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Insolvency Law

The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective (*continued*)

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1. Introductory comments

117. There are three types of relief available under the UNCITRAL Model Law:

(a) Interim (urgent) relief that can be sought at any time after the application to recognize a foreign proceeding has been made;[1]

(b) Automatic relief consequent upon recognition of a foreign proceeding as a "foreign main proceeding";[2] and

(c) Discretionary relief consequent upon recognition as either a main or non-main proceeding.[3]

The Model Law specifies the type of relief available, particularly following recognition. It does not import the effects under foreign law of the commencement of the foreign proceedings, nor rely upon the relief available in the recognizing State.

118. By virtue of the definition of "foreign proceeding",[4] the effects of recognition extend also to foreign "interim proceedings".[5] That solution is necessary because interim proceedings are not distinguished from other insolvency proceedings, merely because they are of an interim nature.

119. 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).[6]

120. Nothing in the Model Law limits the power of a court or other competent authority to provide additional assistance to a foreign representative under other laws of the enacting State.[7]

121. Consideration of a particular statute enacting the Model Law is required in order to determine whether any type of relief (automatic or discretionary) envisaged by the Model Law has been removed or modified in the enacting State.[8] Once available relief has been identified, it is open to the receiving court, in addition to

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[1] UNCITRAL Model Law, art. 19.

[2] Ibid., art. 20.

[3] Ibid., art. 21.

[4] Ibid., see art. 2(a).

[5] An example is the appointment of an interim [provisional] liquidator prior to the making of a formal order putting a debtor company into liquidation, which is possible under the law of numerous States: see for e.g. s 246 Companies Act 1993 and r 31.32 of the High Court Rules of New Zealand.

[6] UNCITRAL Model Law, art. 20(2).

[7] Ibid., art. 7. This article is designed to encompass relief based on comity or exequatur, the use of letters rogatory or under any other law of a particular State.

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

automatic relief flowing from a recognized "main" proceeding, to craft any appropriate relief required.

2. Interim relief[9]

122. 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.[10] 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 under article 19 to conditions it considers appropriate. In each case it will be necessary for a judge to determine the relief most appropriate to the circumstances of the particular case and any conditions on which the relief should be granted.

123. Article 19 authorizes the court to grant the type of relief that is usually available only in collective insolvency proceedings,[11] as opposed to the "individual" type of relief that may be granted before the commencement of insolvency proceedings under domestic rules of civil procedure.[12] However, discretionary "collective" relief under article 19 is somewhat narrower than the relief available under article 21.

124. The restriction of interim relief to a "collective" basis is consistent with the need to establish, for recognition purposes, that a "collective" foreign proceeding exists.[13] Collective measures, albeit in a restricted form, may be urgently needed, before the decision on recognition, in order to protect the assets of the debtor and the interests of the creditors.[14] Extension of available interim relief beyond collective relief would frustrate those objectives. On the other hand, because

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

[10] The receiving court is entitled to tailor relief to meet any public policy objections. For a discussion of the "public policy" exception, in relation to questions of relief, see *Ephedra* and *Tri-Continental Exchange* and paras. 47-51 above. In *Ephedra*, involving recognition of Canadian proceedings in the United States, the inability to have a jury trial on certain issues to be resolved in the Canadian proceedings, in circumstances where there was a constitutional right to such a trial in the United States, was held not to be "manifestly contrary to the public policy of the United States". The court indicated that the procedure at issue plainly afforded claimants a fair and impartial proceeding and that nothing more was required by the United States' equivalent of art. 6 of the Model Law. The court granted the relief sought, recognizing and enforcing the claims resolution procedure adopted in the Canadian proceedings. In *Tri-Continental Exchange*, involving recognition of proceedings commenced in St Vincent and the Grenadines (SVG), the United States' court considered whether to impose additional conditions, in accordance with arts. 22 and 6, on the relief sought by the foreign representatives, i.e. that they be entrusted under art. 21 with the administration or realization of the debtors' assets within the territorial jurisdiction of the United States, but not with distribution of those assets. The court concluded that such conditions were unnecessary in the circumstances. The record did not warrant the court placing itself in a position in which it could impede the progress of the main SVG proceeding and if it later transpired that there was reason for it to have discomfort about that conclusion, art. 22(c) enabled it to revise its position and exercise its authority under art. 22(b) to impose conditions on the entrustment under art. 21(1)(e) to the foreign representatives. Those conditions could include the giving of security or the filing of a bond.

[11] I.e. the same type of relief available under article 21.

[12] I.e. measures covering specific assets identified by a creditor.

[13] See also the discussion of *Rubin v Eurofinance* at para. 145 below.

[14] Ibid.

recognition has not yet been granted, interim relief should, in principle, be restricted to urgent and provisional measures.

125. The urgency of the measures is alluded to in the opening words of article 19(1). Article 19(1)(a) restricts a stay to execution proceedings, and article 19(1)(b) refers to perishable assets and assets susceptible to devaluation or otherwise in jeopardy.[15] Otherwise, the measures available under article 19 are essentially the same as those available under article 21.

126. Article 19 relief is provisional in nature. The relief terminates when the application for recognition is determined.[16] However, the court is given the opportunity to extend the measure.[17] The court might wish to do so, for example, to avoid a hiatus between provisional relief granted before recognition and substantive discretionary relief issued afterwards.

127. Article 19(4) emphasizes that any relief granted in favour of a foreign non-main proceeding must be consistent (or should not interfere) with the foreign main proceeding.[18] In order to foster coordination of pre-recognition relief with any foreign main proceeding, the foreign representative applying for recognition is required 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.[19]

128. In addition to addressing the possibility that interim relief might be subjected to conditions the court thinks appropriate, as noted above, article 22 of the UNCITRAL Model Law addresses the need for the court to provide adequate protection of the interests of creditors and other interested persons in granting or denying relief on recognition of foreign proceedings and modifying or terminating that relief.

129. 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.[20] This balance is essential to achieve the objectives of cross-border insolvency legislation.

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[15] E.g. *Tucker (20 November 2009)*, where the Australian court made orders for interim protection of aircraft parts inventory stored at locations in Australia and controlled by Qantas, on the basis that they may be at risk because of a dispute as to the entitlement to the parts. The interim relief was granted to preserve the position and assets of the defendant in Australia for a limited period pending the hearing of the application seeking recognition of the English proceeding. On the evidence, the court was satisfied that it was likely recognition would be granted, at which time the relief under the Australia provision equivalent to art. 20 would commence. A further example is the case of *Williams v Simpson* (17 September 2010). Following an application by the trustee of English bankruptcy proceedings, the New Zealand court made orders for interim measures, including the issue of a search warrant for a specific property, suspension of the debtor's ability to deal with his property in New Zealand and for his examination by a court official. The court observed that "it would be odd if the ability to grant such relief [under art. 19] extended only to property known to exist and readily locatable". It went on to say that "the flexibility inherent in art. 19 could justify the issue of a search warrant to ascertain whether there are assets that are being concealed that might be in jeopardy if some form of interim relief did not attach to them".

[16] UNCITRAL Model Law, art. 19(3).

[17] Ibid., art. 21(1)(f).

[18] Ibid., see also arts. 29 and 30.

[19] Ibid., art. 15(3).

[20] See generally Guide to Enactment, paras. 161-164.

3. Automatic relief on recognition of "main proceeding"[21]

130. Article 20 addresses the effects of recognition of a foreign main proceeding, in particular the automatic effects and the conditions to which it is subject.

131. While relief under articles 19 and 21 is discretionary, the effects provided by article 20 are not; 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. The automatic effects of recognition are different to the effects of an exequatur order.

132. The automatic consequences envisaged in article 20 are intended to allow time for steps to be taken to organize an orderly and fair cross-border insolvency proceeding, even if the effects of commencement of the foreign insolvency proceeding in the country of origin are different from the effects of article 20 in the recognizing State. This approach reflects a basic principle underlying the UNCITRAL 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.

133. If recognition should, in any given case, produce results that would be contrary to the legitimate interests of an interested party, including the debtor, the law of the recognizing State may provide possibilities for protecting those interests.[22]

134. Article 20(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, enforcement measures initiated by creditors outside the court system, measures that creditors are allowed to take under certain conditions in some States. Article 20(1)(b) was added to make it abundantly clear that executions against the assets of the debtor are covered by the stay.

135. Notwithstanding the "automatic" or "mandatory" nature of the effects of recognition 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.[23] 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.

136. Sometimes it may be desirable for the court to modify or terminate the effects of article 20. Domestic rules governing the power of a 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. 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.

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

[22] See UNCITRAL Model Law, art. 20(2).

[23] Ibid.

137. Article 20(4) 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 participating in that proceeding.[24] If a local proceeding is initiated, article 29 deals with the coordination of the foreign and the local proceedings.[25]

4. Post-recognition relief[26]

(i) The provisions of the Model Law

138. Article 21 deals with the relief that may be granted on recognition of a foreign proceeding, indicating some of the types of relief that may be available.

139. Post-recognition relief under article 21 is discretionary. The types of relief listed in article 21(1) are those most frequently used in insolvency proceedings. However, the list is not exhaustive. It is not intended to restrict the receiving court unnecessarily in its ability to grant any type of relief that is available and necessary under the law of the enacting State, to meet the circumstances of a particular case.[27]

140. 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. In each case it will be necessary for a judge to determine the relief most appropriate to the circumstances of the particular case and any conditions on which the relief should be granted. Article 22 also addresses the need for adequate protection of the interests of creditors and other interested persons when the court is granting or denying relief on recognition of foreign proceedings and modifying or terminating that relief.[28]

141. The "turnover" of assets to the foreign representative (or another person), as envisaged in article 21(2), remains discretionary. The UNCITRAL Model Law contains several safeguards designed to ensure the protection of local interests, before assets are turned over to the foreign representative.[29] In *Atlas Shipping*, the United States court granted relief sought under the equivalent of article 21(1)(e) and 21(2) with respect to funds held in United States bank accounts and subject to maritime attachment orders granted both before and after the commencement of insolvency proceedings in Denmark. The judge indicated that the relief granted was without prejudice to the creditors' rights, if any, to assert in the Danish bankruptcy court their rights to the previously garnished funds.[30] The judge also observed that the turnover of the funds to the foreign representative would be more economical

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[24] The right to apply to commence a local insolvency proceeding and to participate in it is, in a general way, dealt with in the Model Law, arts. 11-13.

[25] See paras. 175-177 below.

[26] This summary is taken substantially from the Guide to Enactment, paras. 154-160.

[27] The receiving court is entitled to tailor relief to meet any public policy objections. For a discussion of the "public policy" exception, in relation to questions of relief, see *Ephreda* and *Tri-Continental* (see above, note 10) and paras. 47-51 above.

[28] See above, paras. 128-129.

[29] Those safeguards include: the general statement of the principle of protection of local interests in art. 22(1); the provision in art. 21(2) that the court should not authorize the turnover of assets until it is assured that the local creditors' interests are protected; and art. 22(2), according to which the court may subject the relief it grants to conditions it considers appropriate.

[30] *Atlas Shipping*, at p. 742.

and efficient in that it would permit all of Atlas' creditors worldwide to pursue their rights and remedies in one court of competent jurisdiction.

142. 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 usually narrower than the interests and the authority of a representative of a foreign main proceeding. The latter will, generally, seek to gain control over all assets of the insolvent debtor.

143. Article 21(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.

Those provisions suggest 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.

144. In determining whether or not to grant discretionary relief under article 21, or in modifying or terminating any relief granted, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor are adequately protected. That is one of the reasons why the court may grant relief on such conditions as it considers appropriate.[31] Either a foreign representative or a person affected by relief may apply to modify or terminate the relief; or, the court may do so on its own motion.[32]

145. An example of a case in which relief was initially refused is *Rubin v Eurofinance*. The receiving court was asked to grant relief to enforce an order to pay money to a particular creditor, given as a result of a judgment entered in the United States. An issue arose about whether relief of that type was contemplated by the Model Law. The judge accepted that the proceeding in which judgment was entered was "part and parcel" of Chapter 11 insolvency proceedings[33] in the United States. While accepting, as a matter of English law, that the court could give effect to orders made in the course of foreign insolvency proceedings, the judge drew a distinction between a case in which an order was made to provide a mechanism of collective execution against property of a debtor by creditors whose rights were admitted or established[34] (which would justify relief) and a judgment for money entered in favour of a single creditor (which would not). The judge considered that the order made in the Chapter 11 proceedings fell into the second category, meaning that the judgment could not be enforced under the terms of the UNCITRAL Model Law. For enforcement purposes, the usual rules of English private international law continued to apply.

146. On appeal, the appellate court agreed that the proceedings were part of the Chapter 11 proceedings, but disagreed with the conclusion of the lower court,

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[31] See para. 140 above.

[32] UNCITRAL Model Law, art. 22.

[33] *Rubin v Eurofinance*, para. 47.

[34] Ibid., at para. 58, citing *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 (PC), at para. 13.

finding that the judgements in question were for the purposes of the collective enforcement regime of the insolvency proceedings. As such, the court held, they were governed by the private international law rules relating to insolvency and not by the ordinary private international law rules preventing enforcement of judgements because the defendants were not subject to the jurisdiction of the foreign court.[35]

(ii) Approaches to questions of discretionary relief

147. Because discretionary post-recognition relief will always be tailored to meet the circumstances of a particular case, it is not feasible to refer to particular examples of relief in a text of this kind. However, different policy choices may be open to a court in deciding whether and, if so, to what extent relief should be granted. An informative example of different stances that can be taken to granting discretionary relief (albeit in a proceeding to which the UNCITRAL Model Law did not apply) is a case concerning Australian liquidation proceedings, where relief was sought in England. Although both England and Australia have enacted statutes based on the Model Law, neither was in force at the time that proceeding was commenced in England.[36]

148. The Australian liquidator took steps to realize and protect assets in England, mostly reinsurance claims on policies taken out in London, requesting the English courts to remit those assets to Australia for distribution among all creditors of the companies in accordance with Australian law. Australian law provided for the proceeds of reinsurance contracts to be used to pay liabilities under the relevant insurance contracts before being applied to repayment of general debts. However, the English law (at the time) did not. The question was whether the English court ought to grant relief which would have entailed a distribution to creditors inconsistent with the priorities required under English law. At first instance, the request was denied.[37] That decision was upheld on appeal.[38] On a second appeal, the earlier decisions were overturned and relief was granted in favour of the Australian liquidators.[39]

149. On the second appeal, the final court held that jurisdiction did exist to make the order sought and that, as a matter of discretion, the order should be made. Although the five judges who heard the appeal agreed on the result, they diverged in their reasons for reaching that conclusion:

(a) One view was that, as a matter of principle, a single insolvency estate should emerge in which all creditors (wherever situated) were entitled and required to prove their claims. Although the Australian legislation created different priorities, they did not give rise to a fundamental public policy consideration that might

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

[36] The application by the Australian liquidators was dealt with under the Insolvency Act 1986 (UK), s 426(4), under which courts having jurisdiction in relation to insolvency law in any part of the United Kingdom were obliged to assist courts having corresponding jurisdiction in a specified country, one of which was Australia.

[37] *Re HIH*.

[38] *Re HIH* (first appeal).

[39] *McGrath v Riddell*.

militate against relief being granted.[40] On that basis, the main proceeding in Australia should be allowed to have universal effect;[41]

(b) A second view was that as Australia had been designated as a country to which assistance could be given under the Insolvency Act 1986, there was no reason why effect should not be given to the statutory requirement to assist the Australian liquidators. There was no fundamental public policy consideration that would disentitle the Australian liquidators from obtaining relief;[42]

(c) The third approach relied on four specific factors to grant relief:[43]

(i) The companies in liquidation were Australian insurance companies;

(ii) Australian law made specific provision for the distribution of assets in the case of the insolvency of such companies;

(iii) The Australian priority rules did not conflict with any provisions of English law in force at the material time designed to protect the holders of policies written in England;

(iv) The policy underlying the Australian priority rules accorded (by the time of the decision of the final court) with changes made to the law in England.

(iii) Relief in cases involving suspect antecedent transactions

150. Article 23[44] provides standing for a foreign representative, on recognition, to initiate certain proceedings aimed at illegitimate antecedent transactions. The specific types of proceeding to which article 23 refer are likely to be identified in the adopting legislation of the enacting State.

151. When the foreign proceeding has been recognized as a "non-main proceeding", it is necessary for the court to consider specifically whether any action to be taken under the article 23 authority "should be administered in the foreign non-main proceeding".[45] Again, this distinguishes the nature of a "main" proceeding from that of a "non-main" proceeding and emphasizes that the relief in a "non-main" proceeding is likely to be more restrictive than for a "main" proceeding.

152. Article 23 is drafted narrowly. To the extent the enacting State authorizes particular actions to be taken by a foreign representative, they may only be taken if an insolvency representative within the enacting State could have brought those proceedings.[46] No substantive rights are created by article 23. Nor are conflict of laws rules stated; in each case it will be a question of looking at the national conflict of laws rule to determine whether any proceeding of the type contemplated under article 23 can properly proceed.

153. In *Condor Insurance*, the appellate court was asked to consider the jurisdiction of a bankruptcy court to offer avoidance relief under foreign law in a Chapter 15 proceeding in the United States. Reversing the decisions of the first and second instance courts, the appellate court held that the bankruptcy court did have that

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[40] Compare the discussion of public policy in *Re Gold & Honey Ltd* at para. 110 above.
[41] *McGrath v Riddell*, paras. 30, 36 and 63.
[42] *McGrath v Riddell*, paras. 59, 62 and 76-77.
[43] Ibid., para. 42.
[44] See also Guide to Enactment, paras. 165-167.
[45] UNCITRAL Model Law, art. 23(2).
[46] Ibid., art. 23(1).

power. The case involved the recognition in the United States of foreign main proceedings commenced in Nevis, following which the foreign representatives commenced a proceeding alleging Nevis law claims against the debtor to recover certain assets fraudulently transferred to the United States. Chapter 15 excepts avoidance powers from the relief that may be granted under the equivalent of article 21(1)(g), providing instead under article 23 that such powers may be exercised in a full bankruptcy proceeding. However, Chapter 15 does not, the appellate court found, deny the foreign representative powers of avoidance provided by applicable foreign law and the language used in the legislation suggests the need for a broad reading of the powers granted to the court in order to advance the goals of comity to foreign jurisdictions.[47] Prior to this appellate decision, a similar interpretation had been approved in *Atlas Shipping*, where the court had concluded that the decision of the second instance court in *Condor Insurance* was open to question: the conclusion that a foreign representative was prevented from bringing avoidance actions based on foreign law was "not supported by anything specifically in the legislative history".[48]

E. Cooperation and coordination

1. Introductory comments

154. Articles 25-27 of the UNCITRAL Model Law are designed to promote cooperation between insolvency representatives and the courts of different States to ensure insolvency proceedings affecting a single debtor are dealt with in a manner best designed to meet the needs of all of its creditors. The objective is to maximize returns to creditors (in liquidation and reorganization proceedings) and (in reorganization proceedings) to facilitate protection of investment and the preservation of employment,[49] through fair and efficient administration of the insolvent estate.

155. Court cooperation and coordination are core elements of the Model Law. Cooperation is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets[50] or to find the best solutions for the reorganization of the enterprise. It is also often the only way in which proceedings concerning different members of the same enterprise group taking place in different States can be coordinated.[51] Cooperation leads to the better coordination of the various insolvency proceedings, streamlining them with the object of achieving greater benefits for creditors.

156. Articles 25 and 26 not only authorize cross-border cooperation, they mandate it. They provide that the court and the insolvency representative "shall cooperate to the maximum extent possible". These articles were 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.

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[47] *Condor Insurance* (on appeal), section III, pp. 3-17.

[48] *Atlas Shipping*, p. 744.

[49] UNCITRAL Model Law, Preamble (e).

[50] E.g., when items of production equipment located in two States are worth more if sold together than if sold separately.

[51] See UNCITRAL Legislative Guide, Part three: Treatment of enterprise groups in insolvency, recommendations 239-254 on promoting cross-border cooperation in enterprise group insolvencies.

Enactment of these provisions is particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. Even in jurisdictions in which there is a tradition of wider judicial latitude, this legislative framework for cooperation may prove useful.

157. The articles leave the decision as to when and how to cooperate to the courts and, subject to the supervision of the courts, to the insolvency 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 UNCITRAL Model Law does not require a formal decision to recognize that foreign proceeding.

158. 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 traditional but time consuming procedures, such as letters rogatory and exequatur. This ability is critical when the courts need to act with urgency.

2. Cooperation

159. 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,[52] held prior to completion of the UNCITRAL Model Law. 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.

160. From those reports a number of points emerged:[53]

(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;[54]

(b) Communication should be done openly, with advance notice to the parties involved[55] and in the presence of those parties, except in extreme circumstances;[56]

(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;[57]

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[52] A report of the meeting is available at www.uncitral.org/pdf/english/news/SecondJC.pdf and at www.insol.org. The Colloquium was held in New Orleans, 22-23 March 1997. See also UNCITRAL document A/52/17, paras. 17-22, available at www.uncitral.org/uncitral/en/commission/sessions/30th.html.

[53] A number of these points are now addressed in part three of the UNCITRAL Legislative Guide, specifically paras. 14-40 and recommendations 240-245 on cooperation between courts in cross-border insolvencies.

[54] Ibid., paras. 21-34 and recommendations 241-243.

[55] This is now set out specifically in various court rules, for example, Rule 2002(q)(2) of the United States Federal Rules of Bankruptcy Procedure.

[56] UNCITRAL Legislative Guide, part three, paras. 24-27 and recommendation 243(b) and (c).

[57] Ibid., para. 20 and recommendation 241.

(d) Means of communication include, for example, telephone, video-link, facsimile and electronic-mail;[58]

(e) Where communication is necessary and is used appropriately, there can be considerable benefits for the persons involved in, and affected by, the cross-border insolvency.

161. A number of cases illustrate how communication between courts and insolvency representatives has helped to coordinate multiple proceedings involving both individual debtors and debtors that are members of the same enterprise group and to ensure more speedy completion of the administration of the insolvent debtor's estate.

162. In *Maxwell Communications*[59] judges in New York and England raised independently with the parties' legal representative in each country the possibility that a cross-border agreement be negotiated to assist in coordinating the two sets of proceedings. A facilitator was appointed by each of the courts and resolution of a number of difficult issues emerged.[60]

163. In some cases either telephone or video-link conferences have been held, involving judges and legal representatives in each jurisdiction. An example, from 2001, involved a joint hearing by video-link involving judges in the United States of America and Canada and representatives of all parties, in each jurisdiction. In a procedural sense, the hearing was conducted simultaneously.[61] Each judge heard argument on substantive issues with which his court was concerned prior to deciding on an appropriate outcome. While parties and the judge in the other jurisdiction saw and heard what occurred during substantive argument in the other, they did not actively participate in that part of the hearing.

164. At the conclusion of substantive argument in each court (with the consent of the parties) the two judges adjourned the hearing to speak to each other privately (by telephone), following which the joint hearing was resumed and each judge pronounced orders in the respective proceedings. In doing so, while one judge confirmed that they agreed on an outcome, it is clear that a decision was reached independently by each judge in respect only of the proceeding with which he was dealing.[62]

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[58] Ibid., para. 20.

[59] In *Re Maxwell Communication Corporation plc*, 93 F.3d 1036, 29 Bankr Ct. Dec. 788 (2nd Cir. (N.Y.) 21 August 1996) (No. 1527, 1530, 95-5078, 1528, 1531, 95-5082, 1529, 95-5076, 95-5084), and Cross-Border Insolvency Protocol and Order Approving Protocol in Re Maxwell Communication plc between the United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of England and Wales, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991).

[60] See also *Re Olympia and York Developments Ltd*, Ontario Court of Justice, Toronto, Case No. B125/92 (26 July 1993), and United States Bankruptcy Court for the Southern District of New York, Case Nos. 92-B-42698-42701 (15 July 1993) (Reasons for Decision of the Ontario Court of Justice: (1993), 20 C.B.R. (3d) 165).

[61] *PSI Net Inc.*, Ontario Superior Court of Justice, Toronto, Case No. 01-CL-4155 (10 July 2001) and the United States Bankruptcy Court for the Southern District of New York, Case No. 01-13213 (10 July 2001).

[62] Transcript of conference in *Re PSI-Net* (US Bankruptcy Court, Southern District of New York and Superior Court of Justice of Ontario), 26 September 2001, on file with the UNCITRAL secretariat.

165. Reports from those involved in such hearings suggest that returns to creditors have been maximized considerably as a result of each court obtaining greater information about what is happening in the other jurisdiction and making positive attempts to coordinate proceedings in a manner that will best serve the interests of creditors.

166. Another example of cooperation is the exchange of correspondence containing or responding to requests for assistance from one of the courts involved in the proceeding. In *Perpetual Trustee Company Ltd v Lehman Bros. Special Financing Inc*[63] a series of requests led an English court to respond to the United States' court in a form that explained the steps and decisions taken in England and inviting the United States judge not to make formal orders, at that time, that might be in conflict with those made in England. The intention was to encourage further communication, if conflicting decisions emerged.[64]

167. Cooperation can also be achieved through cross-border agreements in which the parties to them and any appointed representative of the court liaise to coordinate the insolvency proceedings in issue.[65]

168. Article 26, on international cooperation between the insolvency representatives to administer assets of insolvent debtors, reflects the important role that such persons can play in devising and implementing cross-border agreements, within the parameters of their authority. The provision makes it clear that an insolvency representative acts under the overall supervision of the competent court. The court's ability to promote cross-border agreements to facilitate coordination of proceedings is an example of the operation of the "cooperation" principle.[66]

169. In 2000, the American Law Institute developed the Court-to-Court Guidelines[67] as part of its work on transnational insolvency in the countries of the North American Free Trade Agreement (NAFTA). A team of judges, lawyers and academics from the three NAFTA countries, Canada, Mexico and the United States, worked jointly on that project. The Court-to-Court Guidelines are intended to encourage and facilitate cooperation in international cases. They are not intended to alter or change the domestic rules or procedures that are applicable in any country, nor to affect or curtail the substantive rights of any party in proceedings before the courts. The Guidelines have been endorsed by a number of courts in different countries and used in a number of cross-border cases.[68]

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[63] [2009] EWHC 2953 at paras. 12-23.

[64] Ibid., at paras. 41-50.

[65] For examples of the use of this technique, see the UNCITRAL Practice Guide, chap. II, paras, 2-3. As indicated in the Practice Guide, cases using this technique have included *Maxwell*, see above note 62; *Matlack*, Superior Court of Justice of Ontario, Case No. 01-CL-4109 and the United States Bankruptcy Court for the District of Delaware, Case No. 01-01114 (2001); and *Nakash*, United States Bankruptcy Court for the Southern District of New York, Case No. 94B 44840 (23 May 1996) and the District Court of Jerusalem, Case No. 1595/87 (23 May 1996). Notes on the agreements used in these cases are included in Annex I to the Practice Guide.

[66] UNCITRAL Model Law, art. 26(1) and (2) (as well as any other national law impacting on the practicalities of cooperation).

[67] Available in some 14 languages at: www.iiiglobal.org/component/jdownloads/?task=viewcategory&catid=394 [visited …].

[68] An example of a cross-border insolvency agreement endorsed by courts in Ontario and Delaware is that in *Re Matlack Inc*, see above, note 68. It demonstrates how the ALI Guidelines were adapted for use in an actual case. The Guidelines have also been adopted in a number of other

170. In relation to cooperation, there is an important difference between the terms of the UNCITRAL Model Law and that of the EC Regulation. The EC Regulation does not contain any provision for court-to-court communication. Rather, duties are placed on insolvency representatives in both main and secondary proceedings commenced in a Member State "to communicate information to each other", "to cooperate with each other" and for the liquidator in the secondary proceedings to give the insolvency representative in the main proceeding "an early opportunity of submitting proposals" on that proceeding or the use of assets in the secondary proceeding.[69]

3. Coordination

171. Articles 28 and 29 address concurrent proceedings, specifically the commencement of a local insolvency proceeding after recognition of a foreign main proceeding and the manner in which relief should be tailored to ensure consistency between concurrent proceedings.

172. 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.

173. Ordinarily, the local insolvency 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 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.[70] In order to allow such limited cross-border reach of a local proceeding, article 28 provides that the effects of the proceedings may extend where necessary to other property of the debtor that should be administered in the proceedings in the enacting State.

174. Two restrictions are included in article 28 concerning the possible extension of effects of a local insolvency proceeding to assets located abroad:

(a) The extension is permissible "to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27"; and

(b) Those foreign assets must be subject to administration in the enacting State "under the law of [the enacting State]".

Those restrictions emphasize that any local insolvency proceeding instituted after recognition of a foreign main proceeding deals only with the assets of the debtor in the State in which the local proceeding is started, subject only to the need to encourage cooperation and coordination in respect of the foreign main proceeding.

175. Article 29 provides guidance to the court on the approach to be taken to cases where the debtor is subject to a foreign proceeding and a local insolvency proceeding at the same time. The salient principle is that the commencement of a local proceeding does not prevent or terminate the recognition of a foreign

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cross-border insolvency agreements; see the case summaries in Annex I to the UNCITRAL Practice Guide.

[69] EC Regulation, art. 31.

[70] 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.

proceeding. This principle is essential for achieving the objectives of the UNCITRAL Model Law in that it allows the receiving court, in all circumstances, to provide relief in favour of the foreign proceeding.

176. Nevertheless, article 29 maintains the pre-eminence of the local insolvency proceeding over the foreign proceeding. This has been done in the following ways:

(a) Any relief to be granted to the foreign proceeding must be consistent with the local proceeding;[71]

(b) 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;[72]

(c) 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;[73]

(d) 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.[74]

177. Article 29 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.

178. Article 29(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 also expressed in article 21(3) and is restated in article 29 to place emphasis on the need for its application when coordinating local and foreign proceedings.

179. Article 30 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.

180. The objective of article 30 is similar to that of article 29. It is designed to aid cooperation through proper coordination. Consistency of approach will be achieved by appropriate tailoring of relief to be granted or by modifying or terminating relief already granted.

181. 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, of itself, treat any foreign proceeding preferentially. Priority for the foreign main proceeding is reflected in the requirement that any relief in favour of a foreign

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[71] UNCITRAL Model Law, art. 29(a)(i).

[72] Ibid., art. 29(b)(i).

[73] Ibid., art. 29(b)(ii). Those automatic effects do not terminate automatically since they may be beneficial, and the court may wish to maintain them.

[74] Ibid., art. 29(a)(ii).

non-main proceeding (whether already granted or to be granted) must be consistent with the foreign main proceeding.[75]

182. Relief granted under article 30 may be terminated or modified if another foreign non-main proceeding is revealed after the order is made. An order terminating or modifying earlier relief may only be made if it is "for the purpose of facilitating coordination of the proceedings".[76]

183. In relation to concurrent proceedings, there are particular rules relating to payment of debts.

184. 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.

185. For example, assume an unsecured creditor has received 5 per cent of its claim in a foreign insolvency proceeding but is also participating in an insolvency proceeding in the enacting State, where the rate of distribution is 15 per cent. In order to put the creditor in a position equal to the other creditors in the enacting State, the creditor would receive only 10 per cent of its claim in the enacting State. Implicitly, article 32 empowers the receiving court to make orders to give effect to that rule.

186. Article 32 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.

187. The expression "secured claims"[77] 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.

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[75] Ibid., art. 30(a) and (b).

[76] Ibid., art. 30(c).

[77] The definition of "secured claim", in the UNCITRAL Legislative Guide, Glossary, para. 12(nn) is: "a claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor's default".