief is sought;[13]

(b) *The "recognition" principle*: Under this principle the receiving court may make an order recognizing the foreign proceeding, either as a foreign "main" or "non-main" proceeding;[14]

(c) *The "relief" principle*: This principle refers to three distinct situations. In cases where an application for recognition is pending, interim relief may be granted to protect assets within the jurisdiction of the receiving court.[15] If a proceeding is recognized as a "main" proceeding, automatic relief follows.[16] Additional discretionary relief is available in respect of "main" proceedings and relief of the same character may be given in a proceeding that is recognized as "non-main";[17]

(d) *The "cooperation" and "coordination" principle*: This principle places obligations on both courts and insolvency representatives in different States to communicate and cooperate to the maximum extent possible, to ensure that the single debtor's insolvent estate is administered fairly and efficiently, with a view to maximizing benefits to creditors.[18]

14. Those principles are designed to meet the following public policy objectives:[19]

(a) The need for greater legal certainty for trade and investment;

(b) The need for fair and efficient management of international insolvency proceedings, in the interests of all creditors and other interested persons, including the debtor;

(c) Protection and maximization of the value of the debtor's assets for distribution to creditors, whether by reorganization or liquidation;

(d) The desirability and need for courts and other competent authorities to communicate and cooperate when dealing with insolvency proceedings in multiple States; and

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[10] Ibid., art. 2(e); definition of "foreign court".
[11] Ibid., art. 1(2).
[12] As defined by art. 2(d) of the UNCITRAL Model Law.
[13] Ibid., art. 9.
[14] Ibid., art. 17.
[15] Ibid., art. 19.
[16] Ibid., art. 20.
[17] Ibid., art. 21.
[18] Ibid., arts. 25, 26, 27, 29 and 30.
[19] Preamble to the UNCITRAL Model Law; see also Guide to Enactment, para 3.

(e) The facilitation of the rescue of financially troubled businesses, with the aim of protecting investment and preserving employment.

15. In December 2009, the General Assembly endorsed the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.[20] The Practice Guide discusses, by reference to actual cases, various means by which cooperation among insolvency representatives, courts or other competent bodies may be enhanced, to increase the fairness and efficiency of the administration of the estates of an insolvent debtor who has assets or creditors in more than one jurisdiction. One mechanism used to facilitate cooperation, the cross-border insolvency agreement (cross-border agreement), is discussed in some detail. Depending on applicable domestic law and the subject matter of a particular cross-border agreement, in some cases there may be a need for a court (or other competent authority) to approve such an agreement. The Practice Guide provides examples of those agreements.[21]

B. A judge's perspective[22]

16. While the UNCITRAL Model Law emphasizes the desirability of a uniform approach to its interpretation based on its international origins,[23] the domestic law of most States is likely to require interpretation in accordance with national law; unless the enacting State has endorsed the "international" approach in its own legislation.[24] Even so, any court considering legislation based on the Model Law is likely to find the international jurisprudence of assistance to its interpretation.

17. In approaching his or her tasks, the judge's perspective is necessarily different from that of an insolvency representative. A judicial officer's obligation is to determine impartially questions submitted by a party, based on information (evidence) placed before him or her. His or her obligation is to act judicially; meaning that all interested parties should, in the absence of exceptional circumstances, be given an opportunity to be heard on all issues that might materially affect the ultimate decision, to ensure due process is followed. In some States, persons presiding over competent administrative authorities[25] may not be affected by such constraints. While applicable domestic law in some States may require judges to satisfy themselves independently that any order sought should be made, the national law of other States may contemplate that the court simply give effect to the parties' wishes.

18. Some differences in approach to the interpretation of the terms of the Model Law (or any adaptation of its language) may arise from the way in which judges from different legal traditions approach their respective tasks. Although general

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[20] The text is available at from www.uncitral.org/uncitral/en/uncitral_texts.html.

[21] See generally Practice Guide, chap. III and the case summaries included in Annex I.

[22] See the extended definition of the term "Judge" in the glossary.

[23] In States that enact the Model Law, its terms must be interpreted having regard "to its international origin and to the need to promote uniformity in its application and the observance of good faith": UNCITRAL Model Law, article 8.

[24] Indeed the UNCITRAL Model Law itself makes it clear that the terms of any relevant Treaty or agreement to which an enacting State is a party will take precedence over its terms: art. 3.

[25] That is, authorities that come within the definition of "foreign court", UNCITRAL Model Law, art. 2(e).

propositions are fraught with difficulty, the greater codification of law in some jurisdictions may tend to focus more attention on the text of the Model Law than would be the case in other jurisdictions without the same degree of codification or in which many superior courts have an inherent jurisdiction to determine legal questions in a manner that is not contrary to any statute or regulation[26] or have authority to develop particular aspects of the law for which there is no codified rule.[27]

19. These different approaches could affect a receiving court's inclination to act on the Model Law's principle of cooperation between courts and coordination of multiple proceedings.[28] If the domestic law of the enacting State incorporates the cooperation and coordination provisions of the Model Law, there will be a codified recognition of steps that can be taken in that regard.

20. Without explicit adoption of such provisions,[29] there may be doubt as to whether, as a matter of domestic law, a court is entitled to engage in dialogue with a foreign court or to approve a cross-border agreement entered into by insolvency representatives in different States and other interested parties. The court's ability to do so will depend on other provisions of relevant domestic law. On the other hand, those courts which possess an inherent jurisdiction are likely to have greater flexibility in determining what steps can be taken between courts, in order to give effect to the Model Law's emphasis on cooperation and coordination.

21. Due process is a concept which is well understood in jurisdictions of all legal traditions. Minimum standards require a transparent process, notification to the parties of any communications that may take place between relevant courts and the ability for parties to be heard on any issues that arise, whether by physical presence or through an opportunity to make submissions in writing. Irrespective of the legal tradition, it is desirable that safeguards be in place to ensure due process is followed.[30] Those principles assume even greater importance in cases where court-to-court communications take place.

22. Unlike an insolvency representative directly involved in the administration of an insolvent estate, a particular judge is unlikely to have specific knowledge of the issues raised on an initial application to the court, even though urgency often exists in insolvency cases involving complex issues and large sums of money.[31] Judges who have not experienced proceedings of this type before might require assistance from the foreign representative,[32] generally through his or her legal counsel. That assistance could include succinct, yet informative, briefs and evidence.

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[26] For a discussion of the inherent jurisdiction see Master Jacob in *The Inherent Jurisdiction of the Court*, (1970) Current Legal Problems 23.

[27] Examples are the development of the law of equity and negligence in common law systems.

[28] UNCITRAL Model Law, arts. 25, 26, 27, 29 and 30. See further paras. 165-187 below.

[29] For example, in cases involving Member States of the European Union (except Denmark) the European Regulation on Insolvency Proceedings, while requiring cross-border cooperation among insolvency representatives, makes no reference to cooperation between courts.

[30] See further paras. 155-187 below.

[31] UNCITRAL Model Law, art. 17(3) emphasizes the need for speedy resolution of applications for recognition.

[32] As defined in the UNCITRAL Model Law, art. 2(d).

23. From an institutional perspective, there is a need for a judge to be given enough time to read and digest the information proffered before embarking upon a hearing. The pre-hearing reading time required in any given case will be dictated by the urgency with which the application must be addressed, the size of the relevant insolvency administrations, their complexity, the number of States involved, the economic consequences of particular decisions and relevant public policy factors.

24. Over 80 judges from some 40 States, attending a judicial colloquium in Vancouver in June 2009,[33] expressed a view that consideration be given to the provision of assistance to judges (subject to the overriding need to maintain judicial independence and the integrity of a particular State's judicial system), on ways to approach questions arising under the Model Law. This text is intended to provide the type of assistance requested by judges at the Vancouver Colloquium. Its final form has evolved as a result of a series of informal consultations, principally with judges, but also with insolvency practitioners and other experts.

C. The purpose of the UNCITRAL Model Law

25. The UNCITRAL Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Enacting States are encouraged to use the Model Law to make useful additions and improvements to national insolvency regimes, in order to resolve more readily problems arising in cross-border insolvency cases.

26. As mentioned earlier, the Model Law respects differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several modest but significant ways. These include:

(a) Providing foreign representatives with rights of access to the courts of the enacting State. This permits the foreign representative to seek a temporary "breathing space", and allows the receiving court to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

(b) Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be;

(c) Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

(d) Permitting courts in the enacting State to cooperate effectively with courts and representatives involved in a foreign insolvency proceeding;

(e) Authorizing courts in the enacting State and persons administering insolvency proceedings in that State to seek assistance abroad;

(f) Establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in another State;

[33] The Eighth UNCITRAL/INSOL/World Bank Multi-national Judicial Colloquium, Vancouver, 20-21 June 2009. A report of the Colloquium is available from: www.uncitral.org/pdf/English/news/eighthJC.pdf.

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

27. The Guide to Enactment of the UNCITRAL Model Law emphasizes the centrality of cooperation in cross-border insolvency cases, in order to achieve efficient conduct of those proceedings and optimal results. A key element is cooperation both between the courts involved in the various proceedings and between those courts and the insolvency representatives appointed in the different proceedings.[34] An essential element of cooperation is likely to be encouragement of communication among the insolvency representatives and/or other administering authorities of the States involved.[35] While the Model Law provides authorization for cross-border cooperation and communication between courts, it does not specify how that cooperation and communication might be achieved, leaving it up to each jurisdiction to determine by application of its own domestic laws or practices. It does, however, suggest various ways in which cooperation might be implemented.[36]

28. The ability of courts, with the 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. As insolvency proceedings are inherently chaotic and value evaporates quickly with the passage of time, this ability is critical when there is a need for a court to act with urgency.

II. Interpretation and application of the Model Law

A. The "access" principle

29. The UNCITRAL Model Law envisages a proceeding being opened by an application made to the receiving court by an insolvency representative of a debtor who has been appointed in another State — the "foreign representative". The application may seek:

(a) To commence an insolvency proceeding under the laws of the enacting State;[37]

(b) Recognition of the foreign proceeding in the enacting State,[38] so that the foreign representative may:

(i) Participate in an existing insolvency proceeding in that State;[39]

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[34] UNCITRAL Model Law, arts. 25 and 26.

[35] For example, see the discussion of the use of cross-border agreements in the UNCITRAL Practice Guide.

[36] UNCITRAL Model Law, art. 27.

[37] Ibid., art. 11 and Guide to Enactment, paras. 97-99.

[38] Ibid., art. 15 and paras. 112-121.

[39] Ibid., art. 12 and paras. 100-102, which make it clear that the purpose of article 12 is to give the foreign representative procedural standing to "participate" in the proceedings by making petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding. Where the law of the enacting State uses a word other than "participation" to express that concept, that other term

(ii) Apply for relief under the Model Law;[40] or

(iii) To the extent that domestic law permits, intervene in any proceeding to which the debtor is a party.[41]

30. Article 2 of the UNCITRAL Model Law defines both "foreign proceeding" and "foreign representative".

31. The definitions of "foreign representative" and "foreign proceeding" are linked. In order to come within the definition of a "foreign representative", a person must be administering a "collective judicial or administrative 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", or be acting as a representative of the foreign proceeding.[42] A "foreign representative", is entitled, as of right, to apply directly to the court.[43]

32. In some circumstances, it might be argued that a particular entity administered by a "foreign representative" is not a "debtor" for the purposes of the domestic law to be applied by the receiving court.[44] A question of that type arose in *Rubin v Eurofinance*. In that case, receivers and managers had been appointed by the United States' court over a debtor referred to as "The Consumers Trust". A trust of that description is not recognized as a legal entity under English law but is, as a "business trust", in the United States. On a recognition application to the English Court, it was argued that the trust was not a "debtor" as a matter of English law. The judge rejected that submission holding that, having regard to the international origins of the UNCITRAL Model Law, a "parochial interpretation" of the term "debtor" would be "perverse".[45] The judge raised a separate question whether the relief provisions of the Model Law could work in respect of a debtor not recognized as a matter of English law, but on the facts of the case, it was not necessary to determine that point.[46]

33. Whether the "foreign representative" is authorized to act as a representative of a debtor's liquidation or reorganization is determined by the applicable law of the State in which the insolvency proceedings began.[47] In some cases expert evidence of applicable law may be desirable, to determine whether the particular proceeding comes within the scope of the definitions. In other cases, where the procedure in issue is well-known to the receiving court, expert evidence may not be necessary. Where the decision appointing the foreign representative indicates that that person

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may be used in enacting the provision. It is noted that art. 24 uses the term "intervene" to refer to the foreign representative taking part in an individual action by or against the debtor (as opposed to a collective insolvency proceeding).

40 Ibid., arts. 19 and 21 and paras. 135-140 and 154-160.

41 Ibid., art. 24 and paras. 168-172; see note 38 on the use of the term "intervene".

42 UNCITRAL Model Law, art. 2(a). The definition of the term "foreign court" is discussed at para. 11 above.

43 Ibid., art. 9.

44 The term "debtor" is not defined in the Model Law.

45 *Rubin v Eurofinance*, paras. 39 and 40.

46 Ibid., para. 41.

47 UNCITRAL Model Law, art. 5.

satisfies the definition in paragraph (d) of article 2, the court may rely on the presumption established by article 16(1) of the Model Law.

34. In *Stanford International Bank*, the English first instance court expressed a view that a receiver, appointed in the United States, would not be a "foreign representative" as defined because no authorization had been provided, at that stage of the appointment, to administer a liquidation or reorganization of the debtor company.[48] That observation was made in the context of a receivership found ultimately not to be a collective proceeding under a law relating to insolvency.

35. The UNCITRAL Model Law envisages a "foreign representative" as including one appointed on an "interim basis" but not one whose appointment has not yet commenced; for example, by virtue of a stay of an order appointing the insolvency representative pending an appeal.[49] One approach to determining whether a "foreign representative" has standing is to consider whether the definition of "foreign proceeding" is met before determining whether the applicant has been authorized[50] to administer a qualifying reorganization or liquidation of the debtor's assets or affairs, or to act as a representative of the foreign proceeding.

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

(a) The "foreign proceeding" in respect of which recognition is sought is a (interim or final) judicial or administrative proceeding in a foreign State;

(b) The proceeding is "collective" in nature;[51]

(c) The judicial or administrative proceeding arose out of a law relating to insolvency in which proceeding the debtor's assets and affairs are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(d) The control or supervision is being effected by a "foreign court"; namely "a judicial or other authority competent to control or supervise a foreign proceeding";[52] and

(e) The applicant has been authorized in the 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".

37. The foreign representative's ability to seek early recognition (and the consequential ability to seek relief)[53] is often essential for the effective protection of the assets of the debtor from dissipation or concealment. For that reason, the receiving court is obliged to decide the application "at the earliest possible time".[54] The phrase "at the earliest possible time" has a degree of elasticity. Some cases may be so straight-forward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, "the earliest possible

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[48] *Stanford International Bank*, para. 85.
[49] See the definition of "foreign representative" in UNCITRAL Model Law, art. 2(d).
[50] For the purposes of the Model Law, art 2(d).
[51] See below, paras. 66-70.
[52] UNCITRAL Model Law, art. 2(e).
[53] Ibid., see, in particular, arts. 20, 21, 23 and 24. As to interim relief, while the recognition application is pending, see art. 19.
[54] Ibid., art. 17(3).

time" might be measured in months. Interim relief will be available in the event that some order is necessary while the recognition application is pending.[55]

B. The "recognition" principle

1. Introductory comment

38. The object of the "recognition" principle is to avoid lengthy and time-consuming processes by providing prompt resolution of an application for recognition. This brings certainty to the process and enables the receiving court, once recognition has been given, to determine questions of relief in a timely fashion.

39. What follows is a general outline of the recognition principle. A more detailed discussion of its component parts is contained below in paragraphs 56-114.

2. Evidential requirements

40. A foreign representative will make an application under the UNCITRAL Model Law in order to seek recognition of the foreign proceeding. Article 15 of the Model Law establishes the requirements to be met by that application. In deciding whether a foreign proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the definition.[56] The Model Law makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the proceeding satisfies the requirements of article 15, recognition should follow in accordance with article 17.

3. Power to recognize a foreign proceeding

41. The receiving court's power to recognize a foreign proceeding is derived from article 17 of the UNCITRAL Model Law.

42. To facilitate recognition, article 16 creates certain presumptions concerning the authenticity of documents and the content of the order commencing the foreign proceedings and appointing the foreign representative.

43. The foreign representative has a continuing duty of disclosure. He or she must inform the receiving court promptly of any substantial change in the status of the recognized foreign proceeding or of his or her appointment and any other foreign proceeding regarding the same debtor of which the foreign representative becomes aware.[57]

44. Article 17(2) determines the status to be afforded to the foreign proceeding, for recognition purposes. That article envisages recognition on only two grounds — as either a "foreign main proceeding"[58] or a "foreign non-main proceeding".[59] The former is a foreign proceeding that is taking place in the State where "the debtor has

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[55] See below, para 122 and following.
[56] UNCITRAL Model Law, art. 2(a).
[57] Ibid., art. 18.
[58] Ibid., see definition in art. 2(b).
[59] Ibid., see definition in art. 2(c).

the centre of its main interests”, while the latter is a foreign proceeding taking place in a State where the debtor has “an establishment”. The term “establishment” means “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”.[60] Implicitly, the UNCITRAL Model Law does not provide for recognition of other types of insolvency proceedings, for example those commenced in a State where there is only a presence of assets.[61] It might be noted, however, that some States that have enacted the Model Law do provide additional powers to the courts under other law[62] to assist foreign proceedings that might include types of proceeding not subject to recognition under the Model Law.

45. *Bear Stearns*[63] is an illustration of a case in which a “foreign proceeding” was held to be neither a “foreign main proceeding” nor a “foreign non-main proceeding”. Both the court at first instance and the appellate court held that a provisional liquidation commenced in the Cayman Islands did not qualify under either head because the evidence did not establish either that the debtor’s principal place of business was situated in the Cayman Islands or that some non-transitory activity occurred in that State. Accordingly, those proceedings were not recognized.

4. Reciprocity

46. There is no requirement of reciprocity in the UNCITRAL Model Law. It is not envisaged that a foreign proceeding will be denied recognition solely on the grounds that a court in the State in which the foreign proceeding was commenced would not provide equivalent relief to an insolvency representative from the enacting State. Nevertheless, judges should be aware that some States have included reciprocity provisions, in relation to recognition, when enacting legislation based on the Model Law.[64]

5. The “public policy” exception

47. The receiving court retains an ability to deny recognition if, to do so, would be “manifestly contrary” to the public policy of the State in which the receiving court is situated. The notion of “public policy” is grounded in domestic law and may differ from State to State. For that reason, there is no uniform definition of “public policy” in the Model Law.

48. In some States, the expression “public policy” may be given a broad meaning, in that it might relate in principle to any mandatory rule of national law. However, in many States the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees. In those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when to do otherwise would contravene those fundamental principles.

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[60] Ibid., see definition in art. 2(f).

[61] See Guide to Enactment, paras. 73 and 128.

[62] E.g. under s. 8 of the New Zealand Insolvency (Cross-Border) Act 2006 and s. 426 of the United Kingdom Insolvency Act 1986.

[63] Full citations for the cases included in the text are set forth in the Annex.

[64] E.g. Romania, Mexico, South Africa.

49. For the applicability of the public policy exception in the context of the UNCITRAL Model Law, it is important to distinguish 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 reality that international cooperation would be unduly hampered if "public policy" was interpreted broadly in that context.

50. The purpose of the expression "manifestly", used in many international legal texts to qualify the expression "public policy", is to emphasize that public policy exceptions should be interpreted restrictively and that the exception is only intended to be invoked under exceptional circumstances, involving matters of fundamental importance for the enacting State.[65]

51. Other than in the context of the public policy exception, the Model Law makes no provision for a receiving court to evaluate the merits of the foreign court's decision, by which the proceeding has been commenced or the foreign representative appointed.[66]

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

52. A "foreign proceeding" can only be recognized as either "main" or "non-main". The basic distinction between foreign proceedings categorized as "main" and "non-main" proceedings affects the availability of relief flowing from recognition. Recognition of a "main" proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor[67] and an automatic "freeze" of those assets,[68] subject to certain exceptions.[69]

7. Review or rescission of recognition order

53. It is possible, in limited circumstances, for the receiving court to review its decision to recognize a foreign proceeding as either "main" or "non-main". If it is demonstrated that the grounds for making a recognition order were "fully or partially lacking or have ceased to exist" the receiving court may revisit its earlier order.[70]

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

(a) If the recognized foreign proceeding has been terminated;

(b) If the order commencing the foreign insolvency proceeding has been reversed by an appellate court in that State;

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[65] For example, see below, para. 110.

[66] See above, para. 40.

[67] UNCITRAL Model Law, arts. 20(1)(a) and (b).

[68] Ibid., art. 20(1)(c).

[69] Ibid., art. 20(2). Recognition of "main" and "non-main" foreign proceedings is discussed in more detail in paras. 75-114 below.

[70] Ibid., art. 17(4).

(c) If the nature of the recognized foreign proceeding has changed, perhaps by a reorganization proceeding having been converted into a liquidation proceeding;

(d) If new facts have emerged that require or justify a change in the court's decision; for example, if a foreign representative has breached conditions on which relief had been granted.[71]

55. A decision on recognition may also be subject to appeal or review, under applicable domestic law. Some appeal procedures under national laws give an appeal court authority to review the merits of the case in its entirety, including factual aspects. Domestic appeal procedures of an enacting State are not affected by the terms of the UNCITRAL Model Law.

[71] See Guide to Enactment, paras. 129-131.