MODIFIED UNIVERSALISM FOR CROSS-BORDER INSOLVENCIES:

DOES IT WORK IN PRACTICE?

by

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ABSTRACT

This thesis is a study of the application by courts of Canadian and British versions of the UNCITRAL Model Law on Cross-Border Insolvency. The Model Law proposes a legal framework that has as its theoretical foundation the modified universalism theory. By trying to determine whether the application of the Model Law provisions on core concepts of this Law promotes such goals as efficiency, fairness, predictability and protection for local interests in cross-border insolvency cases, this study ultimately assesses whether modified universalism works in practice.

Modified universalism is a relatively new theory for the resolution of cross-border insolvencies that gained international and national acceptance two decades ago. It recognizes that a cross-border case should be administered under a single controlling insolvency proceeding governed by the laws of the country commencing that proceeding. However, the theory allows countries other than the country where the insolvency proceeding was commenced, before giving deference to the controlling proceeding, to determine whether such an act of cooperation would infringe on local interests. On the one hand, the centralization of the administration of a cross-border insolvency case is thought to bring efficiency, fairness and predictability to this process. On the other hand, because of the diversity of national insolvency laws, a centralization of the administration of such cases may infringe on local interests, such as the interest to protect the legitimate expectations of creditors or to further fundamental local public policies. The success of the Model Law, and ultimately of the modified universalism theory, depends on how courts strike a balance between these goals when considering requests for recognition of foreign insolvency proceedings and for relief in favor of these proceedings. The study concludes that the Canadian and British courts' decisions strengthen rather than weaken the claim that the Model

Law works in practice. Such a conclusion in turn suggests that modified universalism can serve as the theoretical foundation of a workable legal framework for the resolution of cross-border insolvencies. This finding may be important for countries that consider revising their cross-border insolvency laws in an effort to facilitate the administration of cross-border insolvency cases.

PREFACE

This thesis is original, unpublished, independent work by the author.

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CHAPTER 1: Introduction

Cross-border insolvencies are insolvencies of debtors that have assets and or creditors across more than one country[1]. Since the elements of such insolvency cases are linked to several jurisdictions, these cases raise challenging questions: whether the insolvency proceeding commenced in a certain country against a debtor operating worldwide should have effect on the debtor's assets and affairs wherever located, implying that only one proceeding should be commenced regarding the debtor, or whether multiple insolvency proceedings should be commenced in respect of the debtor in every country where the debtor has assets or creditors[2]. These questions reveal the two leading and opposed theories advanced in the area of law dealing with cross-border insolvencies. The first of these is universalism, which supports the idea of a single insolvency proceeding in charge of the administration of the insolvency of a debtor operating worldwide[3]. The other is territorialism, which suggests the opening of multiple proceedings with each taking control of the debtor's assets and affairs situated locally[4].

Historically, territorialism was the favored theory for the resolution of cross-border insolvencies[5] because it allowed countries to retain control over local assets and legal relationships and to

[1] Duns, John, *Insolvency: Law and Policy*, (Melbourne, Vic: Oxford University Press, 2002) at 466 [Duns, Insolvency]; Fletcher, Ian F., *Insolvency in Private International Law: National and International Approaches*, 2d ed (Oxford, New York: Oxford University Press, 2005) at 5, 6 [Fletcher, Insolvency in Private International Law].
[2] EC, *Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings. Report on the Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings* (1982), Bulletin of the European Communities, Supplement 2/82 at 47.
[3] Westbrook, Jay Lawrence, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) 65:4 Am Bank LJ 457 at 461 [Westbrook, Theory and Pragmatism]; LoPucki, Lynn M., "The Case for Cooperative Territoriality in International Bankruptcy" (2000) 98:7 Mich L Rev 2216 at 2220 [LoPucki, Cooperative Territoriality].
[4] Honsberger, John D., "Conflict of Laws and the Bankruptcy Reform Act of 1978" (1980) 30:4 Case W Res L Rev 631 at p 634 [Honsberger, Bankruptcy Reform Act] , Fletcher, Professor Ian, ""L'Enfer, C'est les Autres": Evolving Approaches to the Treatment of Security Rights in Cross-Border Insolvency" (2011) 46:3 Tex Int'l LJ 498 at 496 [Fletcher, Treatment of Security Rights].
[5] Westbrook, Theory and Pragmatism, s*upra* note 3 at 460.

make decisions with respect to local laws. Thus, it facilitated the promotion of countries' sovereignty interests[6]. By contrast, territorialism was and still is strongly criticized by academics for creating a system for cross-border insolvencies that is inefficient[7], unfair[8] and unpredictable[9]. The drawbacks of territorialism led to the emergence of universalism, which it was thought would bring about the opposite result[10]. Despite the universalism's advantages, universalism has never been adopted[11]. The primary reason is thought to be its failure to provide for sovereignty concerns, since under universalism local assets and legal relationships may be administered under a foreign law, the law governing the controlling insolvency proceeding[12]. Nevertheless, as universalism was widely recognized as the "long term, theoretical solution to the problem of multinational insolvency"[13], the theory had to adapt to respond to the current legal realities[14]. In response to the challenges encountered by universalism, a modified version of this theory emerged that was intended to promote the benefits of universalism, and at the same time to

[6] Tung, Frederick, "Fear of Commitment in International Bankruptcy" (2001) 33:3/4 The George Washington International Law Review 555 at 560 [Tung, Fear of Commitment].
[7] Guzman, Andrew T., "International Bankruptcy: In Defense of Universalism" (2000) 98:7 Mich L Rev 2217 at 2199 – 2204 [Guzman, Defense of Universalism].
[8] Fletcher, Treatment of Security Rights, *supra* note 4 496.
[9] Westbrook, Theory and Pragmatism, *supra* note 3 at 460.
[10] Universalists affirm that universalism creates an efficient, fair and predicable system for the resolution of cross-border insolvency. See Guzman, Defense of Universalism, *supra* note 7 at 2199 – 2204; Fletcher, Treatment of Secured Rights, *supra* note 4 at 496; Westbrook, Theory and Pragmatism, *supra* note 3 at 466.
[11] Pottow, John A. E., "Procedural Incrementalism: a Model for International Bankruptcy" (2005) 45:4 Va J Int'l L 937 at 950 [Pottow, Procedural Incrementalism]; Tung, Frederick, "Is International Bankruptcy Possible?" (2001) 23:1Mich J Int'l L 31 at 33 [Tung, International Bankruptcy].
[12] Tung, International Bankruptcy, *ibid*.
[13] Westbrook, Jay Lawrence, "A Global Solution to Multinational Default" (2000) 98:7 Mich L Rev 2276 at 2299 [Westbrook, Global Solution]; see also Fletcher, Treatment of Security Rights, *supra* note 4 at 497 stating that "the appeal of the universalist model has tended to gain favor among those seeking to produce a framework for international governance of international insolvencies".
[14] Fletcher, Treatment of Security Rights, *ibid* at 497, 498.

respect local sovereignty interests. This altered version of universalism was named modified universalism[15].

Modified universalism recognizes that a cross-border case should be administered under a single controlling insolvency proceeding governed by the laws of the country commencing that proceeding[16]. However, the theory allows countries other than the country where the insolvency proceeding was commenced, before giving deference to the controlling proceeding, to determine whether such act of cooperation would infringe local interests[17].

The system created by modified universalism turned out to be appealing to countries and to the international community. In the last two decades, several international instruments based on this theory have been successfully enacted. Among them, at an international level, is the United Nations Commission International Trade Law Model Law on Cross-Border Insolvency[18], which provides a legal framework for the resolution of cross-border insolvencies to countries worldwide to incorporate into their national insolvency laws[19]. Also enacted were the American

[15] *Ibid* at p 498 citing the work of Jay Lawrence Westbrook, "Choice of Avoidance Law in Global Insolvencies" (1991) 17:3 Brook J Int'l L 499, which offers the first definition of the "modified universalism" version at 517 [Westbrook, Choice of Avoidance Law].
[16] Westbrook, Choice of Avoidance Law, *ibid* at 517.
[17] *Ibid*.
[18] The UNCITRAL adopted the Model Law on Cross-Border Insolvency at its thirtieth session, see *Report of the United Nations Commission on International Trade Law on the Work of its Thirtieth Session*, UNCITRALOR, 30th Sess, Supl No 17, UN Doc A/52/17, (1997) 1 at 221 [The Thirtieth Session Report]. The Model Law is included in the Thirtieth Session Report at Annex 1 [The Model Law].
[19] At the end of the second chapter it is argued that the Model Law is based on modified universalism theory.

Law Institute's Global Principles for Cooperation in Global Insolvency Cases[20] and, at a regional level, the European Council Regulation on International Insolvency[21].

Several years have passed since some of these instruments have been incorporated in national legislations. Thus, they have already been operating in actual cross-border insolvency cases[22]. With this in mind, the purpose of this thesis is to assess whether modified universalism works in practice. More particularly, it considers whether the application of a legal framework based on modified universalism principles by courts while solving cross-border insolvency matters promotes such goals as efficiency, fairness and predictability, and offers sufficient tools for the protection of local interests. To accomplish this purpose, this thesis will assess the application of the United Nations' Model Law. The second chapter of the thesis initially discussed the nature and main principles of insolvency laws in order to provide a background against which the leading theories for cross-border insolvency law are subsequently evaluated. The third chapter provides a brief description of the legislative history of the Model Law, and it elaborates on core provisions of this Law. The fourth chapter discusses the application of the Model Law as enacted by Canada and Great Britain[23].

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[20] American Law Institute, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases: Report to ALI (March 30, 2012)/The American Law Institute and the International Insolvency Institute*, (Philadelphia, PA: Executive Office, American Law Institute, 2012) [ALI Global Principles]. See Fletcher, Treatment of Security Rights, *supra* note 4 at p 507, affirming that the project is based on modified universalism's principles.

[21] EC, *Council Regulation (EC) No 1346/2000 of 29 May 2009 on Insolvency Proceedings*, [2000] OJ, L160/1 [The Regulation]. See Fletcher, Treatment of Security Rights, *ibid* at 500, affirming that the Regulation embodies the modified universalism principles.

[22] The Model Law has been adopted by at least 20 countries, see the status of adoption of the Model Law, online: <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html> ; The Regulation entered into force and was immediately and directly applicable in every Member State, except for Denmark, since 31 May 2002, see The Regulation, *supra* note 21 at art 47; Fletcher, Insolvency in Private International Law, *supra* note 1 at 357 (on the Denmark Opt-out).

[23] The thesis will also consider the application of the equivalent to the Model Law provisions of the *United States Bankruptcy Code*, 11 USC, Chapter 15 (2005) [US Chapter 15] on specific matters.

The thesis concludes that the inquiry into the decisions of Canadian and British courts applying the local equivalent to the Model Law provisions strengthens rather than weakens the claim that the Model Law works, and that this fact in turn supports the contention that modified universalism can provide the theoretical foundation for a cross-border insolvency law that promotes efficiency, fairness, predictability and protection for local interests.

CHAPTER 2: The Nature of Insolvency Laws and Leading Theories for Cross-Border Insolvency Laws

2.1 Insolvency Laws: Main Principles

Generally, insolvency law is a law that creates a mechanism of debt collection that operates only in the circumstances of a debtor's insolvency[24]. It provides rules for a centralized collection of the debtor's assets and the distribution of these assets, or of the proceeds resulting from the sale of these assets, to creditors according to an established hierarchy of claims or rules that facilitate an arrangement between creditors and their debtor[25]. The need for having special rules for debt collection in the circumstances of a debtor's insolvency is justified by the inadequacy of an ordinary, individual creditor remedies system to deal with such circumstances.

The insolvency state of a debtor in the context of insolvency laws does not have a harmonized definition across jurisdictions[26]. The concepts on which definitions of insolvency most frequently rely are the "cash flow test"[27] and the "balance sheet test"[28]. According to the cash flow test, a debtor is considered insolvent if it is unable to pay its debts as they become due[29]. Instead, pursuant to the balance sheet test, a debtor is considered insolvent if its liabilities exceed its

[24] Duns, Insolvency, *supra* note 1 at 2; Wood, Roderick J., *Bankruptcy and Insolvency Law*, (Toronto, Ont: Irwin Law, 2009) at 2 [Wood, Bankruptcy]; Warren, Elizabeth, "Bankruptcy Policy Making in an Imperfect World" (1993) 92:2 Mich L Rev 336 at 343 [Warren, Imperfect World].
[25] Duns, Insolvency, *ibid*.
[26] Wood, Bankruptcy, *supra* note 24 at 18.
[27] Fletcher, Insolvency in Private International Law, *supra* note 1 at 3, 4; Wood, Bankruptcy at 18; Duns, Insolvency at 80.
[28] *Ibid*.
[29] Fletcher, Insolvency in Private International Law, *ibid* at 4; Duns, Insolvency, *ibid*; Wood, Bankruptcy, *ibid* at 18, 19.

assets[30]. The general inference that can be drawn from the definitions of these concepts is that insolvency is a state of a debtor that might not be able to pay all its creditors in full[31].

In the absence of insolvency laws, the ways to recover a debt when a debtor defaults on its obligations are varied[32]. Some of these ways can be "voluntary"[33] acts of the debtor, as in the case of payment of a debt that the debtor owes to one of its creditors or the perfection of a security right in favor of a creditor[34]. Conversely, when a debtor does not consent to pay on a debt, a creditor has the option of using the coercive power of a state in order to recover the money that it is owed[35]. For instance, a creditor could commence an action in the court against its debtor and obtain a garnishment order[36].

The insolvency of a debtor is characterized by the possibility of defaulting on multiple of the debtor's obligations[37]. Knowing of the insufficiency of the debtor's assets for a payment of the creditors in full, in case of the insolvency of the debtor, its creditors will try to use any means available to recover a debt in the absence of insolvency laws[38]. In addition, each creditor will want to act faster than the others to ensure that it does not come to the recovery of debts process at a moment when there are no assets left to satisfy its claim against the debtor[39]. The collection of debts by such means when the debtor is insolvent leads to unfair and inefficient results.

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[30] Fletcher, Insolvency in Private International Law, *ibid* at 3; Duns, Insolvency, *ibid*, Wood, Bankruptcy, *ibid* at 18, 20.
[31] Jackson, Thomas H., *The Logic and Limits of Bankruptcy Law*, (Cambridge, Mass: Harvard University Press, 1986) at 8, 9 [Jackson, The Logic and Limits].
[32] *Ibid* at 9.
[33] *Ibid*.
[34] *Ibid*.
[35] *Ibid*.9.
[36] *Ibid*.
[37] Warren, Imperfect World, *supra* note 24 at 345.
[38] Wood, Bankruptcy, *supra* note 24 at 3.
[39] *Ibid.*

Leaving creditors to recover their debts through the individual creditor remedies system results in unfairness because of the arbitrariness of the factors that determine which creditors get to satisfy their claims and which do not. In some cases, the creditors that will get to recover their debts in full are determined by the time factor. Under the individual creditor remedies system, the creditor that first obtains a claim on a debtor's assets is generally first in line to get paid on its debt out of those assets[40]. This system is not concerned with the fact that late arriving creditors may be left unable to satisfy their claims against the debtor[41]. In other cases, the decisive factor is the debtor's favoritism[42]. The creditors that get paid are those that the debtor decides to pay according to the debtor's own will.

The system of individual creditor remedies is inefficient because of the need to monitor the debtor's activities[43]. Each creditor will spend time and money monitoring the debtor to ensure that when the debtor faces insolvency it will be among the first to get paid[44]. In addition, this system is inefficient because of the duplication of the creditors' efforts in the process of debt collection[45]. Under this system, each creditor must commence individual proceedings for the establishment of their claims and for the subsequent enforcement of these claims.

Further, the system is inefficient because under the created circumstances, namely the competition between creditors for assets, the cooperation between creditors or between creditors and their debtor for achieving a more efficient outcome is unlikely[46]. The inefficiency caused by the lack of cooperation in case of a debtor's insolvency is best illustrated through the use of

[40] Jackson, The Logic and Limits, *supra* note 31 at 9.
[41] Warren, Elizabeth, "Bankruptcy Policy" (1987) 54:3 U Chicago L Rev 775 at 782 [Warren, Bankruptcy Policy].
[42] *Ibid* at 790.
[43] Warren, Imperfect World, *supra* note 24 at 346; Jackson, The Logic and Limits, *supra* note 31 at 16.
[44] Jackson, The Logic and Limits, *ibis* at 16.
[45] Wood, Bankruptcy, *supra* note 24 at 3.
[46] *Ibid*; Duns, Insolvency, *supra* note 1 at 8.

games theory[47]. Such an exercise is meant to show that in certain situations a group decision is better than an individual decision[48]. Consider the following game presented by Thomas Jackson in the context of insolvency law to illustrate this idea[49]. Imagine that several people are given the right to fish from a lake. If they fish out all the fish from the lake on the first season of fishing, there would be no fish left to multiply and no fish to catch in subsequent years. They would be better off if they were to leave some fish in the lake so that they may fish every year and thus catch more fish than they would catch in a single season of fishing. To avoid depleting the lake from the first season, there should be some obstacle or an agreement between fishermen to limit their fishing so as to leave some fish in the lake. Otherwise, each fisherman will have an incentive to fish as many fish as they can this season, since if they hold off their fishing they run the risk that other fishermen will not do the same and deplete the lake in the first season. The same is true of creditors under the individual creditor remedies system where each creditor is encouraged to be among the first to get the debtor's assets, since if they do not do it they run the risk that there will be no assets left to satisfy their claims[50]. The creditors, as the fishermen in the example, would in certain situations be better off if they were to stop competing for assets and hold the assets together[51]. This would be the case when the rehabilitation of the debtor brings more value to its creditors than the liquidation of the debtor[52]. Further, an orderly liquidation of the debtor or sale as an going concern of a debtor company is assumed to be more efficient than

[47] Jackson, The Logic and Limits, *supra* note 31 at 10.
[48] Duns, Insolvency, *supra* note 1 at 8.
[49] Jackson, The Logic and Limits, *supra* note 31 at 11, 12.
[50] *Ibid* at 12.
[51] *Ibid*.
[52] Warren, Imperfect World, *supra* note 24 at 350.

"the chaotic mix of self-help repossession and judicial execution available"[53] under the individual creditor remedies system[54].

Insolvency laws are created to address the unfairness and the inefficiencies that result under the individual creditor remedies system. To achieve this, insolvency laws provide a "collective"[55] and "compulsory"[56] proceeding[57]. Under such proceedings, the creditors are no longer treated as individuals that have separate claims, but as members of a single group that have a claim to the debtor's estate[58]. The purpose of making the proceeding collective is to make creditors act in a cooperative way[59]. To ensure that the collective proceeding realizes its benefits, the proceeding is compulsory. A creditor can neither make an arrangement with its debtor to avoid participation in an insolvency proceeding commenced with regard to the debtor [60], nor opt out from the insolvency proceeding once the proceeding is commenced[61]. The use of individual creditor remedies is stayed; creditors are precluded from commencing individual proceedings against the debtor and the debtor is barred from disposing of its assets voluntarily[62]. As such, the insolvency laws create an environment for cooperation by removing the need of creditors to race for the debtor's assets. The efficiency of such a system results from the avoidance of the chaotic liquidation of the debtor's assets or of the liquidation of a debtor company when the reorganization of such a company would bring more value to the creditors as a group[63]. A further efficiency that results from the mechanism created by insolvency laws derives from the

[53] *Ibid.*
[54] *Ibid*.
[55] Jackson, The Logic and Limits, *supra* note 31 at 13.
[56] *Ibid.*
[57] *Ibid* at 10.
[58] Duns, Insolvency, *supra* note 1 at 11; Fletcher, Insolvency in Private International Law, *supra* note 1 at 9.
[59] Jackson, The Logic and Limits, *supra* note 31 at 17.
[60] *Ibid*.
[61] Duns, Insolvency, *supra* note 1 at 12.
[62] *Ibid.*
[63] Warren, Imperfect World, *supra* note 24 at 350; Jackson, The Logic and Limits, *supra* note 31 at 14, 15.

avoidance of monitoring costs incurred by creditors in an attempt to ensure that they do not arrive in line for the debtors assets when there is no value left to be distributed among creditors[64]. In addition, a single collective proceeding for the collection and distribution of assets saves the costs of multiple individual proceedings commenced by creditors separately for the purpose of seizing the debtor's assets[65]. This is, generally, achieved through the institution of such features as creditors' committees and insolvency representatives that act in the interests of all the creditors as a group in the collection and distribution of the debtor's assets[66].

Aside from the efficiencies that they bring to the collection of debts in the circumstances of the debtor's insolvency, insolvency laws also bring fairness to this process. In insolvency proceedings, factors such as time or debtor's favoritism are no longer determinative of the payment order of creditors. Instead, the order of such payment is determined according to a pre-established distribution scheme included in insolvency laws that do not order creditors' claims based on such factors[67]. Generally, the distribution occurrs in accordance with a basic principle of insolvency laws - the *parri passu* principle[68]. This principle allows that the creditors should share equally in the debtor's assets[69]. When the assets are insufficient to pay all the creditors' claims in full[70], then the assets will be distributed on a *pro rata* basis, meaning the dividend that each creditor receives on its claim is proportionate to the value of its claim[71]. Nevertheless, the principle for equal treatment of creditors' claims is not absolute. The distributional scheme of

[64] Duns, Insolvency, *supra* note 1 at 9.
[65] Warren, Imperfect World, *supra* note 24 at 346, 347.
[66] *Ibid* at 347.
[67] Fletcher, Insolvency in Private International Law, *supra* note 1 at 9.
[68] Duns, Insolvency, *supra* note 1 at 318.
[69] *Ibid*.
[70] "Because the insolvency is defined in terms of a debtor's cash flow, it is possible, at least in theory, for a debtor to be insolvent but have sufficient assets, when realized, to pay off all creditors", see Duns, *ibid* at 13 n 39.
[71] Fletcher, Insolvency in Private International Law, *supra* note 1 at 9.

insolvency laws includes deviations from the *pari passu* principle[72]. According to insolvency laws' schemes of distribution, some creditors enjoy preferential treatment, and, as a consequence, are entitled to receive payment on their debts in priority to other creditors that do not enjoy such treatment[73]. Nevertheless, the principle of *parri passu* distribution is respected among the creditors that receive the same treatment; in other words, the creditors whose claims are ranked the same are treated equally[74].

The deviations are not arbitrary, as they are with regard to individual creditor remedies. Instead, they are the result of "considered judgment"[75] based on economic and policy grounds[76]. For instance, claims for administrative expenses are given priority in the distributional process to ensure an efficient administration of the debtor's insolvency. Or, some creditors, as employees, ex-spouses, fishermen or farmers may enjoy a preferential rank because they are viewed as vulnerable in the circumstances of the debtor's insolvency[77].

Another deviation from the *parri passu* principle rests on a generally accepted principle of insolvency laws. This principle provides that the creditors' rights under the general law remain unaltered in insolvency proceedings[78]. Accordingly, the priority that proprietary rights enjoy over the personal and contractual rights under the general law are preserved under the insolvency laws[79]. For instance, secured rights perfected prior to the commencement of the insolvency

[72] Warren, Imperfect World, *supra* note 24 at 353.
[73] Fletcher, Insolvency in Private International Law, *supra* note 1 at 9.
[74] *Ibid*.
[75] Warren, Imperfect World, *supra* note 24 at 353.
[76] *Ibid*.
[77] Duns, Insolvency, *supra* note 1 at 331 – 339; Westbrook, Jay Lawrence, "Universal Priorities" (1998) 33:1 Tex Int'l LJ 27 at 33 – 35 [Westbrook, Universal Priorities].
[78] Duns, Insolvency, *ibid* at 12; Jackson, The Logic and Limits, *supra* note 31 at 21, 22; Fletcher, Insolvency in Private International Law, *supra* note 1 at 10.
[79] *Ibid*.

proceedings remain intact[80]. There is more than one reason to leave the pre-insolvency rights unaltered in the insolvency proceedings. First, leaving the secured rights unaltered respects the purpose of establishing such rights[81]. The secured rights' purpose is to make credit available at a low cost. This is achieved through reducing the risk of non-payment. In the event of the debtor's default, a secured creditor has the right to receive payment for its debt by relying on the assets on which the secured right extends[82]. An insolvency law respecting the principle of leaving rights unaltered would isolate such assets from the debtor's estate available for distribution, and would entitle the secured creditors to look to these assets when seeking satisfaction of their claims[83]. Thus, ensuring that the secured rights remain effective in the circumstances of the debtor's insolvency would keep the risk of non-payment and the cost of credit low. Providing otherwise would defeat the purpose of secured rights, and these rights "would resemble an umbrella that is capable of opening only when the sun is shining, but incapable of doing so when the rain is falling"[84].

Aside from the foregoing justification for keeping the pre-insolvency rights intact, another such justification derives from the need to ensure that insolvency laws are not abused[85]. If the creditors' rights would be altered under insolvency laws, creditors would be encouraged to use the insolvency laws to gain the advantage that would result from such alterations[86]. Such an

[80] Fletcher, *ibid* Jackson, *ibid*.
[81] Fletcher, *ibid*; Fletcher, Treatment of Security Rights, *supra* note 4 at 490.
[82] UN, *UNICITRAL Legislative Guide on Secured Transactions*, (New York: UN, 2010) at para 46, online: <http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf>.
[83] Fletcher, Treatment of Secured Rights, *supra* note 4 at 490.
[84] *Ibid.*
[85] Jackson, The Logic and Limits, *supra* note 31 at 21.
[86] *Ibid*.

effect would go against the main purpose of insolvency laws, namely to create a mechanism to be used in the interests of creditors as a group[87].

From the forgoing discussion, certain fundamental principles of insolvency laws emerge. The first is that insolvency laws establish a collective proceeding for the collection of debts. The second is that such proceedings are compulsory. The third is that the creditors are treated equally, with certain exceptions. The fourth is that insolvency laws respect the rights of creditors created prior to the debtor's insolvency. These are principles that, generally, are accepted by countries as fundamental principles of insolvency laws[88]. Despite such agreement on fundamental principles of insolvency laws, countries enact insolvency laws that differ in numerous ways[89]. These differences are due to the fact that each insolvency law is profoundly linked to the social and policy circumstances of the country that enacts it, and such circumstances differ across countries[90]. The differences among insolvency laws range from general objectives that govern these laws to small details of procedure[91]. For instance, national insolvency laws may vary regarding the primary objective that they are trying to accomplish in an insolvency case. Some insolvency laws take as a primary objective the maximization of the welfare of creditors as a group; the decision to liquidate or to restructure an insolvent debtor under such insolvency laws will mainly depend on which route the creditors as a group will fare better (such insolvency laws are called pro-creditor)[92]. Conversely, some insolvency laws would compromise on the welfare of creditors in order to rescue the debtor, if this would provide some

[87] *Ibid*.
[88] Fletcher, Insolvency in Private International Law, *supra* note 1 at 8 – 10; Duns, Insolvency, *supra* note 1 at 11 – 13; Wessels, Bob, "Harmonization of Insolvency Law in Europe" (2011) 8:1 European Company Law 27 at 28.
[89] Fletcher, *ibid* at 4.
[90] Fletcher, *ibid* at 4, 5.
[91] *Ibid*.
[92] Wood, Philip R., *Principles of International Insolvency*, (London: Sweet & Maxwell, 1995) at 3 [Wood, Principles]. Jackson, The Logic and Limits, *supra* note 31, as the proponent of such an approach.

social benefits (such insolvency laws are called pro-debtor)[93]. Among the smaller details on which insolvency laws may differ are the criteria for commencing insolvency proceedings, the ranking of creditors, the rules on setting aside the transactions completed prior to the insolvency proceedings and many others[94].

The differences between national insolvency laws may prove to be substantial. An insolvency case's outcome may vary depending on which insolvency law is applied for its resolution[95]. When the elements of an insolvency case are present within one jurisdiction, the variations between national insolvency laws are of no significance, since only one legal system would be concerned with the respective case. Consequently, only the insolvency laws of that legal system would apply[96]. By contrast, in cases of cross-border insolvency, namely when the elements of the insolvency case are spread across more than one jurisdiction, more legal systems may have an interests in the resolution of the insolvency case[97]. For instance, such cases could be those regarding a debtor that has assets or creditors located in more than one jurisdiction at the time of its insolvency[98]. In particular, such cases raise questions of private international law[99], such as:

- Which court has the jurisdiction to hear the insolvency matters of a particular case?
- Which insolvency laws have to be applied?
- Should foreign insolvency orders be recognized and enforced?

[93] Wood, Principles, *ibid*; Warren, Imperfect World, *supra* note 24, as a proponent of such an approach.
[94] See Wood, Principles, *ibid,* presenting an overview of national insolvency laws on bankruptcy hierarchy at 10 – 29, and on preferences at 72 – 136.
[95] Fletcher, Insolvency in Private International Law, *supra* note 1 at 4, 5.
[96] Fletcher, *ibid* at 5.
[97] *Ibid*.
[98] Duns, Insolvency, *supra* note 1 at 466.
[99] Duns, *ibid* at 467.

Several theories that provide answers to these questions have been developed. The next section will discuss the leading theories in greater detail.

2.2 Theories for Cross-Border Insolvency Laws

2.2.1 Territorialism v Universalism

The complexity of insolvency laws and the social and political basis on which these laws rely made answering the private international law questions that appear in cross-border insolvencies difficult. As a result, several theories were advanced to address these questions. The leading ones among them are the two competing theories of territorialism and universalism[100].

Territorialism advances the claim that the insolvency laws of a country should not be given extraterritorial effect against persons and property situated in foreign jurisdictions[101]. Accordingly, each country should commence and administer insolvency proceedings against a debtor under its own insolvency laws, and these proceedings should only encompass the locally situated property of the debtor[102]. In addition, foreign insolvency proceedings would not be recognized or allowed to have any effect locally[103]. Considering the fact that countries, under their own insolvency laws, assume jurisdiction over debtors on several grounds[104], multiple insolvency proceedings regarding the same debtor could be commenced simultaneously[105], as a

[100] Other theories for cross-border insolvency laws are Professor LoPucki's cooperative territoriality theory, see LoPucki, Cooperative Territoriality, *supra* note 3; and Professor Rasmussen's theory advancing that the applicable insolvency law should be chosen by the parties at the moment of the transaction, see Rasmussen, Robert K., "A New Approach to Transnational Insolvencies" (1997) 19:1 Mich J Int'l L 1 [Rasmussen].
[101] Honsberger, John D., "Conflict of Laws and the Bankruptcy Reform Act of 1978" (1980) 30:4 Case W Res L Rev 631at 634 [Honsberger]; Fletcher, Treatment of Security Rights, *supra* note 4 at 496.
[102] *Ibid*.
[103] Honsberger, *ibid*.
[104] McElcheran, Kevin P., *Commercial Insolvency in Canada*, (Markham, Ont: LexisNexis, 2011) at 238.
[105] Honsberger, *supra* note 101 at 634.

debtor could satisfy the jurisdictional criteria of more than one country. Each such proceeding would be administered without regard to the other foreign proceedings[106].

By contrast, universalism contends that the cross-border insolvency of a debtor should be administered in a single insolvency proceeding according to the laws of the country commencing these proceedings[107]. Under this theory, proceedings would be commenced in the home country of the debtor and would encompass the entire debtor's property and bind all of the debtor's creditors wherever located[108]. Such proceedings would be recognized and enforced in all other countries involved in the cross-border insolvency case[109]. All these other countries would assist the home country in the administration of the debtor's insolvency[110].

Each theory has some implications that make it attractive and some that make it unattractive for the resolution of cross-border insolvencies. One perspective from which the rival theories are judged is through the nature of insolvency laws. It is contended that territorialism is opposed to the fundamental principles of insolvency laws. By limiting the effect of an insolvency proceeding to the territorial confines of the opening country, territorialism creates an opportunity for creditors to seek to satisfy their claims from assets located in countries other than the opening country[111]. This would be possible, since the stay imposed by the insolvency law under which the proceeding was commenced on such individual actions would not operate outside the jurisdiction that commenced the insolvency proceeding[112]. Such consequences of the territorialist system would be contrary to the collective principle of insolvency laws that purport to administer

[106] *Ibid*.
[107] Westbrook, Theory and Pragmatism, *supra* note 3 at 461; LoPucki, Cooperative Territoriality, *supra* note 3 at 2220.
[108] Westbrook, Theory and Pragmatism, *ibid*.
[109] Flecther, Treatment of Security Rights, *supra* note 4 at 495.
[110] Westbrook, Theory and Pragmatism, *supra* note 3 at 461.
[111] Honsberger, *supra* note 101 at 635.
[112] Westbrook, Global Solution, *supra* note 13 at 2285.

the entire property of the debtor under a single proceeding and to prevent the creditors from taking individual actions against the debtor. As such, territorialism raises the same concerns that the ordinary individual creditor remedies system raises in the circumstances of the debtor's insolvency[113]. Namely, territorialism encourages an international race among creditors to the debtor's assets. This may reduce the value of the debtor's property by making a liquidation of the debtor company as a going concern or a restructuring of such a debtor practically impossible[114]. For instance, creditors could attach assets located in foreign jurisdictions without which a sale as a going concern or a restructuring could not go forward. Even if collective insolvency proceedings are commenced in each jurisdiction where the debtor has assets, a going concern liquidation or a restructuring plan may prove to be unachievable. This is so because a going concern sale or a restructuring would depend on the decisions of more than one court and courts sitting in different jurisdictions may reach opposing decisions[115]. For instance, a restructuring may be difficult to implement when some assets needed for the success of the restructuring are located in a jurisdiction that does not favor restructuring, thinks a restructuring of the debtor is not warranted or that local creditors' claims can be satisfied in full out of local assets[116].

Further, territorialism is in disharmony with the equal treatment of creditors principle[117]. Under this theory, creditors may receive differing portions of their claims as a result of differing "asset/local debt ratio"[118]. In the case of an extreme form of territorialism, creditors in a jurisdiction where significant assets are located may be better off than creditors in other

[113] Unt, Lore, "International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialog" (1997) 24:4 Law and Policy in International Business 1037 at p 1044.
[114] *Ibid.*
[115] Guzman, Andrew T., "International Bankruptcy: In Defense of Universalism" (2000) 98:7 Mich L Rev 2217 at 2204 [Guzman, International Bankruptcy].
[116] *Ibid*.
[117] Fletcher, Treatment of Security Rights, *supra* note 4 at 496.
[118] Westbrook, Theory and Pragmatism, *supra* note 3 at 460, 465.

jurisdictions with fewer assets and which does not allow foreign creditors to participate in the distribution of local assets (such form of territorialism is called "ring-fencing"[119]) [120]. Nevertheless, unequal treatment of creditors may result even when foreign creditors have the right to lodge their claims in local proceedings. The foreign creditors that may have the opportunity to use this right would most likely be the sophisticated creditors that have enough resources to chase the debtor's assets in foreign jurisdictions[121]. In addition, inequality of distribution may happen as a result of the abuse of the system created by territorialism on the part of the debtor. A debtor wanting to give preference to a certain creditor may change the location of assets on the eve of insolvency to take advantage of differences that exist between the insolvency laws of different nations[122], or the debtor may satisfy the claims of such a creditor out of foreign assets[123], since the debtor may freely dispose of its foreign located assets.

Aside from failing to promote the insolvency law principles in the context of cross-border insolvencies, territorialism falls short of obtaining the efficiencies that insolvency laws introduced, specifically the elimination of the costs of multiple proceedings commenced against the same debtor and of the monitoring of the debtor. Under territorialism, multiple parallel insolvency proceedings is the norm, and such situations raise the cost of the administration of the debtor's insolvency, particularly because of the multiplication of the expenses incurred for the experts involved in such administrations[124]. As regards the costs of monitoring, they would arise

[119] Fletcher, Treatment of Security Rights, *supra* note 4 at 496.
[120] *Ibid*.
[121] Westbrook, Choice of Avoidance Law, *supra* note 15 at 514.
[122] Westbrook, Global Solution, *supra* note 13 at 2309.
[123] Honsberger, *supra* note 101 at 634.
[124] Rasmussen, *supra* note 100 at 18.

as a result of the need to track the debtor's assets, which may be moved to foreign jurisdictions where these assets will not be affected by a local insolvency proceeding[125].

Universalism, by contrast, is actually created based on the nature of insolvency laws. Following the principle of collectivity, universalism provides for the administration of cross-border insolvency cases under the control of a single insolvency proceeding that encompasses all the debtor's assets and creditors, wherever located. As a consequence, under this theory the maximization of the debtor's value through a going concern sale or a restructuring proceeding is easier to undertake than under territorialism, since the decision to implement such measures would depend on a single court acting under a single set of laws[126]. In addition, the achievement of an orderly liquidation and reorganization plans requires that all the creditors be bound by such proceedings, even those creditors that disagree with their implementation[127]; universalism satisfies this requirement. Thus, universalism, as opposed to territorialism, allows the pursuance of optimal solutions for the debtor's insolvency. Other significant positive results of a single court and a single law system proposed by universalism are the efficient administration of cross-border insolvencies and the absence of the need to monitor the debtor as "the movement of assets would be irrelevant"[128]; all the debtor's assets would be gathered and distributed in a single proceeding.

[125] Pottow, John A. E., "Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests"" (2006) 104:8 Mich L Rev 1899 at 1904 [Pottow, Greed and Pride].
[126] International Bankruptcies Guzman at p 2203 – 2204 "Universalism offers a much better framework for reorganizations as it puts all assets of the firm under the control of a single court. Allowing each jurisdiction to arrive at its own conclusion is akin to giving each creditor – or at least the creditors of each country – a veto over reorganizations" p 2203 - 2204; A global solution Westbrook at 2285 – 2286 saying that "Reorganization Bankruptcy (often called rescue elsewhere) is even more dependent upon the existence of a single reorganization activity." p 2285.
[127] Westbrook, Global Solution, *supra* note 13 at 2285.
[128] Westbrook, Global Solution, *ibid* at 2309; Pottow, Greed and Pride, *supra* note 125 at 1904.

Unlike, territorialism, universalism is in harmony with the principle of the equal treatment of creditors[129]. As the insolvency proceeding commenced in the home country of the debtor will have worldwide effect, the stay on individual proceedings will be effective in every jurisdiction where the debtor has assets, thus impeding creditors from satisfying their claims from these assets outside of the collective proceeding commenced in the home country of the debtor[130]. Further, the worldwide recognition and enforcement of the home country proceeding will prevent the debtor from disposing of its assets and from preferring creditors at its will. As stated above, since the administration of the debtor's estate is taking place under a single law, the changing of the assets' location on the eve of insolvency is no longer relevant; thus, the means to give preference to some creditors over others is not available under universalism. In addition, universalism promotes equality by distributing the debtor's assets under a single priority system, ensuring that all creditors of the same rank receive the same dividend on their debts[131].

Another perspective from which territorialism and universalism are evaluated is the *ex ante* perspective of creditors. When looked at from this perspective, territorialism is more inefficient than universalism. It creates legal uncertainty, which in turn raises the cost of borrowing. The argument asserts that creditors adjust the term on which they extend credit by considering what would be the outcome of the debtor's insolvency[132]. Under territorialism, the creditor, in order to ascertain what that outcome would be, would have to determine the location of the debtor's assets, the likelihood of relocating these assets to other jurisdictions, the insolvency laws of the jurisdiction where the assets are located at the moment of borrowing and the jurisdictions to

[129] Fletcher, Treatment of Security Rights, *supra* note 4 496.
[130] Honsberger, *supra* note 101 at 633.
[131] Westbrook, Theory and Pragmatism, *supra* note 3 at 466. Westbrook, Global Solution, *supra* note 13 at 2293.
[132] Guzman, International Bankruptcy, *supra* note 115 at 2199.

which assets may be relocated in the future[133]. Conversely, universalism is held to increase the predictability of the debtor's insolvency outcome[134]. Under universalism, the creditors do not need to track the relocated assets of the debtor or the shifting applicable insolvency law; they can consider only the insolvency law of the home jurisdiction, as that is the law that will apply to all the debtor's assets independent of their location[135]. Thus, under territorialism, "the creditor's informational needs and therefore its transaction costs are much greater"[136] than under universalism. As the transactional costs incurred by the creditor are generally passed on the debtor[137], the costs of borrowing under territorialism are likely to be higher than under universalism[138].

Linked to the argument that an insolvency under territorialism has unpredictable outcomes is the claim that territorialism creates an environment where debtors may easily forum shop for a jurisdiction that would apply laws giving the debtor unfair advantages[139]. Forum shopping under territorialism is possible because of the ease of moving assets to other jurisdictions on the eve of insolvency in order to shift the law that would apply to the administration and distribution of the relocated assets[140]. For instance, a debtor would not encounter any difficulty in transferring significant liquid assets to its account in a favored jurisdiction just before filing for insolvency

[133] Guzman, International Bankruptcy, *ibid* at 2199-2200.
[134] Westbrook, Global Solution, *supra* note 13 at 2292; Westbrook, Theory and Pragmatism, *supra* note 3 at 466.
[135] Guzman, International Bankruptcy, *supra* note 115 at 2199; Pottow, John A. E., "The Myth (and Realities) of Forum Shopping in Transnational Insolvency. (Symposium: Bankruptcy in the Global Village the Second Decade)" (2007) 32:3 Brook J Int'l L 785 at 788 [Pottow, The Myth].
[136] Guzman, International Bankruptcy, *supra* note 115 at 2199.
[137] *Ibid* at 2201.
[138] Westbrook, Theory and Pragmatism, *supra* note 3 at 466.
[139] "The possibility of *ex post* forum shopping obviously reduces *ex ante* predictability for creditors and therefore increases the agency cost of debt" see Enriques, Luca & Martin Gelter, "Regulatory Competition in European Company Law and Creditor Protection" (2006) 7:1 European Business Organization Law Review 417 at 444.
[140] See Westbrook, Jay Lawrence, "Breaking Away: Local Priorities and Global Assets" (2011) 46:3 Tex Int'l LJ 601 at 612 "localism encourages forum stashing, which seems to me a much greater risk than the much-discussed forum shopping, because moving assets is generally much easier than relocating the seat of the enterprise".

proceedings in that jurisdiction[141]. As regards the possibility of forum shopping under universalism, one author fiercely argues that such a phenomena would be uncontrollable using this theory[142]. To shop for a favorable insolvency law, a debtor would have to change its home country[143]; that author argues that such change could easily be done by relocating the attributes that indicate the home country[144]. Nevertheless, this change would be easy to do only when the criterion adopted for the determination of the home country would be easy to manipulate, such as the place of incorporation[145]. The adoption of a criterion that makes such manipulations unwarranted (for instance, a criterion that would be sufficiently costly to change) would deter forum shopping[146]. Such difficult to manipulate criteria are not impossible to find; as an example could serve a newly emerged concept, namely the centre of main interest of the debtor concept[147].

Despite the fact that universalism wins over territorialism on many levels, territorialism was historically the theory that prevailed in practice[148]. While some jurisdictions have shown a preference for universalism[149]; this theory has never been adopted in its pure form[150]. The main

[141] In Pottow, The Myth, *supra* note 135 at 801, the author presents a case where $24 million from the debtor's US account were wired to a Cayman Islands account just before filling for winding up proceedings in the Cayman Islands under the laws of that forum.
[142] LoPucki, Lynn M., *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts*, (Ann Arbor: University of Michigan Press, 2005) at 229 – 231; LoPucki, Lynn M., "Cooperation in International Bankruptcy: A Post-Universalist Approach" (1999) 84:3 Cornell L Rev 696 at 720 – 723 [LoPucki, A Post-Universalism Approach].
[143] Pottow, The Myth, *supra* note 135 at 797.
[144] LoPucki, A Post-Universalism Approach, *supra* note 142 at 720.
[145] Guzman, International Bankruptcy, *supra* note 115 at 2214.
[146] *Ibid.*
[147] Pottow, The Myth, *supra* note 135 at 798 "While moving *place of incorporation* requires only glorified paperwork, moving *COMI*, by definition, requires more".
[148] Westbrook, Theory and Pragmatism, *supra* note 3 at 460.
[149] See *McGrath & Ors v Riddell & Ors (Conjoint Appeals)*, [2008] UKHL 21, [2008] 1 WLR 852 at para 30 "The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, as far as is consistent with justice and UK

reason for the non-adoption of universalism is the failure of universalism to provide for the protection of local interests. The local interests argument is double-sided. On the one side, the protection of local interests argument is concerned with the interests of sovereign states. As mentioned in the previous section, insolvency laws are shaped according to the social and policy conditions of the countries that enacted them. Adopting universalism presupposes that a country accepts a foreign insolvency law, namely the insolvency law of the home country, to govern all the effects of the debtor's insolvency on its territory. Such deference to a foreign country results in a foreign country's policies embedded in its insolvency law deciding over local relations. Thus, "political judgments about local assets disposition and allocation of local losses from the foreign firm's demise are left in the hands of a foreign court"[151]. Because countries are reluctant to pre-commit such extensive deferral to foreign countries' views about how a debtor's insolvency should be dealt with, they have difficulties submitting to a regime based on pure universalism[152].

On the other side of the problem of local interests are the interests of individual creditors that stand to be affected by a cross-border insolvency case. Under universalism, a creditor would have to determine the home country of the debtor and the law that applies to its debtor's insolvency proceeding when adjusting the credit terms[153]. While such an exercise should not raise any complaints from sophisticated creditors[154], in practice it could prove quite hard to

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public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

[150] Pottow, John A. E., "Procedural Incrementalism: a Model for International Bankruptcy" (2005) 45:4 Va J Int'l L 937 at 950 [Pottow, Procedural Incrementalism].

[151] Tung, Fear of Commitment, *supra* note 6 at 576.

[152] *Ibid*.

[153] Fletcher, Treatment of Security Rights, *supra* note 4 at 496.

[154] Trautman, Donald T., Jay Lawrence Westbrook & Emmanuel Gaillard, "Four Models for International Bankruptcy" (1993) 41:4 Am J Comp L 573 at 624.

implement for unsophisticated creditors[155]. As Professor LoPucki has stated, "[a]s a practical matter, the Mexican employee, the Mexican trade creditor, and even their U.S. counterparts are unlikely to know enough about foreign insolvency laws to adjust to them."[156] Further, for such creditors the determination of the debtor's home country, whose laws will generally apply to the insolvency proceeding of the debtor[157], could raise further practical difficulties. They will have "to reconcile the known and ascertainable facts regarding the debtor with the criteria employed by the jurisdictional test"[158].

The practical difficulty encountered when determining the home country of the debtor and the applicable insolvency law is not the only unfair prejudice that a creditor could suffer due to a universalist system. There may be instances when the fact that the debtor will be subject to a foreign insolvency law is not readily ascertainable to a creditor entering into a transaction with such a debtor[159]. This is a situation where the legitimate expectations of the creditor regarding the law that will determine the consequences of its debtor's insolvency on its legal relationship with the debtor may be defeated[160]. The defeat of the creditor's legitimate expectations could be substantial for the creditor's interests in the context of insolvency laws. Due to the differences that exist between insolvency laws of different countries, the insolvency law whose application the creditor legitimately did not expect may affect the creditor's interest in a way that the creditor did not anticipate[161]. The prejudice that may result from a defeat of a creditor's legitimate expectations is most vividly illustrated in the area of secured creditors' rights. The essential

[155] LoPucki, A Post-Universalism Approach, *supra* note 142 at 711, 712.
[156] *Ibid* at 712.
[157] LoPucki, Cooperative Territoriality, *supra* note 3 at 2220.
[158] Fletcher, Treatment of Security Rights, *supra* note 4 at 496.
[159] Fletcher, Treatment of Security Rights, *ibid* at 497.
[160] *Ibid*.
[161] *Ibid*.

purpose of granting a security to a creditor is to protect the creditor against the risk of insolvency[162]. In the event of the debtor's insolvency, the secured creditor has "direct recourse to the collateral"[163]. Nevertheless, the protection offered against the debtor's insolvency by a security to the creditor is not absolute. The security rights of the creditor may be altered in an insolvency proceeding. For instance, a validly created security under applicable civil law may be declared void under insolvency rules governing preferences[164], or the creditor's "right to resort to its remedies against its collateral may be delayed"[165]. The impact that the debtor's insolvency will have on the rights of the secured creditor is a factor taken into consideration by the creditor when it decides the terms of the credit[166]. Thus, it is important to give effect to the extent of protection on which the secured creditor counted at the time of entering into the transaction with the debtor. Under universalism, secured creditors may not always receive the treatment in home country insolvency proceedings that they had in mind at the time of entering into transactions with their debtors. National insolvency laws differ on how they treat security rights, and different conclusions regarding the secured creditor's rights may be reached under different insolvency laws[167]. If a creditor relies on the protection granted by the law of the location of the property that is the subject matter of the security rights (*lex situs*) and the insolvency of the debtor is ultimately decided under the law of the home country (other than the *lex situs*), which differs on relevant material matters from the *lex situs*, the essential purpose of the secured right might not be achieved[168].

[162] ALI, Global Principles, *supra* note 20 at 236, 237.
[163] Fletcher, Insolvency in Private International Law, *supra* note 1 at 402 – 403.
[164] Drobnig, Ulrich, "Secured Credit in International Insolvency Proceedings" (1998) 33:1 Tex Int'l LJ 53 at 65.
[165] Clark, The Honorable Leif M. & Karen Goldstein, "Sacred Cow: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies" (2011) 46:3 Tex Int'l LJ 513 at 536 [Clark, Sacred Cow].
[166] ALI, Global Principles, *supra* note 20 at 237.
[167] Fletcher, Insolvency in Private International Law, *supra* note 1 at 403.
[168] *Ibid*.

Thus, as long as national insolvency laws remain inharmonious, the concerns raised by the need to protect local interests will make the adoption of universalism unattainable[169]. Since national insolvency laws are grounded on local, social and public policy values, harmonization of these laws is not likely to succeed in the foreseeable future[170]. Accordingly, other solutions that would respond to the current legal realities had to be formulated[171]. As universalism was widely recognized as the "long term, theoretical solution to the problem of multinational insolvency"[172], the short term solution that gained acceptance came as close to the universalist model as the concerns raised by the divergence of national insolvency laws could allow, and was accordingly termed modified universalism[173].

2.2.2 Modified Universalism

Modified universalism embraces the central principles of pure universalism, but recognizes that "a country may only unilaterally control its territory and laws"[174]. It is an abated form of universalism that tries to fit in with the current legal reality[175]. Thus, modified universalism accepts that the cross-border insolvency of a debtor has to be administered under the laws and by the courts of the home country of the debtor[176]. Nevertheless, a local court, other than the home country court, retains the discretion to evaluate the compliance of the home country insolvency

[169] Westbrook, Global Solution, *supra* note 13 at 2299; Fletcher, Treatment of Security Rights, *supra* note 4 at 497.
[170] *Ibid*; Adams, Edward S. & Jason K. Fincke, "Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism" (2008) 15:1 Colum J Eur L 43 at 46 [Adams].
[171] Fletcher, Treatment of Security Rights, *ibid*.
[172] Westbrook, Global Solution, *supra* note 13 at 2299; see also Fletcher, Treatment of Security Rights, *ibid* at 497, stating that "the appeal of the universalist model has tended to gain favor among those seeking to produce a framework for international governance of international insolvencies".
[173] Fletcher, *ibid* at 498; Westbrook, Choice of Avoidance Law, *supra* note 15 at 517; Westbrook, Global Solution, *supra* note 13 at 2302.
[174] Anderson, Kent "The Cross-Border Insolvency Paradigm: A defense of the Modified Universal Approach Considering the Japanese Experience" (2000) 21:4 U Pa J Int'l Econ L 679 at 690 [Anderson, Japanese Experience].
[175] Westbrook, Global Solution, *supra* note 13 at 2299 – 2302.
[176] Westbrook, Choice of Avoidance Law, *supra* note 15 at 517.

proceeding with certain criteria before giving it effect on its territory[177]. Accordingly, the home country insolvency proceeding does not have automatic and direct effect in non-home countries. This deviation from the pure form of universalism is expected to ensure that local interests are given appropriate protection. The usual criteria employed as a guide for the exercise of the local court's discretion are whether the effects of the home country insolvency proceeding, which are asked to be allowed on the local court's territory, would alter the legal entitlements of creditors or offend against local public policy[178]. In addition, under modified universalism, non-home countries reserve the right to commence local insolvency proceedings that would administer the debtor's local assets under local laws[179], consequently limiting the universal effects of the home country insolvency proceeding. This alteration to the single court and single law system serves several functions[180]. First, the right to commence local proceedings is a means that can be used to protect local creditors' interests, for instance, those of local creditors whose legal entitlements are not recognized in the home country insolvency proceeding[181]. Second, local insolvency proceedings may be used as a supplement to the home country insolvency proceeding[182]. For instance, a local proceeding may be commenced for efficiency reasons; there may be some complex estates that cannot be administered as a whole[183]. Or, a local proceeding may be commenced to prevent creditors to initiate individual proceedings under non-insolvency laws in

[177] *Ibid*.
[178] Adams, *supra* note 170 at 48, 49.
[179] Westbrook, Global Solution, *supra* note 13 at 2300.
[180] EC, Miguel Virgos & Etienne Schmitt, *Report on the Convention on Insolvency Proceedings*, Brussels, 3 May 1996 at paras 32, 33 [The Virgos – Schmitt Report].
[181] *Ibid* at para 33.
[182] Adams, *supra* note 170 at 48.
[183] Virgos - Schmitt Report, *supra* note 180 at para 33.

countries that, otherwise, would allow them to do so[184]. This may be the case when the home country insolvency proceeding was not allowed to have local effects.

To avoid conflicts that may otherwise result from the administration of a cross-border insolvency case through concurrent insolvency proceedings, the modified universalism system limits the scope of the non-home country proceedings. These proceedings are allowed to administer only the locally situated assets[185]. To further ensure a harmonized administration of cross-border insolvency cases under a system that allows the commencement of concurrent insolvency proceedings, modified universalism envisions that courts sitting in these concurrent proceedings will cooperate to the maximum extent permitted by local laws to maximize "the value and fairness in the management of the default"[186].

Accordingly, modified universalism purports to achieve some of the benefits of universalism described above, such as efficiency[187] and fairness[188], and at the same time to provide for the protection of local interests. Whether this claim holds true in practice is the question of this thesis. The following chapters are an attempt to answer this question, namely by determining whether the operation of courts in cross-border insolvency cases under a legal framework based on modified universalism promotes the goals of efficiency, fairness and predictability and ensures the protection of local interests. For this purpose, the study of the application by courts

[184] ALI, Global Principles, *supra* note 20 at 231.
[185] Fletcher, Treatment of Security Rights, *supra* note 4 at 501.
[186] Westbrook, Global Solution, *supra* note 13 at 2302.
[187] "The modified regime does not achieve the administrative efficiencies of pure universality, but it limits duplicative administrative expenses while allowing for coordinated liquidation and reorganization." See Anderson, Japanese Experience, *supra* note 174 at 691.
[188] "Under modified universalism, a court is likely to be active in every country in which the debtor has substantial assets. However, in many cases only one court must determine claims and make distributions. This determination by a single court eliminates the necessity for country-by-country filing and determination of claims and arguably enhances the distribution of the system to achieve a worldwide pro rata distribution of assets." See LoPucki, A Post-Universalism Approach at 728.

of the United Nations Commission International Trade Law Model Law on Cross-Border Insolvency[189] was chosen, since, as it is argued in the third chapter, this Law adopts the modified universalism theory. Notably, the Model Law expressly provides in its preamble that it is committed to further, among other more specific goals, "greater legal certainty for trade and investment"[190] and "fair and efficient administration of cross-border insolvencies that protects the interest of all creditors and other interested parties"[191]. This is important for the present research as one cannot assess the workability of a legal instrument by evaluating whether it promotes certain goals when that legal instrument was not intended to promote such goals.

[189] The Model Law, *supra* note 18.
[190] *Ibid,* the Preamble.
[191] *Ibid.*

CHAPTER 3: UNCITRAL Model Law on Cross-Border Insolvency

This chapter reviews the legislative history of the Model Law in order to provide a background to a discussion on the legal framework that this document creates for the resolution of cross-border insolvency cases. Hence, this chapter elaborates on the core provisions that form the foundation of the Model Law, particularly those provisions that concern access of foreign representatives and creditors to courts in the enacting state, recognition of foreign proceeding and relief, cooperation with foreign courts and foreign representatives and coordination of concurrent proceedings. Then, this chapter asks the question of whether or not modified universalism is the theoretical foundation of the Model Law, ultimately concluding that it is.

3.1 Legislative History

At the UNCITRAL Congress "Uniform Commercial Law in the 21st Century" held in conjunction with the twenty-fifth session of the Commission on May 1992 in New York, it was proposed that UNCITRAL consider undertaking work in the area of cross-border insolvency[192]. The reason for this proposal was tied to the need to find a solution to the conflicting claims of jurisdictions over the insolvent debtor's estate that were occurring in cases when a debtor declared bankruptcy in one jurisdiction and at the same time owned assets in other jurisdictions[193]. The conflict of jurisdiction in such cases arose between the jurisdiction where the debtor declared bankruptcy and the other jurisdictions where the debtor had assets[194]. The jurisdiction where the bankruptcy was declared would claim to have jurisdiction to administer

[192] *Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law*, New York, 18-22 May 1992 at 158, online: <http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf>.
[193] *Ibid.*
[194] *Ibid.*

and distribute all of the debtor's assets because they all formed part of the debtor's estate, while the jurisdiction where the assets were located would claim jurisdiction to administer and distribute them only because they were located in its territory.

Those that made the proposal expressed the view that a solution should be found, and that it should not attempt to harmonize or unify the substantive national insolvency law, as such a project would be premature[195]. However, they considered that the problems of cross-border insolvencies could be eased if instead of looking at the country where the insolvency was declared, UNCITRAL would focus instead on the country where the insolvent's assets were located and decide how those assets should be dealt with[196].

In response to this proposal, UNCITRAL decided to undertake an in-depth legal study of the prevailing legal environment in the area of cross-border insolvency[197]. The objective of the study was to ascertain the desirability and feasibility of a potential project aimed at harmonizing the rules regarding cross-border insolvency. For this purpose, the Secretariat of the Commission prepared a report on the legal issues that arose or could arise in cross-border insolvency cases due to the differences in national approaches to such cases[198]. The Secretariat identified that countries had different views about what effects liquidation or reorganization proceedings commenced in one country should have or should be allowed to have in another country. Some countries had insolvency laws that claimed universal effect for the insolvency proceedings commenced in their courts, and at the same time refused to recognize the same universal effect

[195] *Ibid.*
[196] *Ibid.*
[197] *Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Sixth Session*, UNCITRALOR, 48th Sess, Supp 17, UN Doc A/48/17, (1993) at paras 302 – 306 [The Twenty-Sixth Session Report].
[198] Secretariat of the United Nations Commission on International Trade Law, *Possible Future Work: Cross-Border Insolvency*, UNCITRALOR, 26th Sess, UN Doc A/CN.9/378/Add.4, (1993).

of foreign insolvency proceedings. Other countries had insolvency laws claiming that local insolvency proceedings had effect only on local assets. Furthermore, it was also identified that national rules on judicial assistance accorded to foreign insolvency representatives differed widely; some courts were empowered to make various orders at the request of foreign insolvency representatives, while other courts were not empowered to entertain any such requests. The secretariat further reported that although many national laws allowed foreign creditors to participate in local insolvency proceedings, those creditors might not be treated equally as local creditors. Other areas of disharmony identified included the priority rules in the distribution of assets; the rules governing the security interests and their effectiveness in insolvency proceedings; the rules for avoidance of transactions prejudicial to creditors generally and as a whole; and the rules that governed the effect that a reorganization plan approved by a court in one jurisdiction should have or be allowed to have in another jurisdiction. The secretariat concluded that the identified disharmony of national rules on various matters related to cross-border insolvency leads to wasteful, uncertain and unfair resolution of cross-border insolvency[199]. This is particularly so because such disharmony creates obstacles to access by creditors to debtors' assets, encourages courts in an effort to protect the interests and expectations of local creditors arising under local law to refuse recognition or limit assistance to foreign insolvency proceedings, and in turn encourages the commencement of parallel uncoordinated insolvency proceedings with respect to the same debtor.

In its report, the Secretariat conveyed the views of commentators and members of associations of practitioner[200]. They agreed that to avoid conflict and the undesirable effects occurring in cross-border insolvency cases as a result of the disharmony of rules governing such cases, states had to

[199] *Ibid* at para 49.
[200] *Ibid* at paras 50, 51.

agree on harmonized rules for cross-border insolvency[201]. They considered that a feasible system of harmonized rules for cross-border insolvencies should provide an insolvency representative access to assets located abroad, though subject to conditions. One condition was that the insolvency proceeding in which the insolvency representative was appointed had to be commenced in accordance with harmonized rules for jurisdiction. Another condition was that the access and power of the insolvency representative to administer and/or distribute the assets located abroad had to be tailored so as to ensure the protection of interests and expectations of local creditors arising under local law. To be noted is that these commentators and members of associations of practitioner pointed out that:

> [I]t may be unrealistic to suppose that any principle of universality of insolvency proceedings could be attained at the global, or even at regional, level in the foreseeable future…it will continue to be unacceptable that interests and expectations arising under local law could be overridden by the effects of insolvency proceedings taken place elsewhere.[202]

This suggests that even if these commentators saw the current approaches to cross-border insolvency, which were mainly based on principles of territorialism, as inadequate, they did not consider shifting to a full universalist approach as a feasible and desirable solution to the cross-border insolvency problems, at least at that time.

At the same time, some concerns were expressed about the feasibility of a project intended to harmonize the rules on cross-border insolvency[203]. The reason for such concerns was that similar projects undertaken by international organizations were unsuccessful; such projects either could not reach agreed solutions or were not widely adopted[204].

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[201] *Ibid*.
[202] *Ibid* at para 51.
[203] The Twenty-Sixth Session Report, s*upra* note 197 at para 304.
[204] *Ibid*.

In light of the Secretariat's study conclusions, and of the views expressed by commentators, the Commission at its twenty-sixth session decided that the Secretariat should continue the in-depth study of the legal environment in the area of cross-border insolvency and focus on the aspects of cross-border insolvency laws that could be harmonized[205].

The initial step taken by the Secretariat to accomplish its task was to organize, in collaboration with INSOL - an international association of insolvency professionals, a colloquium on cross-border insolvency issues[206]. The colloquium was held in Vienna in 1994 and was attended by approximately 90 participants representing governments of common and civil law countries, international organizations, such as INSOL and Committee J of the Section on Business Law of the International Bar Association, and professionals that participated in cross-border insolvency cases or who lead projects intended to harmonize cross-border insolvency laws[207].

The purpose of the colloquium was to determine from a practical standpoint the feasibility and the desirability of a project harmonizing the rules on cross-border insolvency[208]. Attention was drawn to national law reforms and initiatives at the international level made to address the problematic issues that arise in cross-border insolvency cases. These reforms and international initiatives suggested what sub-areas of cross-border insolvency laws could be harmonized. The identified sub-areas were judicial cooperation and access of foreign insolvency representatives and creditors and recognition of foreign proceedings[209]. Though these two sub-areas may seem modest at first glance, the participants at the colloquium viewed them as sub-areas in which

[205] *Ibid* at paras 305, 306.
[206] Secretariat of the United Nations Commission on International Trade Law, *Cross-Border Insolvency: Report on UNCITRAL – INSOL Colloquium on Cross-Border Insolvency*, UNCITRALOR, 27th Sess, UN Doc A/CN.9/398, (1994).
[207] *Ibid* at para 2.
[208] *Ibid* at paras 2, 3.
[209] *Ibid* at paras 16 - 18.

harmonization of rules would be useful and would allow countries to avoid the unification of substantive rules of insolvency, which was considered unachievable at that stage[210].

The next step was to pursue work in the sub-areas identified as feasible and useful to be harmonized. The Secretariat, in conjunction with INSOL, co-sponsored a second colloquium intended to receive the views of judges regarding the current rules on judicial cooperation, access and recognition, and to determine what rules might, from the standpoint of the needs of practice and the goals of insolvency laws, facilitate judicial cooperation, access and recognition[211]. The colloquium took place in Toronto in 1995 and was attended by over sixty-judges and government officials from thirty-six states[212].

The participants of the colloquium in their discussions had the benefit of a report prepared by an expert committee assembled by INSOL that was meant to facilitate discussion between the participants[213]. The report provided an update on the contemporary national approaches in the sub-areas of judicial cooperation, access and recognition of a limited number of countries[214].

The findings reflected in the report available to the participants at the colloquium, and the findings made by these participants in the course of the colloquium in respect to national approaches in the sub-areas of judicial cooperation, access and recognition, can be summarized

[210] *Ibid* at para 16.
[211] Secretariat of the United Nations Commission on International Trade Law, *Cross-Border Insolvency: Report on UNCITRAL – INSOL Judicial Colloquium on Cross-Border Insolvency*, UNCITRALOR, 28th Sess, UN Doc A/CN.9/413, (1995) [The Judicial Colloquium Report].
[212] *Ibid* at para 1.
[213] *Ibid* at para 4.
[214] Joint Project of UNCITRAL and INSOL International on Cross-Border Insolvencies (Reporters: Evan Flaschen & Ron Harmer), *Expert Committee's Report on Cross-Border Insolvency Access and Recognition*, (1996) IIR 139 [The Expert Committee's Report].

as follows[215]. The judicial cooperation was hindered by a lack of legislation to authorize such cooperation in some countries and by the inadequacy of existing legislation in other countries. Harmonized legislative provisions on judicial cooperation would authorize the extension of cooperation by judges in countries where courts cannot act without express legislative authority, as was the case in many civil law countries. Such express legislative provisions would also be useful in countries where the courts have broad discretionary powers to cooperate by promoting predictability in cross-border insolvency cases. The means used to achieve judicial cooperation were inadequate for the resolution of cross-border insolvency cases. One of those means was the negotiation and approval of ad hoc "protocols" – insolvency agreements entered into for the purpose of facilitating the cooperation and coordination of parallel insolvency proceedings commenced with regard to the same debtor in different jurisdictions[216]. Although these protocols proved to be very useful in facilitating the resolution of cross-border insolvency cases[217], in the absence of legal authority or judicial willingness to cooperate, the protocol approach fell short of promoting predictability for the cross-border insolvency law area. As regards the access and recognition sub-area, countries adopted various approaches to access and recognition. In the absence of specific legislation on cross-border insolvency in common law countries, courts decided on the issues related to access and recognition by applying the principle of comity[218]. This approach granted courts flexibility and discretion to impose conditions on the recognition of

[215] The following paragraph about national approaches to "judicial cooperation" and "access and recognition" will be based on the content of the Expert Committee's Report, *ibid*, and the Judicial Colloquium Report, *supra* note 211.

[216] UN, *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*, (New York: UN, 2010), online: <http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf> at 27 [The Practice Guide on Cross-Border Cooperation].

[217] *Olympia & York Developments Ltd v Royal Trust Co* (1993), 20 CBR (3d) 165 (Ont Gen Div) and *Maxwell Communication Corp v Societe Generale (In re Maxwell Communication Corp)*, 93 F (3d) 1036 (2nd Cir 1996).

[218] The doctrine of "comity" is an important doctrine of private international law. Common law courts applied this doctrine to justify the application of foreign laws and the recognition and enforcement of foreign judgments, Rafferty, Nicholas et al, *Private International Law in Common Law Canada: cases, text and materials*, 3d ed (Toronto: Emond Montgomery Publications, 2010) at 9.

foreign proceedings and limits on access to foreign representatives to the extent necessary in the particular case brought before the court. But such an approach enhanced uncertainty, which is undesirable in the area of cross-border insolvency. By contrast, in civil law countries, courts could not rely on the concept of comity outside of the statutory framework[219]. Thus, in the absence of express provisions on access and recognition in the context of cross-border insolvencies, the foreign insolvency representatives seeking access and recognition of the foreign proceeding in the courts of these countries had to rely on the law governing the recognition and enforcement of foreign judgments given in two-party disputes. The technique employed in such cases required the petitioning of the court to recognize the foreign judgment by issuing an enabling order - an "exequatur". The advantage of the exequatur approach was that it provided certainty; to acquire an exequatur, the foreign petitioner had only to satisfy clear procedural requirements. The drawback of this approach was that the legislation governing the issuance of an exequatur could be confined to the recognition and enforcement of foreign judgments given in two-party disputes, and courts could not easily apply that legislation to recognize and enforce foreign insolvency proceedings that were collective by nature.

At the colloquium, the participants suggested possible practical rules for judicial cooperation, access and recognition. Some of these were: the inclusion of an automatic stay of proceedings to provide a minimum period of time needed to examine the request for recognition; facilitation of communication between courts in cross-border insolvency cases; provisions for establishing equal access of creditors to insolvency proceedings; and the inclusion of a rule determining the controlling insolvency proceeding with the effect of other insolvency proceedings being

[219] The Expert Committee's Report, *supra* note 214 at 145, 146.

secondary[220]. In light of the diversity of national approaches to cross-border insolvency issues, the participants suggested that the form of legal instrument UNCITRAL should draft for its project aimed at harmonizing rules on cross-border insolvency should consist of model legislative provisions containing "a menu of options" [221].

In consideration of the views expressed at the judicial colloquium, in 1995 the Commission, at its twenty-eighth session, decided to develop a legal instrument on judicial cooperation on cross-border insolvency, on court access to foreign insolvency representatives and recognition of foreign insolvency proceedings[222]. It assigned this task to one of the three intergovernmental working groups of UNICITRAL, which was named for this project the Working Group on Insolvency Law[223]. In only four two-week sessions the Working Group developed a draft text on cross-border insolvency[224]. The draft was presented at the thirtieth session of the Commission, where the final review of the provisions of the draft took place[225]. After minor drafting changes, the Commission adopted the draft text under the name "Model Law on Cross-border Insolvency" (The Model Law) on 30 May 1997[226]. The final text has 32 articles divided into five chapters[227]. The Model Law provides a legal framework to address more predictably and efficiently the cases of cross-border insolvency where the insolvent debtor has assets and/or creditors in more than

[220] The Judicial Colloquium Report, s*upra* note 211 at paras 20, 21.
[221] *Ibid* at 24.
[222] *Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Eight Session*, UNCITRALOR, 15th Sess, Supp No 17, UN Doc A/50/17, (1995) at paras 382 - 393.
[223] *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, UNCITRAL, 30th Sess, Annex, UN Doc A/CN.9/422 (1997) at para 6 [The Guide to Enactment].
[224] *Ibid.*
[225] The Thirtieth Session Report, *supra* note 18.
[226] *Ibid* at 43.
[227] Chapter I – general provisions (on scope of application, basic definitions of the terms used in the Model Law, provisions on international obligations of the States, public policy exception and interpretation); Chapter II – access of foreign representatives and creditors to courts in the enacting state; Chapter III – recognition of foreign proceeding and relief; Chapter IV – cooperation with foreign courts and foreign representatives; Chapter V – concurrent proceedings (on coordination of parallel insolvency proceedings opened in regard of the same debtor).

one jurisdiction[228]. In view of the difficulty in achieving harmonization in the field of cross-border insolvency laws, the Model Law respects the differences between national procedural laws and does not attempt to modify the substantive insolvency rules in the enacting states[229]. The philosophy of the Model Law is to provide minimum standards needed to be complied with for predictable and efficient resolutions of cross-border insolvency cases, if the enacting state provides for a less restrictive rule than the Model Law does, then that specific rule applies[230].

3.2 Form of Instrument

The Commission presented the text on cross-border insolvencies to states for adoption in the form of a model law[231]. A model law is a legislative text that, once enacted by a state, becomes part of its national law[232]. It also allows the enacting states to make any substantive changes to its text that are necessary to accommodate national requirements[233]. Because of the flexibility afforded by model laws to the enacting states and of the range of differing approaches in national laws on cross-border insolvency, the Commission considered that a model law would be a better vehicle for harmonization in this area of law[234]. However, at the drafting stage, there were arguments stating that the form of a convention would be more appropriate for a text that

[228] The Guide to Enactment, s*upra* note 223 at para 1.
[229] *Ibid* at para 3.
[230] Berends, André J, "The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" (1998) 6 Tul J Int'l & Comp L 309 at 321 [Berends, A Comprehensive Overview].
[231] UNCITRAL uses several legislative techniques to harmonize the laws on international trade, as developing such legislative texts as: conventions, model laws, legislative guides and model provisions. As the degree of harmonization that these types of legislative texts can achieve is different, they are used depending on what degree of harmonization UNCITRAL thinks is desirable or feasible to achieve in a particular area of law. UN, *A Guide to UNCITRAL. Basic Facts about the United Nations Commission on International Trade Law*, (Vienne: UN, 2013), online: <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> at 13.
[232] *Ibid* at 14.
[233] *Ibid*.
[234] The Thirtieth Session Report, s*upra* note 18 at para 26.

addresses such issues as judicial cooperation[235]. It was claimed that judicial cooperation requires a greater degree of harmonization than the degree that could be achieved through a model law, and that degree of harmonization could be satisfied by adopting the text as a draft convention that afforded less flexibility to enacting states to alter its text[236]. In addition, it was pointed out that usually courts cooperate with foreign courts or authorities only after the requirement of reciprocity was satisfied, and that in the case of conventions it was easier to verify whether the reciprocity requirement was satisfied than in the case of model laws[237].

The majority of those implicated in the drafting of the Model Law text opposed this argument. They were of the view that a model law was better suited than a convention to achieve harmonization in the area of cross-border insolvency in the shortest possible time, and the urgency of harmonization of cross-border insolvency rules was acknowledged from the beginning of the work of the Commission in this area of law[238]. In support of that view, the lack of success of some conventions that attempted to harmonize the rules on cross-border insolvency was noted[239]. They believed that a model law proposing a flexible legislative text might be more easily accepted for enactment by states[240]. Furthermore, due to the complexity of the procedures for ratification and adoption that a convention requires, this form of legislative text could not induce harmonization of cross-border insolvency laws in the shortest possible time[241]. As regards

[235] *Report of the Working Group on Insolvency Law on the Work of its Twentieth Session*, UNCITRALOR, 30th Sess, UN Doc A/CN.9/433, (1996) at paras 16 – 20 [The Working Group's Twentieth Session Report].
[236] *Ibid.*
[237] *Ibid.*
[238] *Ibid.*
[239] *Ibid*.
[240] *Ibid.*
[241] Clift, Jenny, "The UNCITRAL Model Law on Cross-Border Insolvency – a Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency. (United Nations Commission on International Trade Law) (2004) 12 Tul J Int'l & Comp L 307 at 318 [Clift].

the reciprocity requirement, it was not accepted as a strong argument for adoption of the text in the form of a convention[242].

Though the text of the model law on cross-border insolvency may be modified to the extent desired by the enacting states, "in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the model law into their legal systems"[243]. Moreover, to achieve a greater degree of harmonization and certainty in the field of cross-border insolvency, the Commission decided that the model law would be accompanied by a guide to enactment[244]. The guide to enactment was meant to provide background and explanatory information designed to help Governments and legislators preparing to incorporate the model law into their national legal systems and useful guidance to the end user of this law, as judges, practitioners and academics[245].

3.3 Main Features of the Model Law

In a preamble, the Model Law expressly states the objective that it intends to promote. Those objectives are:

> (a) cooperation between the courts and other competent authorities of the enacting State and foreign States involved in cases of cross-border insolvency;
>
> (b) greater legal certainty for trade and investment;
>
> (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
>
> (d) protection and maximization of the value of the debtor's assets; and

[242] The Working Group's Twentieth Session Report, *supra* note 235 at 19.
[243] The Guide to Enactment, s*upra* note 223 at para 12.
[244] The Thirtieth Session Report, s*upra* note 18 at para 23 - 24.
[245] *Ibid.*

(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment[246].

The purpose of the preamble is not to create substantive rights, but to assist the enacting States in the interpretation of the Model Law[247].

3.4 Scope of Application of the Model Law

3.4.1 Types of Procedure Covered

The Model Law limits its scope of application by defining the type of foreign proceeding that is susceptible to recognition or cooperation under its provisions. Article 2(a) defines a "foreign proceeding" as a collective proceeding, in the sense that it represents the interests of all creditors[248], opened for the purpose of liquidation or reorganization of the debtor pursuant to a law relating to insolvency, and in which the assets and the affairs of the debtor are under the control or supervision of a judicial or administrative authority. The Model Law expressly states that it also covers interim insolvency proceedings[249]. The reason is that besides the provisional nature of an interim proceeding, this type of proceeding usually meets all the requirements mentioned previously, and thus, an exclusion from the scope of the Model Law is not warranted[250]. The wording of the definition permits the inclusion into the scope of the Model Law of proceedings that allow the debtor to stay in control of its assets, as insolvency proceedings that embody the "debtor in possession" concept[251]. However, arguably, an English

[246] The Model Law, *supra* note 18 at Preamble.
[247] The Guide to Enactment, s*upra* note 223 at paras 54, 55.
[248] To be noted that such proceedings as receiverships that are instituted for the benefit of individual secured creditors are not covered by the provisions of the Model Law. Such proceedings are aimed at protecting the interest of particular creditors, specifically, of those creditors that have a secured interest in the assets of the debtor. See Fletcher, Insolvency in Private International Law, *supra* note 1 at 455.
[249] The Model Law, *supra* note 18 art 2 (a).
[250] The Guide to Enactment, s*upra* note 223 at para 69.
[251] Fletcher, s*upra* note 1 at 456.

law administrative receivership would not be a proceeding covered by the Model Law provisions due to its non-collective nature[252].

3.4.2 Types of Debtors Covered

The Model Law is intended to apply to any proceeding that satisfies the requirements set in the definition provided for "foreign proceedings"[253]. That definition encompasses any foreign proceeding independent of the nature or status of the debtor under national law[254]. However, the drafters of the Model Law considered that exceptions in the application of the Model Law to certain debtors were warranted. Article 1 paragraph 2 expressly provides that an enacting state may designate any type of entities, such as financial services institutions or insurance companies, which will be excluded from the scope of application of the Model Law provisions enacted in that state[255]. The reason that justifies the flexibility of excluding certain entities from the scope of application of the Model Law is that ordinary insolvency law does usually not cover such entities[256]. Countries create special insolvency regimes for such entities because their insolvency "gives rise to the particular need to protect vital interests of a large number of individuals, and… requires particular prompt and circumspect action (for instance to avoid massive withdrawals of deposits)"[257]. These special insolvency regimes may not be fully susceptible to the application of the Model Law[258]. For instance, article 14 of the Model Law provides for notification of creditors whenever a local insolvency proceeding is commenced; however, the application of this article may not be compatible with the objectives of a special insolvency regime that require

[252] *Ibid* at 455.
[253] The Guide to Enactment, s*upra* note 223 at para 60.
[254] *Ibid*.
[255] The Model Law, *supra* note 18 art 1 (2).
[256] Guide to Enactment, s*upra* note 223 at para 61.
[257] *Ibid.*
[258] *Report of the Working Group on Insolvency Law on the Work of its Nineteenth Session*, UNCITRALOR, 29th Sess, UN Doc A/CN.9/422, (1996) at para 42 [The Working Group's Nineteenth Session Report].

prompt and discrete action in order to avoid massive withdrawals of deposits in case of a financial institution insolvency[259].

Nevertheless, the enacting states are advised not to exclude all the cases of insolvency of these entities[260]. For instance, enacting states may wish to recognize pursuant to the Model Law provisions a foreign insolvency proceeding commenced in respect of a bank when the activity of that bank on the territory of the recognizing state is not subject to the national regulatory scheme[261]. Similarly, the enacting state may not wish to limit the right of the insolvency representative to seek recognition of a local insolvency proceeding in regard to a bank even if the insolvency of such entities is subject to special regulatory schemes in the enacting state[262].

Furthermore, the enacting state may also exclude from the scope of the Model Law the insolvency of other entities that play an important role in the functioning of society, for instance public utility companies, such as electricity companies and railroad companies, which are usually subject to special insolvency regimes[263].

In addition, the enacting states that do not have provisions for the insolvency of consumers or give special treatment to these types of insolvencies may exclude from the scope of the Model Law the insolvencies that relate to consumers, but they are advised to exclude only the insolvency of the consumers whose debts do not exceed a certain monetary ceiling[264]. To be noted is that the drafters of the Model Law do not advise to exclude all the insolvencies of

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[259] *Ibid*.
[260] The Guide to Enactment, s*upra* note 223 at para 63.
[261] *Ibid*.
[262] *Ibid* at para 64.
[263] Berends, A Comprehensive Overview, s*upra* note 230 at 325, 326.
[264] The Guide to Enactment, s*upra* note 223 at para 66. The Guide to Enactment defines consumers at paragraph 66 as "natural persons residing in the enacting State whose debts have been incurred predominantly for personal or household purposes, rather for commercial or business purposes… non-traders".

natural persons. Such exclusion would unnecessarily limit the scope of application of the Model Law. It is frequently the case that natural persons conduct significant commercial activities in international trade without assuming "any particular corporate garb" [265].

3.5 Access and Assistance

3.5.1 Authority to Act Abroad

Courts asked for assistance by foreign insolvency representatives often wish to be assured that the foreign representatives have authority to act abroad from the jurisdiction where they were appointed as insolvency representatives, especially with respect to the debtor's foreign located assets[266]. UNCITRAL found that express legislative authorization for insolvency representatives to act abroad was absent in some countries[267]. The absence of such express legislative authority introduces uncertainty that in turn increases the workload of insolvency representatives and subsequently the costs of insolvency proceedings[268]. To reduce uncertainty in cross-border insolvency cases, article 5 of the Model Law expressly authorizes insolvency representatives to act in foreign states on behalf of the insolvency proceeding in which they were appointed[269]. This provision only gives insolvency representatives the power to act abroad, but the applicable foreign law determines the extent of their power[270].

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[265] Working Group on Insolvency Law, *Possible Issues Relating to Judicial Cooperation and Access and Recognition in Cases of Cross-Border Insolvency*, UNCITRALOR, 18th Sess, UN Doc A/CN.9/WG.V/WP.42, (1995) at para 36.
[266] *Report of the Working Group on Insolvency Law on the Work of its Eighteenth Session*, UNCITRALOR, 29th Sess, UN Doc A/CN.9/419, (1995) at para 36 [The Working Group's Eighteenth Session Report].
[267] The Guide to Enactment, s*upra* note 223 at para 27.
[268] "Unpredictability almost invariably leads to increased efforts, expense and delay on the part of the parties involved in the issue", see the Expert Committees' Report, *supra* note 214 at 146.
[269] The Model Law, *supra* note 18 art 5.
[270] *Ibid*.

Similarly, article 25 of the Model Law authorizes the courts to cooperate and communicate directly with foreign courts and foreign representatives in cross-border insolvency cases[271]. This article provides the needed legislative authority for courts that cannot operate outside the areas of express legislative authorization to cooperate with foreign courts and foreign representatives[272]. It also adds clarity about the authority to cooperate for courts that have cooperated thus far on the basis of judicial discretion[273].

3.5.2 Foreign Representative's Access to Courts of the Enacting State

The Model Law grants foreign representatives the right to directly access the courts of the enacting states[274]. This provision eliminates the need for the foreign representatives to meet such requirements as licences and consular action that some countries require in order to grant access to their courts[275]. In this way, the Model Law emphasizes the importance of quick action in cross-border insolvency cases. However, to be able to exercise this right, a foreign representative should fall within the scope of the definition of "foreign representative" provided by the Model Law[276]. That definition states that a "foreign representative means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding"[277].

The definition is formulated broadly in order to avoid the unnecessary limitation of the scope of application of the Model Law. It refers to both the insolvency representatives that are natural

[271] *Ibid* at art 25 (2).
[272] The Guide to Enactment, s*upra* note 223 at para 174.
[273] *Ibid*.
[274] The Model Law, *supra* note 18 at art 9.
[275] The Guide to Enactment, s*upra* note 223 at para 93.
[276] Fletcher, Insolvency in Private International Law, s*upra* note 1 at 473.
[277] The Model Law, *supra* note 18 at art 2 (d).

persons and those that are bodies appointed to administer the insolvency of debtors. Allowing a body appointed to administer the reorganization or the liquidation of a debtor to be recognized as a foreign representative, the Model Law removes the exclusion from its scope of application those types of proceedings where the debtor remains in control of its assets (for instance, the debtor in possession proceedings)[278].

In addition to authorizing the foreign representatives to directly access the courts in the enacting states, the Model Law gives them the right to commence local insolvency proceedings in enacting states[279]. This right can be exercised before or after an application for recognition of the foreign proceeding is made by the foreign representative in the courts of the enacting states pursuant to the provisions of the Model Law (the right to apply for recognition and the conditions and effects of recognition are discussed in later sections of this thesis). Moreover, it can be exercised even when recognition of the foreign proceeding requested by the foreign representative is refused.

The purpose of this provision is to enhance the efficiency of foreign representatives' actions to avoid the dissipation of the debtors' assets. The commencement of a local insolvency proceeding will usually have the effect of staying the individual legal actions of creditors against the debtor's assets and of precluding the debtors to dispose of their assets[280]. The foreign representative can use this provision when the commencement of a local insolvency proceeding

[278] The drafters of the Model Law considered that the expression "a body… to administer the reorganization or the liquidation of the debtor' assets or affairs" might be sufficient to express the point that the insolvency proceedings that allow the debtor to stay in control of its assets and affairs are covered by the Model Law, see the discussions of the UNCITRAL Working Group on Insolvency as reported in the Working Group's Eighteenth Session Report, *supra* note 266 at paras 115, 116.
[279] The Model Law, *supra* note 18 at art 11.
[280] Fletcher, Insolvency in Private International Law, s*upra* note 1 at 474, 475.

would be a more efficient way to stop the dissipation of assets than the application for recognition of the foreign proceeding would be[281].

It is to be noted that the foreign representative is entitled to commence an insolvency proceeding "if the conditions for commencing such a proceeding are otherwise met"[282]. Thus, the Model Law does not try to establish any exceptions in favour of foreign representatives to the need to satisfy the conditions for opening an insolvency proceeding imposed by the law of the enacting state[283].

In order to prevent insolvency representatives from avoiding petitioning for recognition and assistance from some jurisdictions the Model Law provides a measure of protection for foreign representatives. Article 10 of the Model Law states that an application under the Model Law provisions in a court of the enacting state by a foreign representative does not subject the foreign representative or the assets of the debtor under the supervision of the foreign representative to the jurisdiction of the court receiving the application for any purpose other than the application[284]. According to the laws of some jurisdictions, any voluntary appearance in that jurisdiction will justify the assumption of jurisdiction over that person even on matters unrelated to the cause of the appearance[285]. This article provides that the court in the enacting state will not

[281] *Ibid*; For instance, when a foreign representative applies for recognition of the foreign non-main proceeding, the granting of the recognition does not give rise to an automatic stay of actions and proceedings. Furthermore, even if the foreign representative applies for relief available upon recognition of a foreign non-main proceeding relief can be granted only in relation to assets that should be administered in the foreign non-main proceeding (the Model Law, *supra* note 18 at art 21(3)). Thus, in these circumstances and in the absence of a recognition of a foreign main proceeding (such recognition would trigger an automatic stay of individual proceedings of creditors against the debtor and suspension of the debtor's right to dispose of its assets, see the Model Law, (*ibid)* at art 20(1)) the commencement of a local insolvency proceeding would be a more efficient way than the application for recognition of the foreign non-main proceeding to avoid the dissipation of assets.
[282] The Model Law, *supra* note 18 at art 11.
[283] Fletcher, Insolvency in Private International Law, s*upra* note 1 at 475.
[284] The Model Law, *supra* note 18 at art 10.
[285] Fletcher, Insolvency in Private International Law, s*upra* note 1 at 474.

assume jurisdiction over the foreign representative (for instance, in matters concerning the foreign representative personally), or over the assets under the supervision of the foreign representative on the sole ground that the foreign representative made an application in the enacting state[286]. In the absence of such a provision, a foreign representative might avoid making an application in certain jurisdictions, and thus, endanger the efficient resolution of a cross-border insolvency case[287].

However, the protection that the foreign representative receives under article 10 is qualified[288]. The courts retain the jurisdiction to deal with the acts of foreign representatives that offend against their laws[289].

3.5.3 Access of Foreign Creditors to Courts of the Enacting State

Article 13 paragraph 1 of the Model Law states that foreign creditors have the right to commence and participate in an insolvency proceeding in the enacting state in the same manner and to the same extent as local creditors[290]. According to this provision, foreign creditors will still have to satisfy all the requirements set in the national laws of the enacting states for the commencement of proceedings, filing of claims or making petitions to courts, since this provision establishes equal treatment of all creditors. Although the Model Law recognizes that creditors should be

[286] The Guide to Enactment, s*upra* note 223 at para 94.
[287] Sarra, Janis "Northern Lights, Canada's Version of the UNCITRAL Model Law on Cross-Border Insolvency" (2007) 16:1 IIR 19 at 40 [Sarra, Northern Lights].
[288] Guide to Enactment, s*upra* note 223 at 95.
[289] *Ibid*. "For example, a tort or a misconduct committed by the foreign representative may provide grounds for jurisdiction to deal with the consequences of such an action by the foreign representative. Furthermore, the foreign representative who applies for relief in the enacting State will be subject to conditions that the court may order in connection with relief granted (article 22, paragraph 2)" *Ibid*.
[290] The Model Law, *supra* note 18 at art 13 para 1. The terms "foreign creditors" and "local creditors" are not defined by the Model Law. Because countries use different criteria to establish who should be regarded as foreign or local creditors, it would be difficult to formulate a uniform definition. See The Guide to Enactment, *supra* note 223 at para 163.

treated equally, it does not venture that foreign creditors be placed on equal footing with their local counterparts in the process of asset distribution. It only prescribes a minimum standard of treatment of foreign creditors[291]. Paragraph 2 of article 13 states that the claims of foreign creditors should not be ranked lower than the class of general unsecured creditors except when an equivalent local claim would rank lower than the class of general unsecured creditors. The Model Law presents as an example the treatment of claims for penalty or deferred payment claims as claims that are usually ranked lower than the class of general unsecured creditors.

The Model Law makes one more exception to the equal treatment of creditors rule. In a footnote to article 13 paragraph 2, it introduces an alternative wording of this paragraph that allows enacting states to exclude foreign tax and social security claims from the distribution process of the local proceedings[292]. The justification for granting such flexibility to enacting states is the reluctance of some states to enforce foreign public authorities' claims for policy reasons[293]. Failing to provide for the option to exclude foreign tax and social security claims from local proceedings would have affected the acceptability of the Model Law by these countries. Furthermore, this alternative paragraph introduces certainty into cross-border insolvency cases. In some states, the question whether the enforcement of foreign tax claims in cross-border insolvencies should be refused for policy reasons is not entirely settled[294]. Incorporating this alternative paragraph that expressly gives an answer to the question whether the foreign tax claims and other public authorities claims will be accepted in the process of asset distribution in

[291] The Model Law, *ibid* at art 13(2); Sarra, Northern Lights, *supra* note 287 at 52; Clift, *supra* note 241 at 321.
[292] The Model Law, *supra* note 18 at art 13 n 2.
[293] Fletcher, Insolvency in Private International Law, s*upra* note 1 at 476, 477.
[294] New Zealand. Law Commission, *Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency?* (Wellington, NZ: The Commission, 1999) at 51.

local insolvency proceedings makes it clear to foreign public authorities what their position will be in the local insolvency proceeding of the enacting state.

Granting the right of direct access to courts in the enacting states to foreign creditors would be meaningless without establishing a mechanism for notifying foreign creditors of the commencement of insolvency proceedings in the enacting states so as to give them the chance to file claims and protect their rights. Article 14 of the Model Law states the rules for notification of foreign creditors[295]. In line with the equal treatment rule, paragraph 1 of this article states that notification should be given to foreign creditors whenever such notification is required for local creditors according to the national law of the enacting states. Independent of the traditional methods for notification of local creditors, the enacting states must notify foreign creditors individually unless the court considers that the circumstances warrant the use of other means of notification (for example, when individual notice would prove to be too costly for the proceedings)[296]. Nevertheless, enacting states are advised not to use letters rogatory or other similar formal methods of notification, as these are too time-consuming[297].

In addition, the Model Law establishes the minimum information that the notice of commencement of insolvency proceedings to foreign creditors should contain[298]. Thus, a notice to foreign creditors should indicate the time period and place for the filing of claims, and should include any other information that is required by national law or courts to be included in a notification to local creditors and should specify whether secured creditors need to file secured claims. The last requirement was introduced for the protection of the interests of foreign secured

[295] The Model Law, *supra* note 18 at art 14.
[296] The Guide to Enactment, s*upra* note 223 at para 107.
[297] The Model Law, *supra* note 18 at art 14(2).
[298] *Ibid* at art 14(3).

creditors. Countries differ as to the need to file secured claims and as to the effects of filing or failing to file secured claims[299]. In some countries, filing a secured claim results in waiving that secured claim, while in other countries the secured claim is waived if it is not filed[300]. Warning the foreign secured creditors of these effects in the notice will help them protect their rights more effectively.

The Model Law leaves the issue of the language in which the notification should be made to foreign creditors to be decided by enacting states.

3.6 Recognition of Foreign Proceedings

3.6.1 Decision Whether to Recognize a Foreign Proceeding

Recognition of a foreign proceeding under the Model Law has important effects on the resolution of insolvency cases. For instance, after a foreign proceeding is recognized the foreign representative is allowed to take action to avoid the dissipation and concealment of the debtor's assets. Recognizing that for this to be effective such an action must be triggered early on, the Model Law obligates the courts to decide on the application for recognition of a foreign proceeding "at the earliest possible time"[301]. The Model Law not only establishes an obligation for the courts to decide quickly on the application for recognition, but it also provides a simplified system for the process of recognition of foreign proceedings. This process, under the Model Law, becomes almost automatic[302]. If the four criteria that article 17 establishes are met,

[299] Fletcher, Insolvency in Private International Law, s*upra* note 1 at 478.
[300] The Guide to Enactment, s*upra* note 223 at para 111.
[301] The Model Law, art 17 para 3.
[302] Sarra, Northern Lights, *supra* note 287 at 46.

then the foreign proceeding for which recognition is requested has to be recognized unless the public policy exception is invoked[303].

The four criteria are as follows. First, the foreign proceeding should be a proceeding within the meaning of subparagraph (a) of article 2 that defines the term "foreign proceeding". Second, the foreign representative that applies for recognition should be the one that was appointed in the proceeding that is requested to be recognized. In addition, the foreign representative must be a person or body within the meaning of subparagraph (d) of article 2 that determines the meaning of the term "foreign representative". Third, the application for recognition must meet the procedural requirements for such an application indicated by paragraph 2 of article 15. Fourth, the application has to be submitted to the competent court or authority that has jurisdiction to receive such applications according to the law of the enacting state.

To simplify the process of recognition of foreign proceedings even further, the Model Law imposes a limited list of procedural requirements for an application for such recognition. First, it requires that a certified copy of the decision to commence the foreign insolvency proceeding and to appoint the foreign representative accompany the application. Alternatively, the foreign representative could attach to the recognition application a certificate from the foreign court confirming the fact of commencement of the foreign proceeding and of the appointment of the foreign representative[304]. In the absence of such evidence, the foreign representative is allowed to present any other evidence that the court where the application for recognition is made considers acceptable[305]. Furthermore, in line with the objective of simplifying the process of recognition of foreign proceedings, the Model Law allows the courts to presume that the

[303] The Model Law, *supra* note 18 at art 17(1).
[304] *Ibid* at *a*rt 15(2) (a), (b).
[305] *Ibid* at *a*rt 15(2) (c).

documents that accompany the application are authentic, whether they are legalized or not[306]. Legalization is a procedure that presupposes the certification of documents by authorities such as diplomatic or consular agents[307]. This is a complex and time-consuming procedure. Instituting a presumption in favour of the authenticity of the documents submitted in support of the application for recognition, and removing the necessity of legalization of these documents, simplifies and expedites the recognition process.

Article 15 establishes two additional procedural requirements for an application for recognition[308]. First, the foreign representative must inform the court of all foreign proceedings commenced with regard to the debtor and that are known to the foreign representative. This requirement is not necessary for the decision on recognition, but for a subsequent decision on granting relief in favour of the foreign proceeding in case the foreign representative applies for such relief. The information about the existence of other foreign insolvency proceedings with regard to the debtor will assist the court in deciding the scope of that relief[309]. Second, the recognizing court may, but is not required to, request from the foreign representative a translation of the documents that are attached to the application for recognition of the foreign proceeding[310]. Not requiring a translation in cases when such translation is not warranted shortens the time and reduces the costs of the recognition process.

The Working Group on Insolvency considered the issue of whether or not reciprocity should be included as a requirement for recognition[311]. The argument in favour of the inclusion of

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[306] *Ibid* at *a*rt 16(1), (2).
[307] Guide to Enactment, s*upra* note 223 at paras 113, 114.
[308] The Model Law, *supra* note 18 at art 15(3), (4).
[309] Guide to Enactment, s*upra* note 223 at paras 117, 118.
[310] The Model Law, *supra* note 18 at art 15 (4).
[311] The Working Group's Eighteenth Session Report, s*upra* note 266 at paras 42 – 45.

reciprocity as a requirement for recognition suggested that such a requirement would accelerate the process of harmonization of cross-border insolvency laws by putting pressure on countries that have not yet adopted the Model Law to adopt it. However, this argument was not accepted. Because the term reciprocity had differing interpretation in distinct legal systems, and because it would have been difficult to determine whether reciprocal treatment was or would actually be accorded, the inclusion of the reciprocity as a requirement for granting recognition would have contributed to uncertainty, an effect that the Working Group was committed to reduce in the context of cross-border insolvencies. Furthermore, the inclusion of such a requirement was seen as inconsistent with the aim of the Model Law to promote greater international cooperation in cross-border insolvencies.

Under the Model Law, only the foreign representatives have the right to apply for recognition of a foreign proceeding[312]. There were suggestions in the Working Group to extend this right to creditors[313], since creditors were thought to have an interest in causing the courts to cooperate in cross-border insolvencies, especially when there were not enough assets in their jurisdiction to satisfy their claims. However, this argument was not successful. Since a foreign representative was viewed as more informed about the financial status of the debtor and the course of the insolvency proceeding than creditors, it was considered that the foreign representative was a more appropriate person to decide whether an application for recognition should be brought[314]. After all, a foreign representative, as an insolvency representative, is presumed to act in the interest of all the creditors. If the foreign representative decides not to bring an application for recognition, then creditors can be assured that this decision serves their interests. Thus, creditors,

[312] The Model Law, *supra* note 18 at art 15(1).
[313] *Supra* note 38 at 351; Report of the Working Group on Insolvency on Insolvency Law on the Work of its twenty-first session, 19 February 1997, UN Doc. A/CN.9/435 at para 167.
[314] Berends, A Comprehensive Overview, s*upra* note 230 at 351.

under the Model Law provisions, are not granted the right to apply for recognition of foreign proceedings.

3.6.2 Main and Non-Main Proceedings

Another important component in the process of the recognition of a foreign proceeding under the Model Law is the duty of the recognizing court to categorize the foreign proceeding under consideration. Depending on the jurisdictional basis on which the foreign court commenced the foreign proceeding, the court shall recognize the foreign proceeding as a "main" or "non-main" proceeding[315]. This determination is an important part of the Model Law scheme. The degree of assistance in the form of relief and judicial cooperation is contingent on the type of recognized foreign proceeding.

The foreign proceeding shall be recognized as a main proceeding if it takes place in the enacting state where the debtor has its "centre of main interests" (COMI). The Model Law does not define the concept of COMI, but the Commission does not leave the enacting countries without any guidance. This concept is assimilated from the European Union Convention on Insolvency Proceedings[316] that never came into force, but its text is incorporated into the EC Regulation on International Insolvency (the Regulation)[317] that is now part of the law of all the Member States of the European Union, except for Denmark[318]. The function that it serves in the context of the Regulation is distinct from that that it serves under the Model Law. The presence of COMI on the territory of a Member State of the European Union gives to the competent court of that state

[315] The Model Law, *supra* note 18 at art 17(2).
[316] The European Union Convention on Insolvency Proceedings opened for signature in Brussels on November 23 1995 and signed by 14 Member States out of 15 Member States (the United Kingdom was the state that did not signed it), see Fletcher, Insolvency in Private International Law, *supra* note 1 at 352 n 37.
[317]The Regulation, *supra* note 21.
[318] Fletcher, Insolvency in Private International Law, s*upra* note 1 at 352 – 358.

jurisdiction to commence a main insolvency proceeding[319]. Thus, under the Regulation the concept of COMI is part of a rule governing jurisdiction in insolvency matters, while under the Model Law it is part of a rule on recognition of foreign proceedings. The Working Group considered that this distinction did not warrant a differing interpretation of the concept under the Model Law[320]. By choosing to use this concept over other proposed alternative ones, the Working Group intended to promote harmony and consistency with respect to terminology used in the cross-border insolvency regulation area[321]. In view of this circumstance, the explanation of COMI provided by the Regulation and jurisprudence interpreting the Regulation is relevant to the interpretation of this concept by courts in states that enact the Model Law. Furthermore, recent amendments to the Guide to Enactment quote the Regulation and its explanatory report (The Virgos – Schmit Report[322]) as guidance for the interpretation of the concept of COMI[323]. The Regulation indicates that COMI "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by the third parties"[324]. The reason for adopting such an explanation is simple[325]. As it will be seen, a main

[319] The Regulation, *supra* note 21 at art 3(1).
[320] UN, *Legislative Guide on Insolvency Law*, (New York: UN, 2005), online: <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> at 41 [Legislative Guide on Insolvency].
[321] The Working Group's Nineteenth Session Report, *supra* note 258 at paras 88 - 90.
[322] The Virgos Schmitt Report, *supra* note 180, is an explanatory report written to facilitate the interpretation of the European Convention on Insolvency. Although the Convention failed to enter into force, the report is considered an authoritative guidance for the interpretation of the Regulation.
[323] The Commission at its 46th session, 8-26 July 2013, adopted the revisions to the Guide to Enactment of the Model Law prepared by the Working Group on Insolvency. These revisions are directed at providing further guidance on the interpretation and application of selected concepts of the Model Law, among them is the concept of COMI (United Nations Commission on International Trade Law, *Provisional Agenda, Annotations thereto and Scheduling of Meetings of the Forthy-Sixth Session*, UNCITRALOR, 46th Sess, UN Doc A/CN.9/759, (2013) at paras 19, 20). The guidance provided for the interpretation of COMI contains quotes from the recitals (12) and (13) of the Regulation (these recitals explain the concept of COMI) and from the Virgos-Schmit Report (United Nations Commission on International Trade Law, Working Group V (Insolvency Law), *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, UNCITRALOR, 43d Sess, UN Doc A/CN.9/WG.V/WP.112, (2013) at paras 31, 31A-C [UN Doc, Interpretation and Application of Selected Concepts]).
[324] The Regulation, *supra* note 21 at recital 13.

insolvency proceeding, under both regulatory instruments, may be allowed to enjoy broad extraterritorial effects and to encompass all the debtor's assets wherever located. Therefore, potentially, it will have the greatest impact on the creditors' rights in the event of their debtor's insolvency. As insolvency is a foreseeable risk, it is important to enable potential creditors to assess how the insolvency of their future debtor will affect their rights. Interpreting COMI, the indicator of the jurisdiction of the main insolvency proceeding, as the place "ascertainable by third parties" enables potential creditors to calculate the legal risk assumed through dealing with their future debtor in case of its insolvency.

To expedite the evidentiary process, the Model Law establishes the presumption that the debtor's registered office, or habitual residence in the case of individuals, in the absence of proof to the contrary, is the debtor's COMI[326]. However, there will often be cases when the debtor does not carry on any business activity in the territory of the jurisdiction where its registered office is placed. For instance, a debtor may choose to have its registered office in a state only for tax purposes, and aside from a letterbox have nothing in that state[327]. To avoid the recognition of a foreign proceeding commenced in the jurisdiction of the registered office, when the debtor has no other substantial connection to that jurisdiction, as the main proceeding, the Model Law provides for the possibility of rebuttal of this presumption[328]. Nevertheless, the Model Law does not provide any guidance as to what proof would be relevant to rebut the presumption[329].

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[325] The Virgos – Schmitt Report, s*upra* note 180 at para 75.
[326] The Model Law, *supra* note 18 at art 16(3).
[327] Berends, A Comprehensive Overview, s*upra* note 230 at 330.
[328] Guide to Enactment, s*upra* note 223 para 122.
[329] Sarra, Janis "Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies" (2008) 17:2 IIR 73 at 102 [Sarra, Maidum's Challenge].

Since the successful operation of the Model Law's legal framework requires that the administration of a debtor's cross-border insolvency be centralized in a single jurisdiction, a consistent determination of the debtor's COMI is also required in each particular case, by recognizing courts sitting in different jurisdictions. Nevertheless, the drafters of the Model Law encourage courts to make decisions regarding the COMI of a debtor free of any COMI determinations in respect of the same debtor made by courts in other jurisdictions. Even if a recognizing court may rely on relevant information as to COMI contained in decisions and orders of foreign courts, that information is "not determinative or binding"[330] on the recognizing court, which would have to independently satisfy itself about the location of the debtor's COMI[331].

Much has been written about the use of COMI as the indicator of the main proceeding[332]. The main criticism is the fact that the concept of COMI as provided by the Model Law does not easily facilitate the resolution of cross-border insolvencies of business enterprise groups[333]. The explanation is as follows. Business enterprise groups are groups that consist of a number of individual legal entities. The Model Law provides that the determination of COMI has to be made in respect of each individual legal entity. Thus, a court asked to recognize foreign

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[330] *Report of Working Group V (Insolvency Law) on the Work of its Fortieth Session*, UNCITRALOR, 45th Sess, UN Doc A/CN.9/738, (2012) at para 34.

[331] *Ibid* at para 35; *Report of the Working Group V (Insolvency Law) on the Work of its Fortieth-Second Sess,* UNCITRALOR, 46th Sess, UN Doc A/CN.9/763, (2013) at para 30; See also the *Report to the International Bar Association on the Twenty-Second Session of UNCITRAL Working Group V (Insolvency Law), Vienne, November 2012* at p 2, online: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=7C066E65-A0E7-405C-AAEB-731A8D2F365B> , "Based on remarks of some of the world's leading insolvency jurists, the Working Group agreed that courts called upon to recognize main insolvency proceedings pending in other jurisdictions should remain free to make their own determinations as to COMI as might be required by national law, irrespective of other courts' findings."

[332] For instance, see Sarra, Maidum's Challenge, s*upra* note 329, Westbrook, Jay Lawarence, "Locating the Eye of the Financial Storm" (2007) 32:3 Brook J Int'l L 1019 [Westbrook, The Eye of the Storm]; LoPucki, Lynn M., "Universalism Unravels" (2005) 79:1 Am Bankr LJ 143 [LoPucki, Universalism Unravels] and Bomhof, Scott A. & Adam M. Slavens, "Shifting Gears in Cross-Border Insolvencies: From Comity to COMI" (2008) 24:1 BFLR 31.

[333] LoPucki, Universalism Unravels, *supra* note 332; Sarra, Maidum's Challenge, s*upra* note 329 at 116.

proceedings commenced in respect of legal entities that are members of the same business enterprise group, will have to determine separately the COMI of each legal entity. If such court finds that different members of the same group have their respective COMIs in different jurisdictions, more than one court may be empowered to administer main proceedings in the context of cross-border insolvency of the group. There are cases in which the reorganization of a business enterprise group is more efficient when it is administered under the supervision of a single leading court[334]. Accordingly, in such cases, the concept of COMI may hamper the resolution of such groups' reorganizations. This is all the more important in that business enterprise groups are a wide spread form of conducting business, and many cross-border insolvencies involve members of such groups[335].

A court will recognize as a foreign non-main proceeding, a foreign proceeding, other than the foreign main proceeding, that is opened in the jurisdiction where the debtor has an establishment[336]. As in the case of COMI, the term "establishment" and its definition are borrowed from the text of the Regulation for reasons of consistency in terminology in cross-border insolvency legislation. The Model Law defines this term as "the place of operation where the debtor carries out non-transitory economic activity with human means and goods or services"[337].

Allowing for recognition of foreign proceedings commenced in jurisdictions where the debtor has an establishment is meant to protect the interests of potential creditors concluding contracts

[334] Sarra, Maidum's Challenge, s*upra* note 329 at 116.
[335] Sarra, Northern Lights, s*upra* note 287 at 43.
[336] The Model Law, *supra* note 18 at art 17(2) (b).
[337] *Ibid* at art 2 (f). This definition corresponds to the definition provided in article 2 (h) of the Regulation. The only difference is that the drafters of the Model Law added the words "or services".

with local establishments[338]. Foreign companies that conduct economic activities through local establishments should be subject to the same rules as local companies. Thusly, a potential creditor entering into contracts with a local establishment will not have to inquire whether the establishment is of a local or a foreign company. Accordingly, they will incur the same information costs and legal risks whether they deal with a local or a foreign company.

As under the Model Law, a court is obligated to recognize a foreign proceeding only when it is either commenced in the jurisdiction of the debtor's COMI or in the jurisdiction where the debtor has an establishment. It follows that a foreign proceeding commenced in a jurisdiction that has neither the COMI of the debtor nor one of its establishments will not be recognized. For instance, foreign proceedings opened on the basis of the presence of the debtor's assets in the jurisdiction will not enjoy the benefits of recognition under the Model Law provisions[339]. Despite that, the Model Law is not entirely against such rules of assumption of jurisdiction in insolvency matters[340]. According to article 28, a local insolvency proceeding may be commenced in the enacting state provided that the debtor has assets located in its territory. Nevertheless, the effects of such insolvency proceeding are limited to those assets and other assets of the debtor that should be administered in that proceeding[341]. In addition, foreign proceedings commenced based on the presence of assets, and other foreign proceedings that do not receive recognition, can still derive benefits from the Model Law provisions, specifically from those that deal with matters of cooperation with foreign courts and foreign representatives[342]. According to these provisions, cooperation with foreign courts and foreign representatives does not require prior recognition of

[338] The Virgos – Schmitt Report, s*upra* note 180 at para 71.
[339] Fletcher, Insolvency in Private International Law, s*upra* note 1 at 458.
[340] *Ibid.*
[341] The Model Law, *supra* note 18 at art 28.
[342] *Ibid* at art 25 – 27; Fletcher, Insolvency in Private International Law, *supra* note 1 at 459.

the foreign proceeding with the courts and foreign representatives of which cooperation is wanted or needed[343].

3.7 Relief

The principle underlying the approach that the Model Law adopts with respect to the effects of foreign proceedings in the recognizing state is that recognition of a foreign proceeding does not import into the recognizing state the effects that the recognized proceeding has under its national law[344]. Instead, the Model Law establishes a minimum list of forms of relief that the recognized foreign proceeding can enjoy in the recognizing jurisdiction. The minimum list includes the type of relief that is needed to avoid the dissipation of the debtors' assets[345]. The relief included in the minimum list is either triggered automatically by recognition or is given at the discretion of the recognizing court. This relief is complemented by any other type of relief that would be available to a local insolvency representative under local insolvency laws[346]. This last provision reveals that the Model Law favours the application of the law of the recognizing jurisdiction when determining the scope of the relief instead of favouring the application of the law of the originating jurisdiction. The reason for favouring an approach based on the application of the law of the recognizing jurisdiction was that courts find it easier to apply their own laws than to apply foreign laws[347]. Thus, this approach would make the granting of relief to foreign proceedings more likely and make the Model Law more acceptable for adoption[348].

[343] Guide to Enactment, s*upra* note 223 at para 117.
[344] Berends, A Comprehensive Overview, s*upra* note 230 at 372.
[345] The Working Group's Eighteenth Session Report, s*upra* note 266 at para 57.
[346] *Ibid* at paras 53-59.
[347] *Ibid* at para 51.
[348] *Ibid*.

Providing a minimum list of relief available to foreign representatives has one more function. It assures the insolvency representatives that the basic relief necessary for the administration of the debtor's assets will be available to assist him or her in foreign jurisdictions that enacted the Model Law, as the relief in this minimum list may not be otherwise included in the insolvency laws of those foreign jurisdictions.

3.7.1 Interim Relief

In order to protect the interests of all the creditors as a whole and to preserve the value of assets that, due to their nature or circumstances, are susceptible to devaluation or dissipation, the Model Law provides that provisional relief be available from the time of filing an application for recognition until the application is decided upon[349]. Under this rule, courts have the discretion to grant provisional relief only at the request of the foreign representative and only if such relief is urgently needed to protect the assets of the debtor or the interests of the creditors; for instance, when there is a need to prevent some creditors from gaining an advantage over other creditors by taking individual actions in the jurisdiction where an application for recognition is sought.

Article 19 paragraph 1 provides for the following non-exhaustive list of measures that a court may grant in favour of the foreign proceeding: the staying of execution against the debtor's assets; entrusting the administration or realization of the debtor's assets to the foreign representative or another person designated by the court; and any relief included in paragraph 1 (c), (d) and (g) of article 21 (types of relief available after recognition is granted at the discretion

[349] The Model Law, *supra* note 18 art 19.

of the court)[350]. The provisional relief granted terminates when the recognition is decided upon, unless the court decides to extend it[351].

3.7.2 Automatic Relief

According to article 20, recognition has certain automatic effects when it is given with respect to a foreign main proceeding. Those effects are the stay of individual actions of creditors against the debtor' assets, rights, obligations or liabilities and the suspension of the debtor's rights to transfer, encumber or otherwise dispose of any of its assets[352]. These are effects that usually flow from the commencement of a local insolvency proceeding in various countries. Their purpose is to give the insolvency representative time to reorganize or liquidate the debtor by preventing the creditors from realizing their claims to assets and preventing the debtor from concealing or disposing of its assets[353]. Thus, allowing foreign proceedings to enjoy these effects in the recognizing country promotes order, efficiency and fairness in the administration of cross-border insolvency cases[354]. In addition, requiring that such relief flow automatically from recognition in combination with a simplified process of recognition allows foreign representatives to prevent the dissipation of the debtors' assets in a timely manner.

The apparently broad scope of the automatic stay and suspension of rights that flows from recognition is nevertheless limited by exceptions included in paragraph 2 of the same article. The scope of the automatic stay and suspension of rights, its modification or termination, is subject to any exceptions, limitations, modifications or termination that a similar stay and suspension of

[350] *Ibid a*rt 19(1).
[351] *Ibid* at art 19(3).
[352] *Ibid a*rt 20(1).
[353] Sarra, Northern Lights, *supra* note 287 at 48.
[354] *Ibid*.

rights triggered by the commencement of a local insolvency proceeding would be subject to under local insolvency laws[355]. For instance, local laws may provide that the stay will not prevent a secured creditor from exercising its enforcement remedies against the secured assets or the debtor from dealing with its assets in the ordinary course of business[356].

The Model Law allows for two more exceptions to the automatic stay and suspension of rights. First, the automatic stay and suspension of rights does not affect the right to commence individual actions and proceedings in order to protect a creditor's interest[357]. The rational for this exception is that the stay and suspension that flows from recognition does not trigger the cessation of the running of the limitation period for claims, so creditors are allowed to commence individual actions to establish their claims[358]. Nevertheless, no enforcement will be allowed to be taken on any judgment obtained in such actions[359]. Second, the automatic stay and suspension of rights does not affect the right to commence local insolvency proceedings and to file claims in such proceedings[360]. This exception clarifies that the recognition of a foreign proceeding in the enacting state will not preclude the commencement of local insolvency proceedings[361].

3.7.3 Discretionary Relief

According to article 21, after recognition of a foreign proceeding, where necessary to protect the assets of the debtor or the interests of the creditors, the recognizing court may grant relief at the

[355] The Model Law, *supra* note 18 at art 20(2).
[356] Guide to Enactment, s*upra* note 223 at para 148.
[357] The Model Law, *supra* note 18 at art 20(3).
[358] Guide to Enactment, s*upra* note 223 at paras 151, 152
[359] *Ibid.*
[360] The Model Law, *supra* note 18 at art 20(4).
[361] Guide to Enactment, s*upra* note 223 at para 153.

request of the foreign representative[362]. Such discretionary relief may be given in favour of both a main and a non-main foreign proceeding.

This article establishes a minimum list of relief that a court may grant in respect of a recognized foreign proceeding[363]. The minimum list is not exhaustive, but is merely illustrative of the most frequent types of relief that are given in insolvency cases, and can be combined with relief that would be available to a local insolvency representative under the local insolvency laws[364]. Among the reliefs listed in article 21 are the granting of orders to stay individual actions of creditors and suspend the debtors' rights to dispose of its assets to the extent that they were not stayed as a result of recognition. Under this provision, the court may extend the scope of the relief that flows from recognition. For instance, the court may order a stay of the enforcement of secured claims if such enforcement was allowed to be commenced or continue notwithstanding the granting of recognition. Other orders that the court has the discretion to make pursuant to this provision are orders to facilitate access of the foreign representative to information about the debtor's estate, orders to designate the foreign representative or another person to administer and realize all or part of the debtor's assets located in the recognizing state and orders to extend the interim relief granted at the time of application for recognition[365]. It should be noted that an order authorizing the foreign representative to administer and realize the debtor's assets located in the recognizing state does not imply giving the right to the foreign representative to take them for distribution to creditors under the foreign proceeding[366]. To acquire this right a foreign

[362] The Model Law, *supra* note 18 at art 21.
[363] *Ibid,* at art 21(1).
[364] *Ibid,* at art 21(1) (g).
[365] *Ibid,* at art 21(1) (d), (e).
[366] Berends, A Comprehensive Overview, s*upra* note 230 at 370.

representative should obtain a separate court order as provided by article 21, paragraph 2[367]. The consequence of such an order is the remittal of those assets to the foreign proceeding where those assets will be distributed according to the laws of the foreign proceeding[368]. It is common ground that national insolvency laws establish different distributional rules giving priority and privileges to different classes of creditors[369]. In order to protect the expectations of creditors regarding their rank and privileges in a distribution process, the Model Law allows the courts to order the remittal of assets to a foreign proceeding only after the court is satisfied that the interests of the local creditors are adequately protected[370].

Also, under article 21, if a foreign proceeding is a foreign non-main proceeding, the court has the discretion to grant such relief as that which flows automatically from the recognition of a foreign main proceeding, such as the stay of individual actions against the debtor and the suspension of the right of the debtor to dispose of its assets[371]. This highlights the differential treatment that the Model Law adopts towards main and non-main proceeding. The stay is mandatory in case of recognition of a main proceeding and only discretionary in case of recognition of a non-main proceeding. A further distinction the Model makes between these two categories of foreign proceeding is limiting the scope of any relief granted in favour of a foreign non-main proceeding. In other words, the relief granted to a foreign non-main proceeding is limited to the assets that under the law of the recognizing state should be administered in the foreign non-main proceeding and to information required in that proceeding[372]. But what are the assets that *should* be

[367] The Model Law, *supra* note 18 at art 21(2).
[368] Fletcher, Insolvency in Private International Law, s*upra* note 1 at 469.
[369] Garrido, José M., "No Two Snowflakes the Same: The Distributional Question in International Bankruptcies" (2011) 46:3 Tex Int'l LJ 459 [Garrido, The Distributional Question].
[370] The Model Law, *supra* note 18 at art 21(2).
[371] Sarra, Northern Lights, *supra* note 287 at 49.
[372] The Model Law, *supra* note 18 at art 21(3).

administered in a foreign non-main proceeding? One author suggests that assets removed by the debtor on the eve of insolvency from the jurisdiction of the foreign non-main proceeding to that of the recognizing court, and fraudulently reducing the pool of assets available for distribution in the foreign non-main proceeding, could be a type of asset that should be administered in the foreign non-main proceeding[373]. A further possibility may be when it can be established that all or some of the assets located in the recognizing country are more closely associated with a foreign establishment where the recognized foreign non-main proceeding is commenced[374]. For instance, when it can be shown that the assets located in the recognizing jurisdiction were assets used for the operation of the foreign establishment.

3.7.4 Protection of Creditors and Other Interested Persons

The Model Law establishes several measures that can be employed by the courts to ensure that the interests of creditors and other interested persons, when relief in favor of a foreign proceeding is granted, are protected. First, The Model Law allows that the scope of automatic relief in favor of a foreign main proceeding, provided by article 20, to be subject to any exceptions, limitations, modifications and termination established by the law of the recognizing court[375]. Second, it provides that courts, when granting or denying relief granted under article 19 and 21 (that regulate interim and discretionary relief respectively), or when modifying or terminating such relief, be satisfied that the interests of the creditors and other interested persons are adequately protected[376]. Third, it empowers the courts to subject relief granted under article

[373] Berends, A Comprehensive Overview, s*upra* note 230 at 371.
[374] Fletcher, Insolvency in Private International Law, s*upra* note 1 at 470.
[375] The Model Law, *supra* note 18 at art 20(2).
[376] *Ibid*, at art 22(1).

19 and 21 to any conditions it considers appropriate[377]. Finally, it gives procedural standing to the foreign representative or a person affected by interim or discretionary relief to petition for modification or termination of such relief[378]. These measures seem to protect the individual interests of creditors that may be affected by the granting of relief to foreign proceedings as opposed to the collective interests of all creditors generally.

Although by introducing these measures the Model Law emphasizes the importance of protecting the individual interests of creditors, it does not give them an overriding importance over the other interests and objectives that the Model Law seeks to protect and to promote, such as maximization of the value of the debtor's assets and facilitation of the rescue of financially troubled businesses. The Guide to Enactment states that "there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief…[this] balance is essential to achieve the objectives of cross-border insolvency legislation" [379]. The Model Law gives enough flexibility to courts to achieve a fair balance between the individual interests of creditors and the relief granted to foreign representatives. The Model Law does not suggest that courts refuse to grant relief altogether when such relief would affect individual creditors' interests. Instead, it uses broad terms as "adequate protection" [380] or "conditions [the courts] considers appropriate" that leave the court enough flexibility to decide how to tailor the relief that it may grant to foreign representatives in such a manner as to not adversely affect the creditors' interests. For instance, when a remittal of local assets for distribution under a foreign proceeding, requested by a foreign representative

[377] *Ibid, at* art 22(2).
[378] *Ibid,* art 22(3).
[379] Guide to Enactment, *supra* note 223 at para 161.
[380] For an analysis of the concept "adequate protection" see Yamauchi, Keith D., "The UNCITRAL Model Cross-Border Insolvency Law: The Stay of Proceedings and Adequate Protection" (2004) 13:2 IIR 87.

under article 21 paragraph 2, would adversely affect the interests of a local creditor, instead of refusing to grant such relief altogether and commencing a local insolvency proceeding to distribute those assets, which would be wasteful, the courts could subject the granting of such relief to any conditions that would ensure that the interests of the local creditor will be adequately protected in the foreign proceeding.

3.7.5 Other Type of Relief

After recognition of the foreign proceeding has been granted, the foreign representative appointed in that foreign proceeding is entitled to institute avoidance actions ("actions to avoid or otherwise render ineffective acts detrimental to creditors"[381]) under the courts of the recognizing jurisdiction[382]. It is to be noted that this provision only grants procedural standing to the foreign representative to commence avoidance actions; it does not intend to create substantive rights or affect the choice of avoidance rules established in the enacting states[383].

Strong arguments were advanced against this provision at the time of its drafting[384]. The provision was said to increase uncertainty about concluded or performed transactions. This provision creates the possibility of avoiding a transaction under a law other than the law expected by the party entering in such a transaction to apply. Consider the following example:

> A debtor incorporated in Barbados (with its COMI in Barbados) has placed a deposit with the London branch of a UK bank in order to secure the debtor's guarantee in respect of a loan facility granted by the bank to the debtor's parent in the US. The guarantee is governed by New York law and provides that if the debtor defaults under the guarantee, the bank could set off the deposit against the

[381] The Guide to Enactment, *supra* note 223 at para 165.
[382] The Model Law, *supra* note 18 at art 23(1).
[383] The Guide to Enactment, s*upra* note 223 at para 166. See also Ho, Look Chan, "Conflict of Laws in Insolvency Transaction Avoidance" (2008) 20:1 SAC LJ 343 [Ho, Transaction Avoidance] for a discussion of the complex situations in which the issue of choice of avoidance law could arise.
[384] The Thirtieth Session Report, *supra* note 18 at para 214.

> debtor's guarantee obligations. Both the debtor and its parent become insolvent. The debtor goes into Barbados liquidation and the liquidator applies to the English court for recognition and relief under the [English] Model Law in order to avoid the guarantee.[385]

If the English court where the avoidance action was commenced applies its rules of avoidance, as it normally does in a local insolvency proceeding[386], then the avoidance action may unnecessarily affect the interest of the bank, which did not expect that a transaction governed by New York law entered into with a debtor whose COMI is in Barbados will be rendered ineffective by the application of English law.

However, the drafters decided to include this provision in the final text of the Model Law, as "the right to commence such actions is essential to protect the integrity of the assets of the debtor and is often the only realistic way to achieve such protection"[387].

Also upon recognition of foreign proceeding, the foreign representative acquires the right to participate in a local insolvency proceeding[388] and to intervene in individual court actions or other proceedings instituted by the debtor against third parties or by third parties against the debtor[389]. These provisions only give procedural standing to the foreign representative and do not intend to establish a privileged status for the foreign representative, namely the foreign representative will have to comply with any existent conditions under local law for bringing such actions[390].

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[385] Ho, Transaction Avoidance*, supra* note 383 at 350.
[386] *Ibid*.
[387] Guide to Enactment, *supra* note 223 at para 167.
[388] The Model Law, *supra* note 18 at art 12.
[389] *Ibid,* at art 24.
[390] Guide to Enactment, *supra* note 223 at paras 101, 170.

3.8 Cross-Border Cooperation

One of the stated objectives of the Model Law is to promote cross-border cooperation[391]. Cooperation in cross-border insolvency cases will enable courts and insolvency representatives to achieve efficient results[392]. It may often be the only way to prevent dissipation of the debtor's assets or maximization of the value of those assets[393]. For instance, cooperation could facilitate the selling of assets located in more than one country together, when those assets are worth more if sold together than if sold separately, or the formulation of a better plan for the reorganization of the debtor[394].

The Model Law sets out an obligation to cooperate for courts and insolvency representatives. Article 25 specifies that a "court shall cooperate to the maximum extent possible with foreign courts or foreign representatives"[395]. The same duty is imposed on insolvency representatives: article 26 states that the person or body administering a reorganization or liquidation under the law of the enacting state "shall cooperate to the maximum extent possible with foreign courts or foreign representatives"[396]. Nevertheless, the same provision states that the insolvency representatives' acts of cooperation are subject to the supervision of the courts that appointed these representatives[397]. The Model Law does not intend to modify the rules of the enacting states regarding the supervisory powers of the courts, though the Guide for enactment advises

[391] The Model Law, *supra* note 18 at Preamble (a).
[392] Guide to Enactment, *supra* note 223 at para 173.
[393] *Ibid.*
[394] *Ibid*.
[395] The Model Law, *supra* note 18 at art 25.
[396] *Ibid*, at art 26.
[397] *Ibid.*

that courts in exercising those powers allow for a certain degree of initiative on the part of the insolvency representative for practical reasons[398].

The inclusion of a rule on cooperation serves to fill the gap in the legislation of countries that do not expressly authorize courts to cooperate with their foreign counterparts or foreign representatives in cross-border insolvency cases[399]. This provision could be particularly useful in civil law countries where courts can only act within the confines established by legislation[400]. However, it could prove useful in common-law countries also, by clarifying any uncertainty regarding the right of courts to cooperate with their foreign counterparts or foreign representatives in cross-border insolvency cases [401].

Recognizing the need for urgent action in insolvency cases, the Model Law empowers the courts and insolvency representatives to communicate directly with, or request assistance directly from, foreign courts or foreign representatives[402]. The purpose of this provision is to avoid the use of time-consuming means of cooperation, such as letters rogatory or communication through higher courts[403].

It is to be noted that the Model Law allows cooperation with foreign courts and foreign representatives administering a foreign proceeding that is not yet recognized or is refused recognition[404].

[398] Guide to Enactment, *supra* note 223 at para 180.
[399] *Ibid* at para 174.
[400] Berends, A Comprehensive Overview, *supra* note 230 at 379.
[401] Sarra, Northern Lights, *supra* note 287 at 51.
[402] The Model Law, at art 25(2), 26(2).
[403] Guide to Enactment, *supra* note 223 at para 179.
[404] Berends, A Comprehensive Overview, *supra* note 230 at 380.

Even if the Model Law establishes an obligation to cooperate, it does give to courts and insolvency representatives the flexibility to decide the degree of that cooperation and the forms of its implementation[405]. By adding the words "to the maximum extent possible", the Model Law allows the courts and insolvency representatives to limit the degree of cooperation to the extent necessary to comply with any substantive or procedural rules established by their national law[406]. For instance, their national law may limit the exchange of some information regarding the debtor in order to protect the debtor's privacy, or it may mandate that appropriate safeguards for the protection of the parties involved in the cross-border insolvency case be taken into the process of communication with foreign courts, such as notification to creditors about such communication[407]. Furthermore, the flexibility given to courts in respect to their right to cooperate is suggested by article 27, which provides a non-exhaustive list of forms of cooperation[408]. The forms listed are only possible forms of cooperation that a court may use in cross-border insolvency cases, such as appointment of a person or body to act at the direction of the court[409] or approval or implementation by courts of agreements concerning the coordination of proceedings[410]. By including a non-exhaustive list, the Model Law gives to the courts the discretion to adopt the appropriate form of cooperation as the circumstances of the case and their national laws dictate.

[405] Fletcher, Insolvency in Private International Law, *supra* note 1 at 480.
[406] Berends, A Comprehensive Overview, *supra* note 230 at 379.
[407] *Ibid* at 380.
[408] The Model Law, *supra* note 18 at art 27 (f).
[409] *Ibid* at art 27 (a).
[410] *Ibid* at art 27 (d).

3.9 Coordination of Concurrent Proceedings

The Model Law accepts the commencement of concurrent insolvency proceedings in different jurisdictions regarding the same debtor, a type of situation that is characteristic of the state of the administration of cross-border insolvencies before the adoption of the Model Law. Concurrent insolvency proceedings are often accompanied by competition between the courts that supervise those proceedings for control over the debtor's assets, which results in conflicting claims for jurisdiction over the debtor's assets[411]. The Model Law tries to address these difficulties, not by eliminating the possibility of commencing concurrent insolvency proceedings, but by establishing rules for coordination of these proceedings.

The rules for coordination of concurrent insolvency proceedings formulated by the Model Law can be placed within two main categories. The first category concerns rules that coordinate a local insolvency proceeding with recognized foreign proceedings regarding the same debtor. The second category concerns rules that coordinate more than one recognized foreign proceeding regarding the same debtor.

The rules in the first category address two types of situations. One is when the local proceeding is already commenced at the time an application for recognition of the foreign proceeding is filed. In this situation, the court must ensure that any relief granted to the foreign proceeding is consistent with the local proceeding in the recognizing state[412]. Additionally, the existence of a local insolvency proceeding at the time recognition is granted to a foreign main proceeding makes article 20, which provides for the automatic stay of individual actions of creditors against

[411] Fletcher, Insolvency in Private International Law, *supra* note 1 at 482.
[412] The Model Law, *supra* note 18 at art 29 (a) (i).

the debtor and for the suspension of the right of the debtor to dispose of its assets, inoperative[413]. The principle derived from these provisions is that the existence of a local insolvency proceeding does not preclude the recognition of a foreign proceeding[414]. This is important as recognition will facilitate cooperation and will allow foreign representatives to apply for relief that is available after recognition is granted, although the relief that the recognizing court may offer will be limited to the extent necessary so as to be consistent with the local proceeding.

The other situation that the rules for coordination of a local proceeding with foreign proceedings address is when the local proceeding commences after recognition or after the filing of the application for recognition of a foreign proceeding. In this situation, any relief granted to the foreign proceeding shall be modified or terminated if inconsistent with the local proceeding[415]. Furthermore, if the recognized foreign proceeding is a foreign main proceeding, the automatic relief accorded pursuant to article 20 will be modified or terminated if it is inconsistent with the local proceeding[416]. A principle embodied by these provisions is that the recognition of a foreign proceeding, either main or non-main, does not preclude the commencement of a local proceeding.

Nevertheless, when a foreign main proceeding has already been recognized at the time an application for the commencement of a local insolvency proceeding is filed there are certain limitations on the jurisdiction of the courts to commence such local proceeding and to the scope of that local proceeding[417]. According to this provision, a court can commence a local proceeding only if the debtor has assets in the jurisdiction of that court. Furthermore, the effects of such a

[413] *Ibid*, at art 29 (a) (ii); Clift, *supra* note 241 at 329.
[414] Guide to Enactment, *supra* note 223 at para 189.
[415] The Model Law, *supra* note 18 at art 29 (b) (i).
[416] *Ibid* at art 29 (b) (ii).
[417] *Ibid* at art 28.

local proceeding will be restricted to the assets of the debtor located in the jurisdiction where it was commenced and to other such assets that are located abroad, but that should be administered in that local proceeding[418]. The purpose of this rule is to avoid potential conflicts of jurisdiction between the foreign main proceeding and the local proceeding over the debtor's assets as both, under their national laws, could otherwise claim universal effect[419].

Another principle embodied by the rules that govern coordination between a local proceeding and foreign proceedings is the prevalence of the local proceeding over the foreign proceedings[420]. By establishing this principle, the Model Law avoids interfering with the autonomy of the enacting states to administer insolvency cases on their territory according to the policies that these countries established for such administration[421]. Nevertheless, the Model Law does not establish a rigid hierarchy between the foreign main proceeding and the local proceeding, since that would affect the ability of courts to cooperate and exercise their discretion when granting relief to the foreign representatives[422].

Article 30 provides the rules from the second category; these are the rules that coordinate more than one foreign proceeding regarding the same debtor when these proceeding seek relief in the recognizing state. The principles that govern these rules are the following: first, the relief granted to a foreign non-main proceeding must be consistent with the relief granted to a foreign main

[418] *Ibid*.
[419] Fletcher, Insolvency in Private International Law, *supra* note 1 at 482.
[420] Guide to Enactment, *supra* note 223 at para 190.
[421] Fletcher, Insolvency in Private International Law, *supra* note 1 at 484.
[422] Guide to Enactment, s*upra* note 223 at para 190.

proceeding[423]; second, relief granted to a non-main proceeding must be tailored so as to be consistent with relief granted to other non-main proceedings[424].

Other rules of coordination of concurrent proceedings are the presumption of insolvency based on recognition of a foreign main proceeding and "the hotchpot rule". Article 31 establishes the rebuttable presumption that the recognition of a foreign main proceeding is proof that the debtor is insolvent. This presumption simplifies the evidentiary process for the commencement of a local proceeding when proof that the debtor is insolvent is required for such proceedings to be commenced[425]. This provision will prove to be useful when the commencement of a local proceeding is "urgently needed for the protection of local creditors"[426]. Nevertheless, the presumption is rebuttable, and the courts may still require that the insolvency of the debtor be proved[427]. Furthermore, the presumption will apply only if the main proceeding is recognized in the jurisdiction where commencement of a local proceeding is sought; the mere existence of a main proceeding regarding the debtor does not make this presumption operative[428].

The hotchpot rule is a rule of payment of creditors in concurrent proceedings. This rule intends to calculate the payment to be given to a creditor in a local insolvency proceeding by taking into account the payment received by this creditor in a foreign insolvency proceeding[429]. According to article 30, a creditor who has received partial payment in respect of its claim in a foreign insolvency proceeding cannot receive payment in a local proceeding until other creditors of the

[423] The Model Law, *supra* note 18 at art 30 (a), (b).
[424] *Ibid* at art 30 (c).
[425] Guide to Enactment, *supra* note 223 at paras 194, 195.
[426] *Ibid* at para 197.
[427] *Ibid*.
[428] Yamamoto, Kazuhiko, "New Japanese Legislation on Cross-Border Insolvency as Compared with the UNCITRAL Model Law" (2002) 11:2 IIR 67 at 94 [Yamamoto, New Japanese Legislation].
[429] Bang-Pedersen, Urlik Rammeskow, "Asset Distribution In Transnational Insolvencies: Combining Predictability and Protection of Local Interests" (1999) 73:2 Am Bankr LJ 385 at 388.

same rank in this proceeding receive a portion of their claims equivalent to that received by the creditor in the foreign proceeding[430]. Conversely, a creditor that has received partial payment in a foreign proceeding that constitutes a smaller portion of his or her claim than the portion that other creditors of the same rank are entitled to receive in the local proceeding will receive payment in a local proceeding to the extent necessary so as to put him or her in an equal position with the other creditors of the same rank in the local proceeding. However, a creditor that has received a greater portion of his or her claim in the foreign proceeding than the portion that other creditors of the same rank in the local proceeding are entitled to receive will be allowed to keep what he or she received in the foreign proceeding[431]. The purpose of this rule is to guarantee that a creditor will not receive a more favourable treatment as a result of its opportunity to file its claim and to obtain satisfaction for its claim in multiple insolvency proceedings[432].

The hotchpot rule has to be applied without prejudice to secured claims or rights in rem[433]. For instance, a creditor's claim against the debtor has both a secured and unsecured part; this creditor receives full payment on its secured claim in a foreign proceeding and, later, participates in a local proceeding in an enacting state for the unsecured balance of its debt; in this case, the part of the payment that the secured creditor has already received for the secured part of its original

[430] The Model Law, *supra* note 18 at art 32. The following example is given in the Guide to Enactment: "an unsecured creditor has received 5 per cent of its claim in the foreign proceeding; that creditor also participates in the insolvency proceeding in the enacting State. Where the rate of distribution is 15 per cent; in order to put the creditor in the equal position as the other creditors in the enacting State, the creditor would receive 10 per cent of its claim in the enacting State", see The Guide to Enactment, *supra* note 223 at para 198.
[431] Han, Min, "The Hotchpot Rule in Korean Insolvency Proceedings" (2007) 7 J Korean L 445 at 457 [Han, The Hotchpot Rule]; Berends, A Comprehensive Overview, *supra* note 230 at 394.
[432] The Guide to Enactment, *supra* note 223 at para 198.
[433] The Model Law, *supra* note 18 at art 32. The Guide to enactment defines "secured claims" as "claims guaranteed by particular assets" and "rights in rem" as "rights relating to a particular property that are enforceable also against third parties", *supra* note 223 at para 200.

claim will not be taken into account for the purpose of calculating the amount that this creditor is entitle to receive in the local proceeding for the unsecured part of its claim[434].

The hotchpot rule as enacted by the Model Law does not include in the calculation of the payment that a creditor is entitled to receive in a local proceeding the payments received by the creditor outside of a foreign insolvency proceeding[435]. Examples of such payments are the payments received in foreign individual execution actions instituted by the creditor against the debtor or voluntary payments out of the debtor's assets located abroad[436]. The Model Law left to the discretion of the enacting states to decide how to deal with such payments[437].

3.10 The Public Policy Exception and International Obligations

The Model Law authorizes courts to refuse to take any action governed by the provisions of the Model Law enacted in their countries if those actions would be manifestly contrary to the public policy of their state[438]. Thus, the public policy exception could be invoked by courts to refuse to grant recognition of foreign proceedings, relief and any other action that the Model Law mandates or encourages courts to take. In view of the potentially wide range of applications of the public policy exception, its broad interpretation could hamper the achievement of the Model Law objectives[439]. In order to reduce this risk, the Model Law introduced the phrase "manifestly

[434] Fletcher, Insolvency in Private International Law, *supra* note 1 at 485.
[435] Yamamoto, New Japanese Legislation, *supra* note 428 at 95; Han, The Hotchpot Rule, *supra* note 431 at 457.
[436] *Ibid*.
[437] Han, The Hotchpot Rule*, supra* note 431 at 457.
[438] The Model Law, *supra* note 18 at art 6.
[439] The Working Group's Eighteenth Session Report, *supra* note 266 at para 40.

contrary to the public policy"[440], suggesting that courts in the enacting states interpret the exception restrictively[441].

Another rule that sets the limits of the scope of application of the Model Law is provided by article 3. It specifies that if there is a conflict between the provisions based on the Model Law in the enacting state and an obligation of that state arising out of any treaty or agreement, the obligation of the treaty or agreement prevails[442]. This provision merely restates a principle of international law that establishes the supremacy of international obligations over national law[443]. This principle, if applied frequently, would affect the goal of the Model Law of promoting cooperation and predictability in cross-border insolvencies[444]. It is advisable that courts interpret the scope of application of international treaties that their countries are part of with care. It might be the case that certain treaties, even if they address matters related to access to courts, cooperation between courts or recognition of foreign judgments, are not intended to apply in cross-border insolvency cases[445].

3.11 Is Modified Universalism the Theoretical Basis of the Model Law?

To summarize from the second chapter of this thesis, modified universalism is based on a combination of principles borrowed from both universalism and territorialism. Modified universalism claims that a debtor should have a "home country" for insolvency purposes and that courts located in other countries than the home country should recognize the insolvency proceeding commenced in the home country of the debtor as the controlling proceeding for the

[440] The Model Law, *supra* note 18 at art 6.
[441] The Guide to Enactment, s*upra* note 223 at para 89.
[442] The Model Law, *supra* note 18 at art 3.
[443] Guide to Enactment, *supra* note 223 at para 76.
[444] *Ibid* at para 77.
[445] Berends, A Comprehensive Overview, *supra* note 230 at 334.

administration of that debtor's cross-border insolvency and should allow that proceeding to have broad effects on their territory. This first principle is borrowed from universalism.

At the same time, modified universalism, recognizes the territorialist concerns, and states that the proceeding commenced in the home country should enjoy only such effects in other countries that are consistent with the local public policy and legal values[446].

To show further deference to the public policy and legal values of countries, modified universalism allows the commencement of local proceedings in respect of the same debtor, even when an insolvency proceeding is taking place in the home country of the debtor[447]. To reduce the situations of conflict that could arise from concurrent proceedings, modified universalism suggests using a system of rules for coordination of these concurrent proceedings and rules for the cooperation between the courts and other authorities involved in the administration of the cross-border insolvency of the same debtor[448].

A study of the articles of the Model Law reveals that the Model Law embodies the principles of modified universalism. The universalism principle is the basis of the articles that govern the relief granted to a foreign main proceeding. According to article 20, the recognition of the foreign main proceeding triggers an automatic stay of individual actions of creditors against the debtor and suspension of the debtor's right to dispose of its assets; and, according to article 21, the foreign representative appointed in the foreign main proceeding may receive additional relief with respect to any of the debtor's assets or affairs located in the territory of the recognizing

[446] Fletcher, Insolvency in Private International Law, *supra* note 1 at 15 – 17, the author discusses the need for an "Internationalist Principle" that actually represents a description of the modified universalism theory. See also, Westbrook, Global Solution, *supra* note 13 at 2300; Pottow, Procedural Incrementalism, *supra* note 150 at 952.
[447] Fletcher, Insolvency in Private international Law, *ibid* at 16.
[448] *Ibid* at 17.

court. These articles, in combination with article 21 paragraph 2 (that govern the remittal of assets for administration in the foreign proceeding), suggest that the main proceeding is allowed to act as the controlling proceeding over the administration of the debtors assets. This claim is further supported by the discrimination that the Model Law makes in favour of the foreign main proceeding over the foreign non-main proceeding. Any relief that the foreign non-main proceeding may receive has to be related to the assets that should be administered in the foreign non-main proceeding or to information required in that proceeding. In addition all this relief must be consistent with the relief granted to a foreign main proceeding.

The deference to territorialist concerns is shown in the articles that establish the public policy exception and in the articles that provide for the protection of the individual creditors' interests. Those articles entitle the courts to refuse to grant recognition or relief to the foreign main proceeding, or condition, modify or terminate that relief, if acting otherwise would be against the public policy or would adversely affect the interests of individual creditors.

As well as modified universalism, the Model Law allows for the commencement of concurrent proceedings regarding the same debtor as acknowledged by article 28, which allows the commencement of a local proceeding even after the recognition of a foreign main proceeding. It also provides rules of coordination of the concurrent proceedings (articles 28 - 30) and cooperation between courts and other authorities involved in the administration of the cross-border insolvency (articles 25 – 27).

The next chapter is concerned with establishing whether modified universalism provides an effective mechanism for dealing with cases of cross-border insolvency so as to further the objectives of efficiency, fairness, predictability and protection of local interests on a practical

level. In other words, the next chapter will be concerned with determining whether the application of a law based on the modified universalism theory to actual cross-border cases furthers these objectives. Accordingly, the Model Law, being a law based on the modified universalism theory, can be used for the purposes of the next chapter.

CHAPTER 4: The Application of the Model Law

This chapter discusses the application of the provisions of the Model Law as enacted by Canada and Great Britain[449]. In Canada, the Model Law was incorporated in Part IV of the Companies' Creditors Arrangement Act (CCAA)[450] and Part XIII of the Bankruptcy and Insolvency Act (BIA)[451]. In Great Britain, the Model Law was incorporated in Schedule 1 of the Cross-Border Insolvency Regulations 2006 (CBIR)[452]. Great Britain enacted the Model Law almost verbatim. The modifications that Great Britain made to the Model Law's text were only those that were needed to incorporate the Model Law into its insolvency law regime[453]. On the other hand, Canada has adopted the Model Law in a considerably modified form. In view of this circumstance, an analysis of the application of the relevant provisions of the CCAA and BIA by courts will provide meaningful insight into the question of the workability of the Model Law's legal framework only if those provisions when not enacted verbatim will nevertheless lead to results consistent with those contemplated by the Model Law. For this reason, this chapter first assesses the compliance of the relevant provisions of CCAA and BIA within the scheme of the Model Law. Next, this chapter discusses the application of the Canadian and British versions of the Model Law provisions governing recognition, determination of COMI, and relief. This chapter determines whether the application of these provisions promotes the objectives of the Model Law.

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[449] This thesis is focused on the application of the version of the Model Law as enacted by Great Britain. For this reason, reference is made only to Great Britain and not to the United Kingdom of Great Britain and Northern Island. The Northern Ireland has also enacted the Model Law, but through the *The Cross-Border Insolvency Regulations (Northern Ireland) 2007*, SR 2007/115.

[450] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 [CCAA].

[451] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 [BIA].

[452] *The Cross-Border Insolvency Regulations 2006*, SI 2006/1030 [CBIR].

[453] Ho, Look Chan, "Applying Foreign Law – Realising the Model Law's Potential" (2010) JIBLR 552 at 1 n 1 [Ho, Applying Foreign Law].

4.1 Canadian Versions of the Model Law

Part IV of the CCAA and Part XIII of the BIA enact certain provisions of the Model Law with modifications and omit other such provisions. These parts, when interpreted in the general context of the whole Canadian body of laws, provide mechanisms for solving cross-border insolvency cases equivalent to those available under the Model Law[454]. An analysis of the compliance of the Canadian version of the Model Law with the Model Law can be conducted under three subheadings[455]. The first subheading concerns provisions that, even if not identical to the corresponding Model Law provisions, considerably reflect those provisions. The second subheading concerns provisions that differ considerably from the text of their analogous Model Law provisions. The third subheading concerns provisions that are omitted in the relevant parts of the CCAA and the BIA.

4.1.1 Canadian Provisions that Considerably Reflect the Model Law Provisions

The Canadian versions of the Model Law enact the preamble of the Model Law that spells out the objectives of this act for cross-border insolvencies almost verbatim[456]. Similarly enacted are the provisions that formulate the definitions of foreign proceeding, foreign main proceeding, foreign representative and foreign court. It is worth noting that the definitions of foreign

[454] Bélenger, Philippe H. & Neil A. Peden "The Changing Framework Relating to the Recognition of Cross-Border Insolvencies in Canada and the United States" (2005) Annual Review of Insolvency Law 203 at 223 – 225 [Bélenger].

[455] This categorization is inspired by the categorization provided in Ziegel, Jacob S. "Cross-border Insolvencies" in Anthony J. Duggan & Stephanie Ben-Ishai, *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond/Edited by Stephanie Ben-Ishai and Anthony Duggan*, (Markham, Ont: LexisNexis, 2007) at 296 [Ziegel, Cross-Border Insolvencies].

[456] CCAA, *supra* note 4450 s 44; BIA, s*upra* note 451 s 267.

proceeding and foreign representative differ under the CCAA and the BIA. The difference is needed to reflect the distinct purposes that these two acts serve[457].

Also, without significant departure from the original provisions, the following provisions are enacted:

- the provision authorizing a person to act on behalf of the local insolvency proceeding in a foreign state[458];
- the provision concerning the public policy exception[459];
- the provision limiting the enacting state courts' power to assume jurisdiction over the foreign representative[460];
- the provision authorizing the foreign representative to commence insolvency proceedings in the enacting state[461];
- the provisions governing the application for recognition of a foreign proceeding[462];
- the provision establishing the presumption that the registered office of a debtor company, and the habitual residence in case of individuals, is the debtor's COMI[463];

[457] For instance, under the CCAA s 45 (1) the term "foreign proceeding" is defined as "a judicial or administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for purpose of reorganization", while under the BIA s 268 (1) the definition is entirely similar except that the BIA includes the words at the end of the definition "or liquidation". These words are included to make the definition consistent with the purpose that the BIA serves, meaning that is an act that governs both reorganization and liquidation proceedings.
[458] The Model Law, *supra* note 18 at art 5; CCAA, *supra* note 450 at s 56; BIA, *supra* note 451 at s 279.
[459] The Model Law, *ibid* at art 6; CCAA, *ibid* at s 60 (2); BIA, *ibid* at s 284 (2).
[460] The Model Law, *ibid* at art 10; CCAA, *ibid* at s 57; BIA, i*bid* at s 280.
[461] The Model Law, *ibid* at art 11; CCAA, *ibid* at s 51; BIA, *ibid* at s 274.
[462] The Model Law *ibid* at art 15, 16 (1); CCAA, *ibid* at s 46; BIA, *ibid* at s 269.
[463] The Model Law *ibid* at art 16 (3); CCAA, *ibid* at s 45 (2); BIA, *ibid* at s 268 (2).

- the provision requiring the foreign representative to provide information in respect of any change in its status or the status of the foreign proceeding and information about any proceedings in respect of the debtor commenced in foreign jurisdictions[464];
- the provision empowering the courts to impose any terms and conditions that it considers appropriate when granting relief in favor of a foreign proceeding[465];
- the provision listing the forms that cooperation can take between courts and insolvency representatives involved in different proceedings commenced in different jurisdictions in respect of the same debtor[466];
- the provision establishing the presumption of insolvency. However, the corresponding Canadian provisions have a broader scope. The Model Law establishes that the court is entitled to presume that the debtor is insolvent based on the recognition of the foreign main proceeding[467]. On the other hand, the CCAA and the BIA state that courts are entitled to presume that the debtor is insolvent based on the certified copy of the order commencing the foreign proceeding irrespective of whether that proceeding is a main or a non-main proceeding[468];
- the provision adopting the hotchpot rule[469]. By contrast to the original provision of the Model Law, the Canadian version includes into the calculation of the dividend of a creditor not only the amount that this creditor received in a foreign insolvency proceeding, but also the value of what the creditor received on account of his or her claim

[464] The Model Law *ibid* at art 18; CCAA, *ibid* at s 53; BIA, *ibid* at s 276.
[465] The Model Law *ibid* at art 22(2); CCAA, *ibid* at s 50; BIA, *ibid* at s 273.
[466] The Model Law *ibid* at art 27; CCAA, *ibid* at s 52 (3); BIA, *ibid* at s 275 (3).
[467] The Model Law *ibid* at art 31.
[468] CCAA, *supra* note 450 s 59; BIA, *supra* note 451 s 282.
[469] The Model Law, *supra* note 18 art 32.

by way of a transfer[470]. However, the transfer must be of a type that if it were subject to local law would be regarded as either a transfer that gives a preference to the creditor over other creditors or a transfer at an undervalue[471].

The enacting of these provisions with slight alterations to their text do not appear to lead to results in cross-border insolvency cases brought in front of the Canadian courts that would be inconsistent with those envisioned by the Model Law.

4.1.2 Canadian Provisions that Differ Considerably from the Model Law Provisions

There are a number of such provisions in the Canadian versions of the Model Law. One of these relates to the definition of a foreign non-main proceeding. The Model Law defines the foreign non-main proceeding as a foreign proceeding commenced in the jurisdiction where the debtor has an establishment[472]. The Canadian acts, instead, define the foreign non-main proceeding as "a foreign proceeding, other than the foreign main proceeding"[473]. Hence, the Canadian provisions do not require the presence of an establishment in the jurisdiction of the foreign proceeding to recognize that proceeding as a foreign non-main proceeding[474]. Due to this circumstance, the Canadian courts may recognize foreign proceedings commenced in jurisdictions where the debtor has no assets or no place of business[475]. The practical implication of this deviation is that Canadian courts will recognize as foreign non-main proceedings more

[470] CCAA, *supra* note 450 s 60 (1); BIA, *supra* note 451 s 283 (1).
[471] *Ibid.*
[472] The Model Law at article 2 defines the term establishment as "any place of operations where the debtor carries out a non-transitory activity with human means and goods or services".
[473] CCAA, *supra* note 450 s 45 (1); BIA, *supra* note 451 s 268 (1).
[474] Anderson, Andrew J. F., Stephanie Donaher & Adam Maerov, "UNCITRAL Eh? The Model Law and its Implications for Canadian Stakeholders" (2005) Ann Rev Insol L at 194.
[475] Ziegel, Cross-Border Insolvency, *supra* note 455 at 298.

foreign proceedings than will the courts in the states that enacted the relevant definition verbatim.

Another provision of the Model Law enacted by CCAA and BIA with substantial alterations to its text is the provision that governs the decision to recognize a foreign proceeding. The relevant Canadian provisions are shorter than the corresponding Model Law provisions; however, these are interpreted in combination with the provisions regarding the formal requirements of an application for recognition[476] and appear to require that the same conditions as under the Model Law be satisfied for the court to issue a recognition order[477].

The Canadian versions of the Model Law adopt the provisions of the Model Law relating to the relief that flows automatically from the recognition of a foreign main proceeding with significant changes, but these changes, after a more in-depth consideration, do not appear to be substantial. It is worth noting at this point that while both the CCAA and BIA provide for such automatic relief, the method of making that relief available is different under these two acts. Under the BIA the relief flows directly from the order recognizing the foreign main proceeding[478], while under the CCAA the court must make an additional order granting such relief[479]. This difference is introduced to mirror the method through which such relief is granted in local insolvency proceedings under these acts[480]. Nevertheless, this difference does not make such relief less available under the CCAA cross-border provisions than under those of the BIA since the courts,

[476] CCAA, *supra* note 450 s 46; BIA, *supra* note 451 s 269.
[477] Ziegel, Cross-Border Insolvency, *supra* note 455 at 299.
[478] BIA, *supra* note 451 s 271 (1).
[479] CCAA, *supra* note 450 s 48 (1).
[480] Sarra, Northern lights, *supra* note 287 at 47; In local insolvency proceedings, the stay of proceedings under the BIA flows automatically after the granting of the bankruptcy order while under the CCAA is derived from a court order. This distinction is made because of the need to tailor the stay according to the circumstances of the particular case in CCAA proceedings. See Wood, Bankruptcy, *supra* note 24 at 333.

under the CCAA regime, are *required*, after recognizing the foreign main proceeding, to make orders granting such relief[481].

After the recognition of a foreign main proceeding, both the CCAA and the BIA require that the commencement or the continuation of any action, execution or proceeding against the debtor is stayed, and the debtor is prohibited from disposing of its assets outside of the ordinary course of its business[482]. This stay and prohibition reflect the automatic relief adopted by the Model Law[483]. Also, in accordance with the Model Law, the Canadian provisions state that the scope of this stay and prohibition will be determined by the Canadian insolvency law. The CCAA provides that the order staying the actions against the creditor and prohibiting the debtor from disposing of its assets must be consistent with a similar order that may be granted in a local proceeding commenced under the CCAA[484]. Similarly, the BIA states that any exceptions that would have been applied if the foreign proceeding had been commenced under the BIA apply to this relief[485].

Also in accordance with the Model Law, the Canadian provisions state that the granting of automatic relief does not preclude the commencement of local insolvency proceedings[486]. Nevertheless, the Canadian provisions do not expressly provide that the stay of proceedings does not affect the right to commence actions needed for the protection of a right[487]. However, this omission is not material. Under both the CCAA and the BIA, the courts have the power to lift the

[481] CCAA, *supra* note 450 s 48 (1). It is worth noting that, as the studied Canadian jurisprudence shows, the fact that the court under the CCAA must make an additional order granting automatic relief has no timing implications. Namely, such relief is ordered at the same time when the court makes the order recognizing the foreign proceeding as a foreign main proceeding.
[482] CCAA, *supra* note 450 s 48 (1); BIA, *supra* note 451 s 271 (1).
[483] Sarra, Northern Lights, *supra* note 287 at 48.
[484] CCAA, *supra* note 450 s 48 (2).
[485] BIA, *supra* note 451 s 271 (3).
[486] CCAA, *supra* note 450 s 48 (4); BIA, *ibid* at s 271 (4).
[487] The Model Law, *supra* note 18 art 20 (3).

stay when a creditor is materially prejudiced by the existence of the stay in local insolvency proceedings[488]. This power is relevant in the cross-border insolvency context since, as was previously mentioned, the scope of the automatic relief is determined under Canadian insolvency law.

The Canadian versions of the Model Law, reflecting the Model Law, empower the courts to grant discretionary relief in addition to the automatic relief. Similar to the Model Law, it allows courts to make any order that it considers appropriate if it is satisfied that it is necessary for the protection of the debtor's property or the interests of the creditors[489]. However, the Canadian provisions, in contrast with the Model Law, provide for a shorter list of illustrative orders that a court may grant. Particularly, they omit the Model Law provision authorizing the courts to remit the local assets for distribution in the foreign proceeding. The reason for such omission, one author assumes, could be the fear of the Canadian drafters that courts might abuse the power given by such a provision[490]. However, the same author considers that this is a weak argument for excluding this provision since it could be brought against any provision that implies the application of discretionary powers[491]. Despite this omission, the Canadian courts have the authority through common law to remit local assets[492] with the exception of immovable property[493]. Nevertheless, in respect of immovable property, the courts have bypassed this exception by allowing a local receiver appointed by the foreign representative to take control of

[488] Sarra, Northern lights, *supra* note 287 at 49; Wood, Bankruptcy, *supra* note 24 at 157, 344.
[489] CCAA, *supra* note 450 s 49 (1); BIA, *supra* note 451 s 272 (1).
[490] Ziegel, Cross-Border Insolvencies, *supra* note 455 at 299.
[491] *Ibid*.
[492] *IIT (Re)* (1975), 58 DLR (3d) 55 (Ont SC) [*IIT (Re)]* cited in Ziegel, Jacob S., "Ships at Sea, International Insolvencies, and Divided Courts" (1998) 29 Can Bus LJ 417 at 426 [Ziegel, Ships at Sea].
[493] *Macdonald v. Georgian Bay Lumber Co.* (1878), 2 SCR 364 (SCC) [*Macdonald v. Georgian Bay]* cited in Ziegel, Ships at Sea, *ibid* at 426.

the debtor's property[494]. These rules are relevant in the post Model Law period as the Canadian Model Law includes a provision authorizing courts to apply "any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives"[495] to the extent they are not inconsistent with the provisions of the CCAA or the BIA. The effect that this provision is intended to have is consistent with the Model Law since the Model Law itself encourages the courts in enacting states to provide any additional assistance available to a foreign representative under local law[496].

The Canadian versions of the Model Law make one more alteration to the Model Law provision regulating discretionary relief. In contrast to the Model Law, it does not limit the discretionary relief granted in favor of a foreign non-main proceeding to assets that should be administered in the foreign proceeding and to information that is required in that proceeding[497]. The practical implication of this alteration is that a foreign non-main proceeding may enjoy more generous relief in Canada than in Model Law enacting countries that provide for such a limitation. However, this implication will not shatter the hierarchy between foreign main and non-main proceedings that the Model Law tried to establish by adopting this limitation. The Canadian versions of the Model Law have enacted the provision of the Model Law that ensures that any relief granted in favor of a foreign non-main proceeding will be revoked or amended if inconsistent with the relief granted in respect to a foreign main proceeding[498].

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[494] Duggan, Anthony J. & Jacob S. Ziegel, *Canadian Bankruptcy and Insolvency Law: Cases, Text and Materials*, 2d ed (Toronto: Emond Montgomery Publications, 2009) at 825 [Duggan, Canadian Bankruptcy].
[495] CCAA, *supra* note 450 s 61 (1); BIA, *supra* note 451 s 284 (1).
[496] The Model Law, *supra* note 18 art 7.
[497] The Model Law, *ibid* at art 21 (3); CCAA, *supra* note 450 s 49; BIA, *supra* note 451 s 272.
[498] CCAA, *ibid* at s 55 (1); BIA, *ibid* at s 278 (1).

Other provisions of the Model Law that Canadian legislators decided to adopt with alterations are those relating to cooperation between courts and insolvency representatives from different jurisdictions. The Canadian provisions do not state, as the Model Law does, that the Canadian courts and insolvency representatives are entitled to communicate with or request information from foreign courts and foreign representatives directly[499]. Nevertheless, this omission may not be material. The Canadian courts have communicated directly with their foreign counterparts and have requested information and assistance directly from foreign courts in a number of cases[500].

The Canadian provisions enact the Model Law provisions regarding coordination of concurrent proceedings with two significant changes. Under the Model Law, a local insolvency proceeding, after recognition of a foreign main proceeding, can be commenced only if the debtor has assets in the territory of the recognizing court[501]. The Canadian provisions permit the commencement of such local proceedings even in the absence of such assets. Also, the Model Law provides that such local proceedings should encompass only local assets and assets that should be administered in the local proceeding[502]. The Canadian provisions do not limit the scope of the local proceedings. Considering the fact that bankruptcy and insolvency proceedings commenced in Canada extend to the property of the debtor wherever located[503], these deviations from the Model Law provisions on coordination of concurrent proceedings may lead to conflicting claims over assets[504]. However, considering that under the Model Law scheme the claims of insolvency proceedings over foreign assets are determined in the recognizing state, such conflicting claims

[499] The Model Law, *supra* note 18 at art 25 (2); BIA, *ibid* s 26 (2).
[500] Sarra, Northern Lights, *supra* note 287 at 51.
[501] The Model Law, *supra* note 18 art 28.
[502] *Ibid*.
[503] Under section 2 of the BIA "property" means the property of the debtor "whether situated in Canada or elsewhere", see *supra* note 451 s 2.
[504] Sarra, Northern Lights, *supra* note 287 at 55.

over assets may be avoided. If a Canadian insolvency proceeding is recognized by these countries as a foreign non-main proceeding, then this proceeding's scope will be limited to assets that the recognizing states consider necessary to be administered in the Canadian proceedings.

4.1.3 Model Law Provisions that are Omitted in the Relevant Parts of the CCAA and BIA

The omission of some of these provisions is probably not significant, as many of these provisions are redundant in the Canadian legal context[505]. These provisions include the following:

- the provision establishing the pre-eminence of the obligations of the enacting state deriving from a treaty to which the enacting state is a party over the provisions of the Model Law[506];
- the provision determining the court competent to perform the actions specified by the Model Law[507];
- the interpretation provision stating that the courts should interpret the Model Law having regard "to its international origin and to the need to perform uniformity in its application and the observance of good faith"[508];
- the provision granting to the foreign representative the right to apply directly to the local courts[509];
- the provisions stating that the foreign representative may intervene in any proceeding in which the debtor is a party[510]; and

[505] Bélenger, *supra* note 454 at 297, 298.
[506] The Model Law, *supra* note 18 at art 3.
[507] *Ibid* at art 4.
[508] *Ibid* at art 8.
[509] *Ibid* at art 9.
[510] *Ibid* at art 24.

- the provision granting foreign creditors access to insolvency proceedings in the enacting state[511].

Other omitted provisions may, at least at first glance, raise concerns with respect to the compliance of the Canadian provisions with the Model Law. The Canadian versions of the Model Law omit the provision governing interim relief. This is the relief that may be granted at the discretion of the court after an application for recognition of the foreign proceeding is filed, but before the court makes a decision with respect to this application[512]. Despite this omission, one author argues, Canadian courts have sufficient discretion to grant such relief in favor of foreign proceedings[513].

Another significant provision absent in the relevant parts of the CCAA and the BIA is the general provision that ensures that when granting relief under the Model Law "the interests of creditors and other interested parties, including the debtor, are adequately protected"[514]. The omission of this key provision, arguably, is due to the specific meaning that the phrase "adequately protected" carries in some countries, such as the US, for instance[515]. This protective Model Law provision envisions that when granting relief the court must weigh both the relief that the foreign representative requests and the interest of the persons involved in the particular cross-border insolvency case[516]. The Canadian courts, even in the absence of such provision, have long engaged in balancing the interests of all the stakeholders involved in cross-border

[511] *Ibid* at art 13.
[512] *Ibid* at art 19.
[513] Sarra, Northern Lights, *supra* note 287 at 50.
[514] The Model Law, *supra* note 18 at art 22 (1).
[515] Bélenger, *supra* note 454 at 224; Sarra, Northern Lights, *supra* note 287 at 48, 49. The *United States Bankruptcy Code*, 11 USC, Chapter 3 § 361 (1984) provides that a court may order that adequate protection be granted by the trustee to a secured creditor in the form of cash payment or periodic cash payments, an additional or replacement lien or other type of relief to the extent that the stay under section 362, use, sale, or lease under section 363 or any grant of lien under section 364 affects the value of the secured creditor's interest in the debtor's property.
[516] Sarra, Northern Lights, *supra* note 287 at 49.

insolvency cases when considering an application for relief[517]. Due to this tradition, the omission of the protective Model Law provision should not be material.

Another omitted key provision is the provision that authorizes foreign representatives to commence avoidance actions in the recognizing state[518]. Arguably, the Canadian drafters were concerned that the inclusion of this provision could have been interpreted as allowing the application of foreign avoidance rules, which could have been more generous than the local avoidance rules[519]. Despite this omission, the foreign representatives are not left without any equivalent remedy. Under the BIA provision governing discretionary relief, the court has the authority to appoint a trustee as a receiver and direct it to take any action that the court considers appropriate, which would, presumably, include the taking of avoidance actions[520]. This relief may also be available under the CCAA, since the courts have broad powers for granting any order they consider appropriate at the request of a foreign representative[521].

In conclusion, even if the Canadian versions of the Model Law enacted the Model Law with considerable changes, these changes may turn out to be non-material. However, the achievement under the Canadian provisions of consistent results with results envisioned by the Model Law depends to a great extent on the interpretation of these provisions by Canadian courts.

[517] *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustee of)*, 2001 SCC 90, [2001] 3 SCR 907 at 33, 34, 87 cited in Sarra, Northern Lights, *supra* note 287 at 49.
[518] The Model Law, *supra* note 18 at art 23.
[519] Ziegel, Cross-Border Insolvency, *supra* note 455 at 298.
[520] Sarra, Norhtern Lights, *supra* note 287 at 51.
[521] CCAA, *supra* note 450 s 49 (1).

4.2 Recognition of Foreign Proceedings

Under the Model Law, recognition is not automatic; courts should consider certain criteria when deciding to grant recognition[522]. According to article 17 of the Model Law, such criteria include formal requirements and certain basic elements that the foreign proceeding and the foreign representative must satisfy. These basic elements are derived from the definitions of a foreign proceeding and foreign representative provided in article 2 of the Model Law. The definitions are drafted in broad terms so as to encompass the wide ranging types of insolvency proceedings and insolvency representatives existent in different legal systems[523]. A restrictive interpretation of these terms by courts can possibly reduce the instances when recognition may be granted. A restrictive interpretation of the Model Law based provisions by the courts of enacting states can be one that does not take into account the international origin of these provisions and that limits the scope of these provisions by giving a local meaning to the terms included in these definitions[524].

Recognition of foreign proceedings is a key feature of the Model Law. An order granting such recognition makes available to the foreign proceedings all the mechanisms, such as relief and cooperation with local courts, provided by the Model Law for the facilitation of the administration of cross-border insolvency proceedings. Refusal of recognition brings back the situations possible under territorialism, such as the commencing of full parallel insolvency proceedings, the race of creditors for the assets of the debtor or the concealment of such assets by

[522] Mevorach, Irit, "On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency" (2011) 12:4 European Business Organization Law Review 517 at 525 [Irit, On the Road to Universalism].
[523] The Working Group's Nineteenth Session Report, *supra* note 258 at paras 46 – 54.
[524] The Model Law at article 8 provides that when interpreting this Law's provisions to be mindful of its international origin and to the need to promote uniformity in its application.

the debtor. Accordingly, for the Model Law objectives to be promoted, courts should not interpret the two definitions restrictively.

4.2.1 Canadian Judgments

To date, Canadian courts have found foreign proceedings commenced in various countries, such as the United States[525], the United Kingdom[526], Germany[527] and Mexico[528] to meet the criteria set by the definition of foreign proceeding included in the Canadian versions of the Model Law. Making such determinations, the courts have often relied on the provisions that entitled the courts to accept the documents, as the certified copy of the instrument that commenced the foreign proceeding or a certificate from the foreign court that confirmed the existence of the foreign proceeding, as proof that the foreign proceeding for which recognition was requested in Canada was a foreign proceeding for the purpose of the BIA or CCAA as the case may be[529]. For this reason, the Canadian courts applying the Model Law based provisions on recognition of foreign proceedings have not engaged in an in-depth analysis of the definition of foreign proceeding so as to provide insight into their approach to the interpretation of this definition. However, we can derive some knowledge about their approach to this matter by looking at the interpretation these courts have given to the definition of foreign proceeding that existed in

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[525] *Gyro – Trac (USA) Inc et Raymond Chabot inc*, 2010 QCCS 1321, 66 CBR 5th 170 (Qc SC) [*Gyro - Trac*]; *Probe Resources Ltd (Re)*, 2011 BCSC 552 (available on CanLII) [*Probe Resources*]; *Re Xerium Technologies Inc*, 2010 ONSC 3974, 71 CBR (5th) 30; *Digital Domain Media Group, Inc (Re)*, 2012 BCSC 1565 (available on CanLII) [*Digital Domain*]; *Hartford Computer Hardware, Inc (Re)*, 2012 ONSC 964 (available on CanLII) [*Hartford*]; *Lightsquared LP (Re)*, 2012 ONSC 2994 (available on CanLII) [*Lightsquared*]; *Massachusetts Elephant & Castle Group, Inc (Re)*, 2011 ONSC 4201 (available on CanlII) [*Massachusetts Elephant*].

[526] *Tucker v Aero Inventory (UK) Limited*, [2009] OJ No 4797 (Ont SC) [*Tucker*].

[527] *Burckhardt Reimer (Re)*, 2012 BCSC 2091 (available on CanLII) [*Burckhardt*].

[528] *Compania Mexicana de Aviacion, S.A. de C.V.* (5 August 2010), Montreal 500-11-039418-104 (SCQ) (Order on Motion for Recognition of Foreign Proceeding), online: <http://www.deloitte.com/assets/Dcom-Canada/Local%20Assets/Documents/Insolvencies/Mexicana/ca_en_insolv_Mexicana_OrderRecognitionForeignProceedings_080510.pdf>.

[529] BIA, *supra* note 451 s 269 (2), (3); CCAA, *supra* note 450 s 46 (2), (3); *Burckhardt*, *supra* note 527 at paras 15, 16; *Gyro – Trac, supra* note 525 at paras 83 – 85.

Canadian legislation before and which has been abrogated by the enactment of the Model Law in Canada.

The interpretation given by courts to this abrogated definition is relevant for the present discussion. The abrogated definition was very similar to the Model Law definition of foreign proceeding; it stated that a foreign proceeding means "a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally"[530]. This definition set almost the same criteria for assessing a foreign proceeding as the criteria included in the definition taken from the Model Law[531]. In addition, there are at least two Canadian judgments that, in the context of the application of the Model Law definition of foreign proceeding, referenced leading judgments interpreting the abrogated definition of foreign proceeding[532]. One such referenced judgment is *Babcocks & Wilcox Canada Ltd.*[533].

In the *BW Canada* case, the applicant, Babcocks & Wilcox Canada Ltd., a solvent Canadian company, applied for recognition and relief with respect to Chapter 11 restructuring proceedings commenced under the US Bankruptcy Court by its parent and several of its subsidiaries. The Canadian company was not a party to the Chapter 11 proceedings nor to any Canadian insolvency proceedings. The parent company and its subsidiaries had commenced the restructuring proceedings to protect themselves against mass asbestos claims that could have brought these companies to insolvency. Such claims could also have been advanced against the

[530] CCAA, *supra* note 450 s 18.6 (1).
[531] The difference between the abrogated definition and the new definition is that the new definition specifies, by contrast to the abrogated definition, that the foreign proceeding must also be a proceeding in which the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation, see CCAA, *ibid* at s 45 (1) and BIA, *supra* note 451 s 268 (1).
[532] *Lightsquared*, *supra* note 525 at para 18; *Massachusetts Elephant, supra* note 525 at para 13.
[533] *Babcock & Wilcox Canada Ltd, Re* (2000), 5 BLR (3d) 75, 18 CBR (4th) 157 (Ont SC) [*BW Canada*].

Canadian subsidiary. As the Canadian subsidiary's funds were needed for the US restructuring proceedings to succeed, a stay of actions against the Canadian subsidiary was required. The US bankruptcy court made an order restraining the plaintiffs in the mass asbestos actions from commencing claims against "non-debtors affiliates"[534] in the Chapter 11 proceedings and requested the Canadian courts to assist in the carrying out of the order. For this reason, the Canadian subsidiary filed for recognition of the Chapter 11 proceedings and for a stay of proceedings that could have been commenced against the Canadian subsidiary in Canada.

In order to decide whether recognition and relief was to be granted, the Canadian court had to consider whether the Chapter 11 proceedings were proceedings within the definition of foreign proceeding provided by s. 18.6 paragraph (1) of the CCAA (the abrogated definition). In this context there arose a question about the meaning of the "debtor" term contained in the definition. The Chapter 11 proceedings did not require that the debtor be insolvent. By contrast, for a debtor company to commence a CCAA restructuring proceeding, it had to prove that it was insolvent. Consequently, the question was whether or not the term "debtor" contained in s. 18.6 paragraph (1) of the CCAA required that the debtor in the foreign proceeding be insolvent. The court considered that it did not because the definition was intended to be given a broad scope:

> …the 1997 Amendments [the amendments that introduced the abrogated definition of foreign proceeding] contemplated that it would be inappropriate to pigeonhole or otherwise constrain the interpretation of s. 18.6 since it would be not only impractical but also impossible to contemplate the myriad of circumstances arising under a wide variety of foreign legislation which deal generally and essentially with bankruptcy and insolvency but not exclusively so.[535]

[534] *Ibid* at para 2.
[535] *Ibid* at para 17.

Accordingly, the court recognized that the Chapter 11 proceedings were foreign proceedings as defined by s. 18.6 (1) of the CCAA.

Being one of the first cases to consider the 1997 Amendments that dealt with international insolvencies at length[536], the court listed certain factors that in its view could serve as guidance for courts when applying the provisions introduced by these amendments. One of the factors suggested that courts refuse recognition of a foreign proceeding in very limited circumstances:

> Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally is so different from the bankruptcy and insolvency law of Canada or perhaps the legal process that generates the foreign order diverges radically from the process here in Canada.[537]

This case is enlightening because it shows that the Canadian courts take a liberal approach to interpreting the definition of foreign proceeding; namely, they recognize that foreign proceedings may include details unfamiliar to the local insolvency laws and that that is not a reason to deny recognition.

Such a liberal approach promotes the objective of facilitation of restructuring proceedings. This is evident in the *BW Canada* case. If the court had given to the term debtor an ordinary domestic meaning, and, for this reason, had refused to grant recognition, then such debtors as the debtors in the Chapter 11 proceedings in the *BW Canada* case would have not had access to a stay of proceedings in Canada. This would have been so because such debtors, being solvent, could not commence a CCAA proceeding to benefit from a stay that was usually granted in such

[536] *Ibid* at para 1.
[537] *Ibid* at para 21 (b).

proceedings. In this circumstance, a foreign proceeding, such as the Chapter 11 proceedings, could have failed.

As regards the interpretation of the definition of foreign representative, it could be said that the courts have interpreted this definition broadly. This is so because the Canadian courts have recognized as falling within this definition a wide variety of foreign representatives ranging from persons that were appointed by the foreign courts to supervise the insolvency proceedings in their respective jurisdictions[538] to debtors that were allowed to remain in the possession of their property and to administer their insolvency under the supervision of the court[539]. Furthermore, the court in *Lightsquared*[540] recognized as a foreign representative foreign representatives appointed on an interim basis, subject to the following condition[541]. After recognizing the foreign representative appointed on an interim basis as a foreign representative in respect of the foreign proceeding, the court pointed out that if the status of the recognized foreign representative were altered by the foreign court then the issue of its recognition would have to be reviewed by the Canadian court[542].

4.2.2 British Judgments

Like Canadian courts, the British courts have recognized as foreign proceeding proceedings commenced and conducted in various jurisdictions including Norway[543], Korea[544], Antigua and

[538] Chartrand, Rupert H., Sandra Abitan & Michael De Lellis, "Emerging Trends and Practices for Recognizing International Insolvencies Under New Part IV of the CCAA" (2011) 27:1 BFLR 125 at 132; *Burckhard, supra* note 527 at paras 1, 16.
[539] *Digital Domain, supra* note 525 at paras 16, 17.
[540] *Lightsquared*, *supra* note 525.
[541] *Lightsquared*, *ibid* at para 20.
[542] *Ibid*.
[543] *European Insurance Agency AS* (7 September 2006), Bristol 6BS30434 (UKHC (Ch)), online: <https://www.insol.org/_files/Model%20Law/UK/European%20Insurance%20Agency%202006.pdf> [*European Insurance Agency*].

Barbuda[545], the United States[546], Denmark[547] and Switzerland[548]. Some of these cases discuss questions relating to recognition, such as the interpretation of the definition of foreign proceeding, and they shed some light on the British courts' approach to these questions.

One of these cases is *Rubin v. Eurofinance SA*[549]. In this case, the foreign proceeding was a US bankruptcy proceeding commenced with respect to a business trust. The US insolvency laws allowed for bankruptcy proceedings to be brought against business trusts, although such entities were not considered to have separate legal personalities for any other purposes[550]. Under English law, the business trust was not considered to have a separate legal personality, not even for the purpose of insolvency laws; consequently, it could not be the subject of English insolvency laws[551]. The opponent to the application for recognition of the foreign US proceeding submitted that the term "debtor" contained in the definition of foreign proceeding in CBIR should be given "its ordinary meaning under the English law"[552] and that for this reason there was no debtor and CBIR did not apply[553]. The court expressly rejected such an interpretation of the "debtor" term. It held that, in the context of the definition of foreign proceedings, giving the term debtor any other meaning than that intended in the foreign proceeding would be "perverse"[554]. Furthermore, it stated that its approach to the interpretation of this term was supported by the Model Law provisions. Specifically the court held that:

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[544] *Samsun Logix Corporation v Def*, [2009] EWHC 576, [2009] BPIR 1502 (Ch) [*Samsun*].
[545] *Stanford International Bank Limited*, Re, [2009] EWHC 1441, [2009] BPIR 1511 (CH) [*Stanford*].
[546] *Rubin & Anor v Eurofinance* SA & Ors, [2009] EWHC 2129, [2009] BPIR 1478 (Ch) [*Rubin*].
[547] *Larsen & Anor (Foreign Representatives of Atlas Bulk Shipping AS) & Anor v Navios International Inc*, [2011] EWHC 878, [2012] Bus LR 1124 [*Larsen v Navios*].
[548] *Cosco Bulk Carrier Co Ltd v Armada Sipping SA & Anor,* [2011] EWHC 216, [2011] 2 AII ER (Comm) 481 at para 1.
[549] *Rubin, supra* note 546.
[550] *Ibid* at para 10.
[551] *Ibid* at para 36.
[552] *Ibid*.
[553] *Ibid*.
[554] *Ibid* at para 39.

> …article 8 provides that in interpreting the Law [the Model Law] regard is to be had to its international origin and to the need to promote uniformity in its application. Both these considerations would be disregarded if the court were to adopt a parochial interpretation of "debtor" and as a result refuse to provide any assistance in relation to a bona fide insolvency proceeding taking place in a foreign jurisdiction.[555]

This case is significant as it shows that, similar to Canadian courts, British courts are inclined to adopt a liberal interpretation and refuse to infuse the terms provided in the Model Law provisions with local meaning.

Another relevant case with respect to the British courts' approach to the interpretation of the definition of foreign proceeding is *Re Stanford International Bank*[556]. In this case, the High Court of Justice received two applications for recognition of two distinct proceedings opened with respect to the same company in different countries. The company, Stanford International Bank Ltd (SIB), was a company incorporated in Antigua that also maintained its registered office there. SIB was part of Sir Allen Stanford's business empire that collapsed due to allegations that Sir Allen and his associates had been engaged in a fraudulent Ponzi scheme that defrauded investors worldwide[557]. On 16 February 2009, the United States Security Exchange Commission filed a complained against Sir Allen, his associates, SIB, Stanford Group Company and Stanford Capital Management, LLC alleging, among other causes of action, securities fraud[558]. The US court made an order appointing a receiver over the worldwide assets of Sir Allen, his associates, SIB, Stanford Group Company and Stanford Capital Management, LLC and other legal entities owned and controlled by any of them[559].

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[555] *Ibid* at para 40.
[556] *Stanford*, *supra* note 545.
[557] *Ibid* at para 1.
[558] *Ibid*.
[559] *Ibid*.

At the same time, the Antigua regulatory authorities took action against SIB[560]. On 19 February 2009, the Financial Services Regulatory Commission of Antigua and Barbuda appointed receiver-managers for SIB. A week later the Antiguan court appointed the receiver-managers as Antiguan receivers of the SIB. On 24 March 2009, the Financial Services Regulatory Commission of Antigua and Barbuda filed a petition to the Antiguan court seeking an order for the winding up of SIB and the appointment of the Antiguan receivers as liquidators[561]. The Antiguan court granted an order on this petition for the winding up of the SIB and appointed the Antiguan receivers as liquidators[562].

Both the US receiver and the Antiguan liquidators filed for recognition to the High Court of Justice under CBIR for the proceedings in which they were appointed. The High Court held that the US receivership was not a foreign proceeding for the purpose of the CBIR and that the Antiguan liquidation was such a proceeding.

In arriving at its conclusion, the court did not assess whether the foreign proceedings were foreign proceedings as defined by the Model Law by reference to the local insolvency laws, but by reference to the criteria set by the relevant definition. This definition specified that the proceeding be:

(a) a collective judicial or administrative proceeding;
(b) based in a law relating to insolvency;
(c) a proceeding in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and

[560] *Ibid*.
[561] *Ibid*.
[562] *Ibid*.

(d) for the purpose of reorganization or liquidation[563].

The court held that to be a collective proceeding, the foreign proceeding had to be for the benefit of all the creditors generally and to contemplate a *pari passu* distribution to all the creditors. Such an interpretation of the criterion of collectivity is not restrictive, as the *pari passu* distribution that encompasses all the creditors' claims is the basic principle of insolvency laws[564]. The US receivership did not comply with this criterion. It was appointed for the purpose of collecting and preserving the debtor's assets for the benefit of the investors only, and it did not preclude creditors from commencing individual proceeding against the debtor, in certain circumstances[565].

Interpreting the criterion as "a law relating to insolvency", the court adopted a non-restrictive approach. Its reasoning suggested that the foreign proceeding did not have to be commenced pursuant to a written statute; it could be commenced by order of a court pursuant to the general common law rules[566]. In addition, it was suggested that the provisions under which the foreign proceeding was commenced did not have to deal with insolvency exclusively; it was only required that the proceedings be commenced pursuant to these provisions on the ground that the debtor was insolvent[567]. The US receivership did not comply with this criterion either; the court order pursuant to which this proceeding was commenced was not based on the insolvency of the debtor, but on the need to prevent the dissipation of the debtor's assets because of the debtor's involvement in securities fraud. By contrast, the Antiguan liquidation was found to be commenced pursuant to a law relating to insolvency, even if it was governed by an act concerned

[563] *Ibid* at para 37.
[564] Clark, Sacred Cow, *supra* note 165 at 574; Fletcher, Insolvency in private International Law, *supra* note 1 at 9.
[565] *Stanford*, *supra* note 545 at paras 79, 84.
[566] *Ibid* at para 84 vii), ix).
[567] *Ibid* at paras 86 - 95.

with the winding up of companies and did not expressly refer to insolvency. The order of the Antiguan court was made pursuant to a provision that allowed for winding up provisions to be commenced on just and equitable grounds, which included the insolvency of the debtor as such a ground; this was the ground on which the Antiguan court relied when making the winding up order.

The US liquidators appealed the judgment of the court of the first instance. The Court of Appeal approved the judgment and agreed with the reasons for the judgment. It also emphasized that, in view of its international origin and objectives, the Model Law "should not be construed by reference to any particular national system of law"[568]. It stated that the Model Law "is intended to embrace all systems of law which satisfy the conditions described in the definitions"[569] of foreign proceeding and foreign representative so as to allow for reciprocal recognition of proceedings between all the states that might enact the Model Law.

Accordingly, the British courts' approach to the determination of the nature of a foreign proceeding is a liberal one and permits recognition of foreign proceedings that satisfy the broadly interpreted criteria set by the Model Law definition of foreign proceedings.

As regards the recognition of foreign representatives under CBIR, it could be inferred from the cases concerned with this matter that the British courts interpret the relevant definition broadly. The British courts have recognized foreign representatives appointed in different countries and in various types of insolvency procedures[570].

[568] *Stanford International Bank Ltd, Re,* [2010] EWCA Civ 137, [2010] 3 WLR 941 at para 23 [*Stanford*].
[569] *Ibid.*
[570] See for instance, *European Insurance Agency*, *supra* note 543, *Larson v Navios, supra* note 547 at para 13; *Samsun, supra* note 544 at paras 5, 6.

4.3 The Determination of COMI of the Debtor

A centralized administration of cross-border insolvency cases is generally considered to be efficient and fair. Having separate insolvency proceedings in each country where a debtor has assets impedes a rescue or a sale as a going concern of the debtor's property [571]; allowing the distribution of a debtor's assets to occur according to one distribution scheme results in equal treatment of the creditors of the same class[572]. For this reason, the Model Law scheme tries to consolidate the government of cross-border insolvency cases under a main proceeding.

The location of the main proceeding depends on the determination of the debtor's COMI[573]. As there must be only one main proceeding, it must be true that each debtor should have only one COMI[574]. The concept of COMI is not defined by the Model Law. Even if courts have multiple sources to which they could look for guidance when interpreting this concept[575], it still remains a broad standard, as opposed to a bright-line rule[576]. In view of its flexibility, courts from different countries may adopt differing interpretations. Inconsistent interpretation of COMI can result in multiple main proceedings competing for control over the debtor's property[577].

Also, inconsistent interpretations of COMI raise the cost of credit. The pricing of credit depends on how accurately the creditors can predict the outcome of insolvency of their debtor[578]. If the

[571] Moss, Gabriel QC, "Group Insolvency – Choice of Forum and Law: The European Experience under the Influence of English Pragmatism. (Symposium: Bankruptcy in the Global Village the Second Decade)" (2007) 32:3 Brook J Int'l L 1005 at 1008 [Moss, Group Insolvencies]; Westbrook, Theory and Pragmatism, *supra* note 3 at 465.
[572] Westbrook, Theory and Pragmatism, *ibid* at 466.
[573] The Model Law, *supra* note 18 at art 17 (2).
[574] Pottow, The Myth, *supra* note 135 at 792.
[575] Legislative Guide on Insolvency, *supra* note 320 at 41; Recent amendments of the Guide to Enactment: UN Doc, Interpretation and Application of Selected Concepts, *supra* note 323 at paras 31, 31A-C.
[576] Pottow, The Myth, *supra* note 135 at 791, 792.
[577] Bufford, The Honorable Samuel L., "Centre of Main Interests, International Insolvency Case Venue, and Equality of Arms: The *Eurofood* Decision of the European Court Of Justice" (2007) 27:2 Nw J Int'l L & Business 351 at 382.
[578] Garrido, The Distributional Question, *supra* note 369 at 469.

outcome is uncertain, the price will likely rise. Under the Model Law, the outcome of insolvency of a debtor will largely depend on the law applicable in the main proceeding; thus, it is important for the creditors to determine with reasonable accuracy where that main proceeding will be commenced prior to entering into a transaction. Therefore, they need to know how to determine the COMI of the debtor, since COMI is the criterion that indicates the jurisdiction entitled to conduct the main proceeding.

4.3.1 Canadian Judgments

In the *Massachusetts* case[579], the lead debtor in the Chapter 11 proceedings commenced pursuant to the US Bankruptcy Code with respect to fourteen members of a business enterprise group, was seeking an order from a Canadian court recognizing those proceedings as foreign main proceedings. Among the fourteen members of this group, all but three companies were incorporated in the US. These three companies were incorporated in Canada where they also had their registered offices[580]. All group members operated and franchised restaurant-pubs in the US and Canada[581].

To recognize the foreign proceedings as foreign main proceedings, the court had to determine the COMI of the debtors. The court held that the determination of COMI had to be made with respect to each company individually[582]. The court started its COMI analysis by recalling the presumption that the registered office of each debtor was its respective COMI. It determined that the registered office of the Canadian subsidiaries was in Canada and that, in view of this fact, their COMIs were deemed to be located in Canada provided there was no proof to the contrary.

[579] *Massachusetts Elephant*, *supra* note 525.
[580] *Ibid* at para 6.
[581] *Ibid* at para 4.
[582] *Ibid* at para 20.

However, the applicant submitted that the COMI of each of the Canadian subsidiaries was located in the US. Subsequently, the court determined that it had to decide whether there was sufficient evidence to rebut the presumption established in favor of the registered office.

In support of its position, the applicant pointed to the following facts: the head offices of all of the Chapter 11 debtors, including the Canadian subsidiaries, were consolidated and located in the US; all the decisions with respect to the operations of all of the members of the group were taken from the consolidated head offices in the US; all of the members of the management of the Chapter 11 debtors were located in the US; almost all of the administrative functions, such as human resources and financial functions, were located in the US; the information technology functions were also provided from the US; and one of the Canadian subsidiaries was the parent of a group of restaurants which operated only in the US[583].

At this point, the court considered it relevant to add that there were other facts that seemed to oppose the applicant's submission. These included the facts that almost half of the operating locations of the group were in Canada, that nearly half the total number of employees were working in Canada, and that a substantial lender of the applicant (a US company, also a debtor under the Chapter 11) was a Canadian company. However, this lender was not opposing the application.

The court held that when determining whether the presumption was rebutted, depending on the circumstances of the particular case, some factors might be more important than others[584]. For instance, the court said that the location of the debtor's primary bank could be an important

[583] *Ibid* at para 23.
[584] *Ibid* at para 28.

factor only if the bank had a significant control over the debtor. However, the court considered that there were factors that would be important in every case. These include:

> (a) the location of the debtor's headquarters or head office functions or nerve centre;
> (b) the location of the debtor's management; and
> (c) the location recognized by significant creditors as being the centre of the company's operations.[585]

It added that other factors might also be relevant in particular circumstances and should be considered only to the extent that they were related to or reinforced these three factors[586].

Based on this, the court concluded that the presumption was rebutted, and the COMI of each of the Canadian debtors was in the US. It stated that the head office and the nerve centre of all of the Chapter 11 debtors and all of their management were in the US; the substantial Canadian lender did not oppose the application.

The approach taken in *Massachusetts* was subsequently refined by the court in *Lightsquared*[587]. In this case, the debtors were all members of a business enterprise group composed of 20 companies. All the members of the group filed for reorganization proceedings under the Chapter 11 provisions of the Bankruptcy Code of the US. Also, all of these companies, except for four of them, were incorporated and had their head offices in the US. Of these four companies, three of them, SkyTerra Holding Canada Inc., SkyTerra Canada Inc. and Lightsquared Corp., were incorporated in Canada[588].

The operations of the Canadian companies can be summarized as follows. Sky Terra Canada Inc.'s sole purpose was to hold certain regulated assets in Canada. Its assets were a satellite,

[585] *Ibid* at para 30.
[586] *Ibid* at para 31.
[587] *Lightsquared, supra* note 525.
[588] *Ibid* at para 9.

certain licenses and a number of contracts with other members of the group and third parties. It had no third party customers and no employees at the time of the application, and its operations were funded by its parent. SkyTerra Holding Canada Inc. was created to hold the shares of Sky Terra Canada Inc.; it had no employees and no operational functions. Lightsquared Corp.'s function was to provide services to Canadian customers based on products and services developed by the group for US customers. It held certain assets and had 43 employees in Canada. The employees worked at its offices in Ottawa, Ontario. Furthermore, its operations were funded by its parent.

The applicant in this case was seeking recognition of the Chapter 11 proceedings as foreign main proceedings. Submitting that the COMI of each of the Chapter 11 debtors was in the US, the applicant relied on the following facts: the corporate decisions on behalf of all the Chapter 11 debtors were made at the consolidated offices in the US; the majority of the employee administration, human resources functions, communication and marketing decisions on behalf of all the debtors were made in the US; the senior executives of all of these debtors were located in the US; the majority of the debtors' managers were shared; all the group members shared a cash management system that was overseen by employees in the US; the Canadian debtors had guaranteed the loan of their parent, and the guarantee was secured on these debtors' assets; thus, the Canadian companies shared the creditors with their parent (a US company).

The court, having recognized that there was a presumption in favor of the registered office, held that there were three main factors that would tend to indicate whether the jurisdiction where the debtor had its COMI was other than the jurisdiction of the registered office. These were:

(a) the location is readily ascertainable by creditors;

(b) the location is one in which the debtor's principal assets or operations are found; and
(c) the location is where the management of the debtor takes place.[589]

It added that, usually, these factors would all point to a single jurisdiction. Where they would conflict, courts would have to scrutinize the facts more carefully. At any rate, the courts would have to determine whether the jurisdiction where the foreign proceeding was commenced corresponded with the actual location of the debtor's true seat or principal place of business, which should be "consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings"[590].

Having recognized that COMI must be determined with respect to each company, notwithstanding that there were members of the same business enterprise group, the court stated, after applying the three factors to the facts of the case, that the presumption was rebutted and that the COMIs of all the members of the group, including the Canadian debtors, were in the US. The court recognized the foreign proceeding as a foreign main proceeding[591].

The approach to the determination of COMI developed in the *Lightsquared* case was subsequently applied in *Allied Systems Holdings Inc. (Re)*[592] and *Digital Domain*[593]. In both of these cases, the foreign representative applied for recognition of US Chapter 11 proceedings commenced with respect to several members of a business enterprise group as foreign main proceedings. In both of these cases, some members of these groups had their registered offices in Canada.

[589] *Ibid* at para 25.
[590] *Ibid* at para 26.
[591] *Ibid* at paras 30, 31.
[592] *Allied Systems Holdings, Inc (Re)* 2012 ONSC 4343 [*Allied Systems Holdings*].
[593] *Digital Domain*, *supra* note 525.

In the *Allied Systems Holdings* case, the Canadian companies were Allied Systems Canada and Axis Canada. Allied Systems had its principal place of business in Hamilton, Ontario; however, only minimal administrative functions of this company were carried out in Canada. Axis had its principal place of business in Atlanta, Georgia. Both companies were managed from the US. By reference to these facts, and to the three factors from *Lightsquared*, the court found that the COMI of each of the two Canadian companies was in the US.

In the *Digital Domain* case, the business enterprise group involved in the Chapter 11 restructuring in the US was developing "computer-generated imagery, animation and visual effects for major motion picture studios and advertisers"[594]. It was composed of fourteen companies, thirteen of which were US companies that were also conducting their business in that country. The fourteenth company was a Canadian subsidiary company that operated in Vancouver. The operations of the Canadian subsidiary were an integral and substantial part of the entire group's operations. The Canadian company was operating from leased premises and had approximately 260 employees.

The court first acknowledged the operation of the presumption that the registered office of a debtor was, in absence of proof to the contrary, deemed to be the debtor's COMI. Accordingly, the court found that in order to recognize the foreign proceeding commenced with respect to the Canadian subsidiary as a foreign main proceeding, it must be satisfied that there was sufficient proof to rebut the presumption.

The applicant identified the following factors in support of its application that the COMI of each of the members of the corporate group, including that of the Canadian subsidiary, was in the US:

[594] *Ibid* at para 2.

the nerve centre or the head office functions of the entire corporate group was located in the US, and it was a location readily ascertainable by creditors; the principal assets of the group were movie projects that were the main source of revenue for the group and that originated and were being operated from US headquarters; the group's management was centralized and performed from its consolidated headquarters; all the corporate decisions on behalf of all of the members of the group were also taken at the group's headquarters; all business operations for all group members were conducted in the US; all of the members of the senior management were located in the US, and Digital Vancouver's personnel reported to senior management in the US; the Digital Vancouver's accounting and collection functions were managed from the US; all the proprietary technology used by Digital Vancouver was owned by a US group member company; all Digital Vancouver's productions projects were developed by employees in the US, and Digital Vancouver did not have any authorization to engage in the marketing or sale of its products or services[595].

Applying the three factor list from *Lightsquared*, the court concluded that each member company, including the Canadian subsidiary, had its COMI in the US. With respect to the Canadian subsidiary, the court held that the fact that its registered office was in Vancouver was not decisive. This was particularly so due to mitigating facts including: the management of the subsidiary occurred in the US; its operations, to a large extent, were conducted in the US, and creditors dealing with the Canadian subsidiary, in the court's opinion, would see the US as its COMI.

[595] *Ibid* at para 25.

It may be inferred from these cases that the Canadian approach to identifying the COMI is based on the following principles[596]. The determination of COMI is made on an entity basis as opposed to a corporate group basis. The COMI of a debtor is presumed, in the absence of proof to the contrary, to be the debtor's registered office. When considering whether the COMI of the debtor is in a jurisdiction other than the jurisdiction of its registered office, the courts do not apply any rigorous test. This means that they do not find one factor to be determinative, but rather they consider many factors to be relevant. What factors are relevant depend on the particular circumstances of the case. However, the factors considered in each particular case are those that will indicate the place where the management and operational functions are actually carried out, and whether that place is ascertainable by creditors as the debtor's COMI. When all these factors pointed to a jurisdiction other than the jurisdiction of the registered office, they were considered sufficient to rebut the presumption, even if the Canadian companies had assets and employees located at its registered office as well as Canadian creditors[597].

Despite the clear and useful guidance that these cases offer with respect to the governing principles over a determination of COMI, there is some uncertainty as to how the courts determined what were the perceptions of creditors in respect of the location of the debtor's COMI.

[596] As all these cases were concerned with finding the COMI of legal persons, the following principles may not apply to the determination of the COMI of natural persons.
[597] See particularly *Massachusetts Elephant*, *supra* note 525 at 25.

4.3.2 British Judgments

In the *Stanford*[598] case, the case where competing applications were filed for recognition as foreign main proceedings of foreign proceedings commenced in respect of the same company (SIB) in Antigua and the US, the Antiguan Liquidator and the US receiver were both claiming that the COMI of SIB was in their respective countries.

As the SIB had its registered office in Antigua, the court observed that Antigua was presumed, absent proof to the contrary, to be the SIB's COMI. Further, the court summarized the facts that it considered as being relevant when determining whether the presumption was rebutted. First, it considered the facts that, in its judgment, created the public face of the SIB, including the company's place of incorporation, the place of its physical headquarters, the place where the company's employees worked and where the operations departments were conducted, the information included in the disclosure statement provided to potential depositors and that included in its marketing materials, the identity of its creditors, the jurisdiction whose law governed the contracts that SIB entered into and the disputes that would have arisen from these contracts, the SIB's principal operating bank account, the location of SIB's assets, the place where the meetings of the Board of directors were held, and the place where the accounts of the SIB were audited. Next, the court considered it relevant to identify the facts that revealed the SIB's connections with the Stanford group. Finally, it considered the facts that in the court's view existed "behind the scene"[599], namely the facts related to the fraud that the Stanford group was involved in, such as the persons who were making strategic decisions with respect to the group and the location of these persons.

[598] *Stanford, supra* notes 545, 568.
[599] *Stanford, supra* note 545 at para 29 – 31.

With all the considered facts in view, the court concluded that the COMI of SIB was in Antigua. It based its decision on the reasoning of the European Court of Justice that provided for the interpretation of COMI in the context of the Regulation[600] in the *Re Eurofood IFSC Ltd* case[601]. The court in *Stanford* decided to follow the ECJ' reasoning in *Eurofood* because the formulation and the context in which COMI was used in both the Regulation and the Model Law were similar, and because the drafters of the Model Law intended to provide a "complementary regime"[602] to that created by the Regulation.

The *Eurofood* case presented the ECJ's interpretation of COMI. Eurofood was an Irish company that had its registered office in Dublin, Ireland. It was a wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy. Eurofood's principal purpose was the "provision of financial facilities for companies in the Parmalat group"[603]. Both the Italian court and the Irish court commenced insolvency proceedings with respect to Eurofood. Both courts decided that the COMI of Eurofood was within their territory. The Italian insolvency representative appealed the Irish decision to the Supreme Court; the latter referred a number of questions to the ECJ. The fourth question asked the court to address the COMI issue:

> Where (a) the registered office of a parent company and of its subsidiary are in two different Member States, (b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated and (c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary, in determining the "centre of main interests", are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?[604]

[600] The Regulation, *supra* note 21.
[601] *Eurofood IFSC Ltd*, C-341/04, [2006] ECR I-3854 [*Eurofood*].
[602] *Stanford, supra* note 545 at para 45.
[603] *Eurofood*, *supra* note 601 at I-3862.
[604] *Ibid* at I-3865.

The ECJ court first stated that by establishing the presumption that the place of the company's registered office, in the absence of proof to the contrary, shall be the company's COMI, the Regulation suggested that the determination of COMI be made with respect to each company individually. The court further relied on the definition of COMI provided by recital 13 of the Regulation. That definition stated that "the "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable to third parties"[605]. The court interpreted that definition as suggesting that COMI had to be identified by reference to factors that were both "objective and ascertainable by third parties"[606]. The court considered that only such factors could ensure "legal certainty"[607] and "foreseeability"[608] with respect to the court that would have jurisdiction to conduct the administration of the main insolvency proceeding and, thus, of the law that would apply in that proceeding. Based on such an approach to the determination of COMI, the court concluded that the presumption in favor of the registered office of the company could only be rebutted if there were factors that were both objective and ascertainable by third parties that showed that "an actual situation exists which is different from that which locating [the COMI] at [the registered office of the company] is deemed to reflect."[609] The court stated that such a situation could exist in the case of a "letterbox company"[610] that was not carrying out any business in the country of its registered office. By contrast, when a subsidiary company carried out its business in the country of its registered office, the simple fact that its decisions were or could be controlled by

[605] *The Regulation*, *supra* note 21 at Recital 13.
[606] *Eurofood, supra* note 601 at I-3868.
[607] *Ibid*.
[608] *Ibid*.
[609] *Ibid*.
[610] *Ibid*.

its parent located in another country was not sufficient to rebut the presumption established in favor of the registered office.

What *Eurofood* decided was that, in order to show that the presumption was rebutted, it had to be demonstrated that the jurisdiction where the debtor conducted its business was other than the jurisdiction where it had its registered office and that this situation might be ascertainable to third parties[611].

By deciding to rely on the approach taken by ECJ in *Eurofood* to identify SIB's COMI, the British court refused to follow its own judgment given in a previous case concerned with the determination of COMI. The court stated that "the head office function"[612] test applied in that judgment was the wrong test for determining COMI. According to this test, the presumption in favor of the registered office was rebutted if it could be shown that the economic decisions of the company were made or controlled from a jurisdiction other than the jurisdiction where the registered office of the company was[613]. The reason for rejecting this test was that looking only at the place where the head office functions were actually carried out, without determining whether that place was ascertainable by third parties, would be inconsistent with the purpose of COMI to provide for legal certainty and foreseeability for parties dealing with the company[614].

Further, the court was concerned with determining what was meant by "ascertainable"[615]. The court refused to follow the interpretation proposed by the US receivers because it made the requirement of ascertainability almost insignificant. According to the US receivers, the

[611] Gaillot, Laurent "The Interpretation by French Courts of the EU COMI Notion: an EU Perspective", (2006) 16:2 Newsletter of the IBA Insolvency, Restructuring and Creditors' Rights Section 38 at 39 [Gaillot, French Courts and COMI].
[612] *Stanford, supra* note 545 at para 61.
[613] *Ibid* at para 60.
[614] *Ibid* at para 61.
[615] *Ibid* at para 62

information that had to be considered ascertainable did not necessarily have to be in the public domain, but rather it had to be what an honest answer to a question asked by a third party would reveal[616]. Instead, the court agreed with the interpretation given to this requirement by the Antiguan liquidator. This definition stated specifically that "ascertainable by a third party was what was in the public domain and what a typical third party would learn as a result of dealing with the company"[617]. This was the preferred interpretation because it did not place a heavy burden on the creditors as that would require them to make inquiries prior to dealing with the debtor in order to discern whether the actual facts differed from what was apparent[618].

Based on the reasoning in *Eurofood,* the court held that when it was necessary to show that the COMI of the debtor was in a jurisdiction other than the jurisdiction of the registered office the presumption in favor of the registered office could only be rebutted by objective factors, and those factors could only count if they were also ascertainable by third parties[619].

The court found that the facts supported rather than rebutted the presumption. The physical headquarters of SIB and most of its employees were located in Antigua; the law governing the contracts concluded by SIB with investors and other creditors was the law of Antigua; SIB's marketing materials presented it as an Antiguan company; private banking facilities offered by SIB were provided from Antigua; and the SIB's accounts were audited by Antiguan accountants and regulated by Antiguan regulators.

[616] *Ibid*.
[617] *Ibid*.
[618] *Ibid*.
[619] *Ibid* at para 70.

The approach to making a COMI identification developed in the *Stanford* case was subsequently applied in *Pillar Securitisation S.a.r.l and Ors v Spicer and Shinners*[620]. Even if in that case, the COMI analysis was in the context of the EC Regulation, and it was still relevant for the interpretation of COMI under the Model Law; the court in *Stanford* affirmed that COMI should be given the same meaning under both acts. In *Pillar Securitisation*, the court had to determine the COMI of a limited partnership - Kaupthing Capital Partners II Master LP Inc (Master) - that was established in Guernsey. Master was part of a large group of companies, the Kaupthing Group, and its business was to hold a fund of investments. It was managed by its operator, which was a member of the Kaupthing Group. Master's operator delegated certain administrative functions and investment management of Master to the other two companies that were also members of the Kaupthing Group.

Master became insolvent, and its principal partner appointed joint administrators. Master's largest creditors applied to the court to settle certain issues related to the appointment of the administrators. The applicants affirmed that the appointment of the administrators was invalid because the COMI of Master was Guernsey, and the English courts did not have jurisdiction in relation to the insolvency pursuant to the Regulation. The courts in the EU Member States had jurisdiction pursuant to the Regulation only when the debtor's COMI was located on the territory of a Member State[621].

To determine where the COMI of Master was, the court relied on the principles established by the ECJ in *Eurofood* and further explained by the court in *Stanford*. It summarized those principles as follows:

[620] *Pillar Securitisation SARL & Ors v Spicer & Anor (Court Administrators),* [2010] EWHC 836, [2011] BCC 338 (Ch) [*Pillar Securitization*].
[621] The Regulation, *supra* note 21 at art 3 (1), (2).

> (i) There is a presumption that the body's COMI is in the state where its registered office is located.
>
> (ii) The presumption can be rebutted only by factors which are both objective and ascertainable by third parties. Thus, the court is to have regard to factors already in the public domain, or which would be apparent to a typical third party doing business with the body, excluding such matters as might only be ascertained on inquiry.
>
> (iii) Accordingly, the place where the body's head office functions are carried out is only relevant if so ascertainable by third parties.
>
> (iv) Each body or individual has its own COMI, there is no COMI constituted by an aggregation of bodies or individuals[622].

Accordingly, the court started its COMI analysis by assuming that the COMI of Master was in Guernsey and that only objective and ascertainable factors as defined in *Stanford* could deem that not to be the case. The court went on to consider whether there were such factors that could rebut the presumption.

The court established that Master was registered in Guernsey, that its filed declaration made at the time of registration stated that its principal place of business was Guernsey and that these facts were in the public domain. Further, the court identified that the company was incorporated in Guernsey for tax reasons and that this fact would be apparent to creditors dealing with the company. The court also determined that Master's head office functions were conducted in London on its behalf by its operator and its investors, as well as by two companies who were members of the Kaupthing Group.

However, following the *Stanford* judgment, the court held that the head office function test was no longer the test applied when determining the COMI of a company. The court specifically said that it could only be satisfied that the presumption that Master's COMI was at its registered

[622] *Pillar Securitization, supra* note 620 at para 13.

office be rebutted "on the bases that it would have been apparent to third parties doing business with the Master that this was the case"[623].

At this point, the court started to examine what would be ascertainable to these third parties. The potential investors were provided with relevant documentation about the structure, operation and management of the partnership. Consequently, the court declared that as far as the investors would know, Master was registered in Guernsey and had its declared place of business there; they would also know that the actual "administration of the fund, the operating and management functions, were to be conducted in London"[624].

Further the court referred to other third parties, namely the Master's creditors. The court established that these creditors communicated with the English operating companies at their London offices. In addition, Master's largest creditor took over Master's debt to a bank that was undertaking restructuring and in those circumstances it was to be expected that this creditor would know its debtor's identity.

The court concluded that because it would have been apparent to third parties that Master's business matters were conducted on its behalf in England, the presumption that Master's COMI was in Guernsey, as the place of its registered office, was rebutted.

It can be inferred from these two British cases concerned with finding a debtor's COMI that such a finding is governed by the following principles. The determination of COMI must be made in respect of each company individually. It is presumed, in absence of proof to the contrary, that the place of the registered office is the debtor's COMI. That presumption can be rebutted only by

[623] *Pillar Securitization ibid* at para 17.
[624] *Pillar Securitization, ibid* at para 20.

factors that are both objective and ascertainable. Ascertainable factors are those that are in the public domain or that would be apparent to a third party dealing with the debtor.

There is no defined combination of factors that when established would rebut the presumption. The facts that would be relevant are those that will show that the debtor's business is conducted from other than the jurisdiction of the debtor's registered office. Establishing that the debtor's business was conducted from another jurisdiction is not the end of the British COMI analysis. The court making that determination would also have to establish whether this fact was ascertainable to third parties.

4.3.3 Consistency of Interpretation

The interpretations given by Canadian and British courts to the concept of COMI under the Model Law based provisions are consistent. First, the courts from both countries recognize that each legal entity has its own COMI, notwithstanding that it is a member of a business enterprise group, and that the courts must rely, in absence of proof to the contrary, on the presumption established in favor of the registered office. The agreement on these points is not surprising as the Model Law provisions did not leave much room for interpretation in respect to this matter.

The issue that may create divergent interpretations is what is sufficient to rebut the presumption. However, the Canadian and British courts' interpretations are aligned on this subject too. The courts from both countries did not give an exhaustive list of factors that when established as pointing to other then the jurisdiction of the registered office would be deemed sufficient to rebut the presumption. This is clearly seen in the British cases, as the court in the *Pillar Securitization* case did not try to determine the same factors as those considered by the court in *Stanford*. As regards Canadian cases, even if they singled out three factors, they expressly recognized that the

issue, whether the presumption is rebutted, "will depend on the particular circumstances and facts of each case"[625]. The point that illustrates that the approaches of these courts are aligned is that their inquiry into the facts has the same intention. Specifically, this is to determine whether the debtor conducts its business from other then the place of its registered office and whether that fact is ascertainable by creditors.

The approach taken by these courts to the interpretation of COMI raises certain concerns. In view of a lack of agreed and pre-established factors that would be relevant to making a COMI determination, it may be possible that, despite a consistent approach to COMI interpretation, the courts from these countries arrive at differing conclusions with respect to the location of the COMI of the same debtor[626]. This may be so because courts may find as relevant distinct factors in a case regarding the same debtor.

The situation may be complicated by divergent court decisions as to whether the ascertainability requirement is satisfied or not. Such inconsistency may be due to two reasons. First, the Canadian interpretation of the ascertainability requirement may diverge from the British approach to the extent that it results in a distinction from the British courts' determinations. Second, even if the Canadian and British courts share the same approach, it is still likely that these courts may inconsistently determine whether this requirement is satisfied or not. In certain instances, the satisfaction of the ascertainability requirement may result in a subjective interpretation[627].

[625] *Digital Domain, supra* note 525 at para 24.
[626] Gaillot, French Courts and COMI, *supra* note 611 at 42.
[627] *Ibid*.

One of the implications of the flexibility of the shared Canadian and British approach to the interpretation of COMI is greater unpredictability. Further, when such flexibility would result in concurrent main proceedings, the approach may result in a defeat of the Model Law's intent to put the administration of cross-border insolvency cases under the control of only one jurisdiction, or, at least, to achieve greater coordination by establishing a scheme of a single main proceeding having universal effect that is supported by local non-main proceedings generally having effect only on local assets[628]. Despite such possible implications, the flexibility offered by the approach may be a necessary evil on the road to secure a benefit, the discouragement of forum shopping[629]. The adoption of a rigid approach, such as making one criterion decisive for the location of the debtor's COMI, would have left debtors the chance, prior to their insolvency, to choose as the controlling jurisdiction the jurisdiction that would give them an advantage in case of insolvency and that would have little connection with the debtors' affairs[630]. Basing the finding of COMI on the assessment of several factors whose range depend on the circumstances of each case, as the Canadian and British approach implies, makes such forum shopping less achievable. The need to balance the predictability achieved through rigid approaches and the benefits that are drawn from flexible approaches is also acknowledged by Professor Westbrook. He explains:

> Predictability is always in tension with correctness of result. The world offers endless variations of the clash between competing values and policies, leaving the judge torn between the predictable result and the one that is correct in this case or that establishes a correct rule for the future. So, we may expect that a balance between predictability and flexibility must be drawn with regard to COMI as well.[631]

[628] The Model Law, *supra* note 18 at art 28; Westbrook, The Eye of the Storm, *supra* note 332 at 1024.
[629] Pottow, The Myth, *supra* note 135 at 790.
[630] *Ibid* at 792.
[631] Westbrook, The Eye of the Storm, *supra* note 332 at 2023.

4.4 Relief

Drawing from the second chapter, the relief that a foreign proceeding may enjoy in the recognizing state under the Model Law provisions as enacted in that state is the relief that automatically flows from the recognition of a foreign main proceeding and relief that may be granted at the discretion of the court. As the automatic relief provisions provide for relief that is urgently needed in insolvency proceedings for the purpose of avoiding dissipation of assets[632], the Model Law gives little room for interpretation to courts. Such relief is expected to be available the moment the recognition order has been granted. Such expectations are confirmed by the Canadian and British judgments[633]. As regards the provision governing discretionary relief, specifically article 21 of the Model Law, the courts are given flexibility in using that provision. Under this provision courts can grant any relief that they consider appropriate in the circumstances of each particular case[634]. Such additional relief is needed for efficient and orderly administration of cross-border insolvencies[635]. Given the importance of this provision for the achievement of the objectives of the Model Law, the interpretation of the scope of this provision by courts will provide insight as to whether the application of this Law promotes these objectives.

Article 21 of the Model Law has two components, a jurisdictional and a discretionary component. First, a court hearing an application under this article must determine whether it has

[632] Berends, A Comprehensive Overview, *supra* note 230 at 363, 364.
[633] Canadian judgment: *Massachusetts Elephant, supra* note 525 at 33 "Having reached the conclusion that the foreign proceeding in this case is a foreign main proceeding certain mandatory relief flows at set out in s. 48 (1) of the CCAA [the equivalent provision of article 20 of the Model Law, which governs automatic relief]"; British judgment: *Samsun*, *supra* note 544: the court, after it recognized that the foreign proceeding is a foreign main proceeding, said at para 11: "I make it clear that the effect of my recognition of the Korean proceeding is that article 20 applies in this case [the equivalent article of article 20 of the Model Law]".
[634] UN, *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (Updated 2013)*, (New York: UN, 2014), online: <http://www.uncitral.org/pdf/english/texts/insolven/Judicial-Perspective-2013-e.pdf> at para 169.
[635] The Thirtieth Session Report, *supra* note 18 at para 63.

jurisdiction to grant the relief sought. Further, being satisfied that it has such jurisdiction, the court must decide whether to exercise its discretion and grant the relief. This section tries to determine, as regards the finding of jurisdiction under article 21, what the courts' reasoning with respect to the extent of their jurisdictional power under this article is, and as regards the discretionary component under the same provision, how courts interpret the provisions guiding the exercise of the courts' discretion, namely the provision that requires that courts grant relief only if satisfied that the creditors and other interested parties' interest are adequately protected[636] and that the act of granting relief is not manifestly against the local public policy[637]. Overall, the next two sections will try to determine whether the approach taken by the courts promote the goals of the Model Law.

4.4.1 Canadian Judgments

It could be said that the Canadian courts have taken a liberal interpretation of the equivalent provision of article 21 paragraph (1) of the Model Law. The Canadian approach can be discerned from the following cases.

In *Tucker*[638] the administrators in a UK insolvency proceeding recognized as a foreign main proceeding in Canada applied for an order temporarily staying the exercise of set-off rights. A substantial part of the foreign debtors' inventory was located in Canada. The inventory in Canada was in the physical control of the debtors' primary customer, who was also owed under the contracts concluded with the debtors. Those contracts included a liquidated damage clause. Due to these circumstances, there was a concern that the customer might use the inventory

[636] Model Law art 22.
[637] Model Law art 6.
[638] *Tucker, supra* note 526.

without making payment and later try to set off the amount that it had to pay for the use of the inventory against the amount that it was owed under the contracts concluded with the debtors. The payment for the use of inventory was needed to ensure the ongoing operation of the debtors and thus prevent prejudice to the debtors' customers.

The court held that it had the power to order a temporary stay of set off rights. It based its reasoning on section 49 (1) of the CCAA (the equivalent of article 21 of the Model Law), which stated that after recognizing the foreign proceeding, a court could make any order that it considered appropriate[639]. It further considered whether the relief sought was available under the CCAA. It found that section 21 of the CCAA expressly stated that set off rights were not precluded by the commencement of local CCAA proceedings. It also found, relying on a Canadian judgment given in a domestic CCAA proceeding, that such rights might be temporarily stayed[640]. Having found that such relief would be available at the request of a local representative in a local CCAA proceeding, the court concluded that such relief was accessible to a foreign representative.

Subsequently, having been persuaded that the exercise of set off would adversely affect the foreign proceeding and the recovery of creditors, the court exercised its discretion and granted the order sought.

Accordingly, under the provision governing discretionary relief in Canada, a court has jurisdiction to grant relief to the same extent that it is granted in local insolvency proceedings. A foreign representative can invoke the same provisions of local insolvency laws that a local insolvency representative would have the chance to use, and this is of considerable practical

[639] *Ibid* at para 24.
[640] *Ibid* at paras 26, 27.

importance. As illustrated by the *Tucker* case, the foreign proceeding had received substantial assistance from the Canadian court, in the absence of which there would have been considerable damage to the debtor's creditors and to the resolution of the proceedings itself. Aside from promoting efficient and orderly administration of cross-border insolvencies, this approach promotes legal certainty for creditors. The Canadian court order given in *Tucker* did not defeat the debtor's customer's legitimate expectations. This customer might be thought to have assumed that if such proceedings had been commenced in Canada, as the Model Law provisions as enacted by both the CCAA and the BIA allowed, such a stay could have been ordered.

Under the same provision, the Canadian courts found that they have power to recognize and enforce foreign insolvency judgments and orders. In *Probe*[641] the foreign representative appointed in a US Chapter 11 proceeding, which was recognized as a foreign main proceeding in Canada, applied for an order recognizing and allowing implementation of the plan of restructuring approved in the foreign main proceeding in Canada. One of the debtors in the US proceeding was a Canadian company. According to the plan, there had to be made certain amendments to the Canadian company's constating instrument.

The court found that under an express provision of the CCAA, it could have ordered such changes to be made to the constating instrument of the debtor if it sanctioned a compromise or arrangement in domestic CCAA proceedings[642]. The relevance of this provision in the context of cross-border proceedings was said to flow from section 48 (2) of the CCAA, which provided that any order made in favor of a foreign main proceeding must be consistent with any order that may be made under CCAA. It further held that "to the extent that this Court may have granted this

[641] *Probe Resources*, *supra* note 525.
[642] *Ibid* at para 40.

relief in other types proceedings under the CCAA, that relief is equally available in the context of recognition proceedings such as this one"[643]. Based on this, it concluded that it had jurisdiction to recognize and order that the plan be enforced in Canada pursuant to section 49 of the CCAA as the applicant requested[644]. Thus, the court found that under the equivalent provision of article 21 of the Model Law, it can recognize and enforce orders made by the foreign court in the course of the foreign proceeding when such orders could have been made in a domestic proceeding.

Accordingly, Canadian courts found that they have jurisdiction to recognize and enforce foreign insolvency orders under the Model Law as enacted in Canada if they are satisfied that these orders are consistent with any orders that may be made in a local insolvency proceeding. Such an approach enhances efficiency and respects the legal expectations of creditors. Efficiency is enhanced by avoiding repeated proceedings for petitioning for an equivalent type of relief to that already granted in the foreign proceeding under local laws[645]. The legal expectations are protected by an assessment of consistency of the foreign insolvency order with local insolvency laws.

The finding of jurisdiction to enforce foreign insolvency orders under the Canadian equivalent to the Model Law provisions by Canadian courts is not surprising and may even be the desired approach to the recognition of foreign insolvency proceedings in Canada considering the present and the pre-Model Law legal context.

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[643] *Ibid*.
[644] *Ibid* at 33, 41.
[645] Briggs, Adrian, "Rubin and New Cap: Foreign Judgments and Insolvency" (2013) Singapore Management University School of Law Research Paper No. 7/2013, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2248422> at 7.

Since the earliest days of Confederation, Canadian courts have had the jurisdiction to entertain applications for the recognition and enforcement of foreign insolvency orders[646]. Relying on common law private international law rules and the principles of comity, the Canadian courts would recognize and give effect to foreign insolvency orders if those orders were made by a court of competent jurisdiction in the jurisdiction of the debtor's domicile[647]. This position of the Canadian courts regarding the recognition and enforcement of foreign insolvency orders was criticized by scholars who argued for more broad grounds of recognition of such orders. These authors felt that the jurisdiction where the debtor was domiciled might often have only a weak connection with the debtor's main business operations[648]. Due to a change of the common law rules in Canada for the recognition of foreign judgments, Canadian courts hearing applications for the recognition and enforcement of foreign insolvency orders have broadened the bases on which they will recognize such orders.

The change in the common law rules for recognition and enforcement of foreign judgments was made through the Supreme Court of Canada's decision in *Morguard Investments Ltd. V. De Savoye*[649]. In this case the court supplemented the traditional common law rules for the recognition and enforcement of foreign judgments with "the real and substantial connection test"[650]. In particular, the court held that neither the personal presence of the defendant in the originating jurisdiction at the time of the action, nor the submission of the defendant to the judgment of the foreign court by agreement or attornment, were not necessary for the foreign

[646] Ziegel, Ships at Sea, *supra* note 492 at 424.
[647] Duggan, Canadian Bankruptcy, *supra* note 494 at 822; see also *IIT (Re)*, *supra* note 492 and *Williams v. Rice,* [1926] 3 DLR 225 (Man KB). This rule was not absolute; it was subject to certain qualifications. For instance, Canadian courts have said that a foreign insolvency order affecting title to immovable in Canada is not enforceable, see *Macdonald v. Georgian Bay*, *supra* note 493, and Duggan, Canadian Bankruptcy, *supra* note 494 at 825.
[648] Duggan, Canadian Bankruptcy, *supra* note 494 at 822.
[649] *Morguard Investments Ltd v De Savoye,* [1990] 3 SCR 1077, 76 DLR (4th) 256 (SCC) [*Morguard*].
[650] *Ibid*.

court to properly exercise jurisdiction over the defendant[651]. By contrast, a real and substantial connection between the action[652] or the defendant and the originating jurisdiction would be sufficient basis for the foreign court's exercise of jurisdiction over the defendant[653]. In *Morguard*, the real and substantial connection test was applied for the recognition and enforcement of an inter-provincial judgment; however, lower courts have used this test for the recognition of foreign judgments in Canada[654]. This interpretation was later affirmed by the Supreme Court in *Beals v. Saldanha*[655].

Staring with the judgment in *Microbiz Corp. v. Classic Software Systems Inc.*[656], Canadian courts have frequently used the real and substantial connection test to recognize and enforce foreign insolvency orders[657]. The significance of the *Morguard* judgment in the cross-border insolvency context was not limited to influencing the courts to change the traditional jurisdictional component of the rules regarding the recognition and enforcement of foreign insolvency judgments[658]. Canadian courts, "following the Supreme Court's lead in *Morguard*, … also emphasized the role of comity between trading nations to justify enforcing as well as recognizing"[659] foreign insolvency proceedings and orders[660]. The growing recognition by

[651] *Ibid*.
[652] Blom, Joost & Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38:2 UBC L Rev 372 at 380, n 33.
[653] *Morguard*, *supra* note 649.
[654] Ziegel, Jacob, "Canada-United States Cross-Border Insolvency Relations and the UNCITRAL Model Law" (2007) 32:3 Brook J Int'l L 1041 at p 1047 [Ziegel, Canada – United States Cross-Border Insolvency].
[655] *Beals v Saldanha,* 2003 SCC 72, 234 DLR (4th) 1 [*Beals v. Saldanha*].
[656] *Microbiz Corp. v. Classic Software Systems Inc.,* 1996 CanLII 8276 (ON SC), 45 CBR (3d) 40 at para 3; Ziegel, Canada – United States Cross-Border Insolvency Relations, *supra* note 654 at 1047.
[657] Ziegel, Canada – United States Cross-Border Insolvency Relations, *supra* note 654 at 1047; Among the cases where Canadian courts have recognized and enforced foreign insolvency judgments by relying on the *Morguard* test are *Roberts v. Picture Butte Municipal Hospital*, [1999] 4 WWR 443, 1998 ABQB 636 (CanLII) [*Roberts v. Butte]*, *Cavell Insurance Company, Re*, 2006 CanLII 16529 (ON CA), 269 DLR (4th) 679, *BW Canada*, *supra* note 533.
[658] Ziegel, Canada – United States Cross-Border Insolvency Relations, *supra* note 654 at 1047 – 1048.
[659] *Ibid* at 1048.
[660] *Ibid*.

Canadian courts of the importance of comity in cases of cross-border insolvency was illustrated by the words of Forsythe J in *Roberts v. Butte*[661] judgment concerning an application for the recognition and enforcement of a US Bankruptcy Court stay of proceedings against the debtor in Canada:

> Comity and cooperation are increasingly important in the bankruptcy context. As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination there would be multiple proceedings, inconsistent judgments and general uncertainty.[662]
>
> …I find that common sense dictates that these matters would be best dealt with by one court, and in the interest of promoting international comity it seems the forum for this case is in the US Bankruptcy Court. Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity to grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the *US Bankruptcy Code* provision, the similar philosophies and procedures in Canada and the US, the Plaintiff's attornment to the jurisdiction of the US Bankruptcy Court, and the incredible number of claims outstanding…[663]

In an effort to account for the increasing number of cross-border insolvency cases and to provide for clearer guidelines to the courts facing the problems that these insolvencies raised, the Canadian government, starting as far back as 1970, attempted to formulate express provisions regarding cross-border insolvencies that were meant to be part of Canada's insolvency legislation[664]. These efforts materialized in 1997 with the enactment of such provisions in Part XIII of the BIA, which were subsequently replicated, with some modifications, in section 18.6 of the CCAA[665]. The 1997 amendments, one author argues, took a "cautious approach"[666] both to cooperation with and to the granting of assistance to foreign insolvency proceedings and foreign

[661] *Roberts v. Butte*, *supra* note 657.
[662] *Ibid* at para 20.
[663] *Ibid* at para 31.
[664] Ziegel, Jacob S., "Corporate Groups and Canada – U.S. Crossborder Insolvencies: Contrasting Judicial Visions" (2001) 35:3 Can Bus LJ 459 at 468 [Ziegel, Corporate Groups].
[665] *Ibid* at 468.
[666] Ziegel, Canada – United States Cross-Border Insolvency Relations, *supra* note 657 at 1048.

insolvency representatives[667]. The amendments encouraged concurrent proceedings regarding the same debtor and included provisions facilitating cooperation between such parallel proceedings[668]. In addition, the 1997 amendments were silent regarding which test for the recognition of foreign insolvency orders Canadian courts should apply[669]. Instead, they included a provision which survived the enactment of the Model Law in Canada[670], stating that:

> Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying such legal or equitable rules governing the recognition of foreign orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act.[671]

Accordingly, under the 1997 amendments, courts still retained the power to recognize and enforce foreign insolvency orders based on the real and substantial connection test. Given the silence of the 1997 amendments regarding the recognition of foreign insolvency orders and their cautious approach to cross-border insolvency cooperation, Canadian courts continued to apply the *Morguard* test after these amendments came into force[672].

Thus, it is not surprising that the Canadian courts applying the Model Law have liberally interpreted the Canadian equivalent of the Model Law provision governing discretionary relief available to the foreign representative after an order recognizing the foreign proceeding is granted in the receiving country. First, the approach to the recognition of foreign insolvency judgments taken by the Canadian courts under the Model Law provisions is in line with the emphasis on the increasing importance of comity and cooperation made by these courts when applying *Morguard* in the pre-Model Law cases. Second, the recognition of a foreign insolvency

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667 *Ibid*.
668 *Ibid*; CCAA, *supra* note 450 s 18.6 (2).
669 Duggan, Canadian Bankruptcy, *supra* note 494 at 823.
670 CCAA, *supra* note 450 s 61.1; BIA, *supra* note 451 s. 284 (1).
671 CCAA, *supra* note 450 s 18.6(4); BIA, *supra* note 451 s 268(5).
672 Ziegel, Canada – United States Cross-Border Insolvency Relations, *supra* note 657 at 1049.

order made by a court in a jurisdiction with which the debtor's only connection is the location of the centre of its main interests in that jurisdiction would not constitute a liberalization of the test used to assess the jurisdiction of the foreign court granting the foreign insolvency order; under the real and substantial connection test, the Canadian courts have recognized foreign insolvency orders made in jurisdictions with which the debtor had fewer connections than the connections that are required by the finding of the centre of the debtor's main interests. This was the case in *BW Canada* where the court recognized and enforced a US stay of proceedings in respect of a solvent Canadian subsidiary company; the Canadian subsidiary was not even a party to the US insolvency proceedings that were commenced against the US parent of the Canadian subsidiary[673].

As noted above, the provision included in the 1997 amendments giving to the courts authority to apply any legal or equitable rules that are not inconsistent with the provisions of the BIA or the CCAA, as the case may be, governing the recognition of foreign insolvency orders was not abrogated by the enactment of the Model Law provisions. Accordingly, in any case in which a court finds that the application of the *Morguard* test is consistent with the provisions based on the Model Law, this test may still be applied to justify recognition of foreign insolvency orders. However, the recognition of such orders based on the real and substantial connection test may not be desirable considering the goal of the Model Law, which was adopted in both the BIA and the CCAA, of promoting greater legal certainty for trade and investment. The concept of the centre of main interests of the debtor, taken as a test to assess whether the foreign court had jurisdiction to make judgments in respect of the insolvency of the debtor, creates more certainty than the real and substantial connection test is able to create when used to make a similar

[673] *BW Canada*, *supra* note 533.

determination. This is so because the centre of main interests of the debtor test for jurisdiction is much clearer than the real and substantial connection test. The clarity of the test is important as it makes the outcome of the application of the test much easier to predict for creditors[674]. As seen in the previous section of this thesis, the concept of COMI has received a consistent interpretation from both Canadian and British courts. These courts have provided helpful guidance as to what constitutes a debtor's COMI. Further, the approach taken by these courts towards the determination of the debtor's COMI is not so complex as to make it hard for creditors to predict the outcome of the application of the concept at the time they enter into transactions with a debtor. The approach, in general terms, is that the test tries to identify, based on factual factors, the jurisdiction from which the debtor conducts its business on a regular basis. In addition, as the British courts held, the determination must be made by relying on facts that are both objective and ascertainable by third parties. Thus, if the recognition of foreign insolvency orders is governed by the Model Law provisions, the Canadian creditors have good tools to predict which country may be recognized as having jurisdiction to administer main proceedings and whose insolvency judgments may be recognized and enforced in Canada; accordingly, Canadian creditors may ascertain at the moment of entering into transactions with a debtor which jurisdiction and which laws may affect their rights.

By contrast, the use of the *Morguard* doctrine for the recognition and enforcement of foreign insolvency orders creates uncertainty because of its inconsistent application as illustrated by the judgments, which are difficult to reconcile[675], given in the *Singer Canada*[676] and *BW Canada*[677]

[674] Pottow, The Myth, *supra* note 153 at 792.
[675] Duggan, Canadian Bankruptcy, *supra* note 494 at 823.
[676] *Singer Sewing Machine Company of Canada Ltd. (Re) (Trustee of)*, [2000] 5 WWR 598, 18 CBR (4th) 127 [*Singer Canada*].
[677] *BW Canada, supra* note 533.

cases[678]. The courts in both these cases faced the issue of whether a stay of proceedings given in a foreign court in an insolvency proceeding commenced against the parent of a Canadian subsidiary that was not a party of the foreign insolvency proceedings and that was carrying business only in Canada may receive recognition and enforcement in Canada against the Canadian subsidiary. The court in *Singer Canada* answered the question in the negative[679], while the court in *BW Canada* arrived at a diametrically opposed answer[680]. The court in *Singer Canada* found that the real and substantial connection test and the principles of comity did not justify the extension of the stay against the subsidiary in Canada. The court considered in its judgment what the real and substantial connection between the foreign order and the Canadian subsidiary was, and at paragraph [26] it held:

> Comity does not require me to recognize a chapter 11 order over a Canadian company carrying on business only in Canada and whose assets are all in Canada. Who the shareholders are is irrelevant and who the creditors are is irrelevant. Under Alberta law neither gives an American bankruptcy court jurisdiction over Singer Canada.[681]

On the contrary, in *BW Canada*, the court found that one of the grounds on which the foreign stay could be given effect in Canada was the evolving principle of comity and cooperation as stated in *Morguard*, which the court found equally applicable to international insolvency matters[682].

In view of the uncertainties that the uneven application of the *Morguard* test would create in the context of cross-border insolvencies, the recognition and enforcement of foreign insolvency orders under the Model Law provisions is the preferred approach.

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[678] Fortuitously, both these cases were decided the same month, see Ziegel, Corporate Groups, *supra* note 664 at 460.
[679] *Singer Canada, supra* note 675 at para 28.
[680] *BW Canada, supra* note 533 at para 22.
[681] *Singer Canada*, *supra* note 675 at para 26.
[682] *BW Canada*, *supra* note 533 at paras 4 – 10, 16, 21, 22.

Turning to the determination of the Canadian courts' approach to the interpretation of the section governing discretionary relief, the liberal understanding of these courts of this section is further shown by the unrestrictive interpretation of what is consistent with local insolvency laws.

In *Hartford*[683] the foreign representative brought a motion under section 49 of the CCAA for recognition and implementation of certain orders made by the court in the foreign main proceeding. Among these orders there was a Debtor in Possession (DIP) financing order[684]. The order contained a "roll up" provision according to which all cash collateral that was in the possession of the debtors at the time of filing for insolvency proceedings, or was coming into their possession after the filing, was deemed to have been remitted to the pre-filing secured lender for the repayment of the pre-filing secured loan and of the loan under the DIP financing. Such a provision was expressly prohibited in a restructuring proceeding under CCAA according to section 11.2 of the CCAA, which provided that a DIP charge "may not secure any obligation before the order is made"[685].

The court considered that it had jurisdiction to recognize and enforce this order in Canada because "nothing was being done that is contrary to the applicable provisions of the CCAA"[686]. The court pointed out that the cash in the possession of the debtors at the time of the filing for insolvency proceedings was effectively spent in the debtors' operations and subsequently replaced with advances made under the DIP financing so that all the cash in the possession of the debtors was proceeds from the DIP financing. Thus, arguably, the roll up provision was such

[683] *Hartford, supra* note 525.
[684] "The term "debtor-in-possession" financing is used to describe the interim financing required for the ongoing operations of the business during restructuring proceedings", see Wood, Bankruptcy, *supra* note 24 at 355.
[685] CCAA, *supra* note 450 s 11.2 (1).
[686] *Hartford, supra* note 525 at para 13.

only on paper and not in fact[687]. If this was the reason for holding that the order was consistent with local law, then it follows that a Canadian court has jurisdiction to recognize and enforce a foreign insolvency order in Canada that is expressly prohibited to be made in a local insolvency proceeding, provided that the effect of that order in Canada would not be inconsistent with what would have been done in a local proceeding. Thus, a court adopting such interpretation will consider the foreign order in the concrete circumstances of the case and will determine whether the enforcement of that order in Canada would or would not produce effects that would be inconsistent with local laws. In view of the differences among national insolvency laws[688], such an approach to the interpretation of what is consistent with local laws would avoid unwarranted refusals of assistance to foreign proceedings. These refusals would be considered unwarranted because they would protect no one's interests. For instance, the recognition and enforcement of the foreign order in *Hartford* was not infringing any public policy, as the Canadian court in this case determined[689], and it was only for the benefit of all the creditors generally that the DIP financing allowed by the foreign order was needed to avoid irreparable harm to the debtors' estate[690].

The Canadian courts' approach to the discretionary relief article allows for a wide range of relief to be accessible to a foreign representative and, consequently, reduces the instances when relief in favor of a foreign proceeding would be refused as a matter of jurisdiction. Such a liberal interpretation enhances the chances for an efficient and coherent administration of cross-border

[687] Golick, Steven & Reisterer Patrick, "Canada: Canadian Courts Permit Roll-Up of Pre-Petition Borrowing in Cross-Border Canada-U.S. Proceeding" (14 May 2012), online: <http://www.mondaq.com/canada/x/177236/Loans+Mortgages+Leasing/Canadian+Court+Permits+RollUp+Of+Pre Petition+Borrowing+In+CrossBorder+CanadaUS+Proceeding>.
[688] *Rubin & Anor* v *Eurofinance SA & Ors,* [2012] UKSC 46, [2012] 3 WLR 1019 at para 15 [*Rubin*].
[689] *Hartford, supra* note 525 at paras 16, 17.
[690] *Ibid* at para 7.

insolvency and at the same time it does not infringe on local interests; the courts still retain the power to refuse to provide relief under their discretionary powers granted by this provision when such relief would be against public policy or would prejudice creditors' interests. The power to refuse to grant relief on such grounds is expressly acknowledged by the articles of the Model Law[691].

By contrast, the text of the Model Law is somewhat ambiguous regarding the limits that these provisions set on the power to grant or deny relief. The Model Law and the Guide to Enactment provide that the public policy exception should not be interpreted broadly; courts should refuse to make any act under the Model Law when that would be *manifestly* contrary to the public policy of the forum[692]. As regards the provisions that empower courts to refuse or condition relief to be granted to a foreign representative in order to offer protection to local creditors[693], the Model Law states that when granting such relief the court must ensure that the interests of creditors and other interested parties, which include the debtor, are *adequately* protected[694].

Since the exercise of the powers granted by these two provisions is in conflict with one of the main purposes of the Model Law, namely the furthering of international cooperation in cross-border insolvency cases in order to ensure efficient and fair administration of such cases, an inquiry into the scope of these provisions as seen by courts in particular cases is instructive of whether the Model Law furthers the international cooperation goal in practice. In addition, such inquiry will provide an answer to the question asking whether the Model Law offers effective ways of protecting local interests; such protection is not only allowed under a legal framework

[691] The Model Law, *supra* note 18 at art 6, 22 (1).
[692] The Model Law, *supra* note 18 at art 6; The Guide to Enactment, *supra* note 223 paras 86 – 89.
[693] The Model Law, *ibid* art 22.
[694] The Model Law, *ibid*.

based on modified universalism, but it is also needed in the present reality of unharmonized national insolvency laws.

The Canadian judgments considering requests for relief under the local versions of the Model Law are not very helpful in assessing the limits that these protective of the local interests provisions set on the power to grant such relief. Some insight may be gained from US judgments that have had the chance to consider this matter more in depth while applying the US version of the Model Law[695].

As regards the provision requiring that relief be granted only if the court is satisfied that the creditors and other parties' interests are receiving adequate protection, the court in the *In re Tri Cont'l Exch. Ltd.* case[696] formulated the standard for the analysis of that provision. In that case, the relief sought by the foreign representative appointed in the foreign main proceeding taking place in St. Vincent and the Grenadines was in favor of entrusting the foreign representative with the administration and realization of the US based assets. A creditor of the debtors, which had a judgment against the debtors under the US law, claiming lien status and opposed the foreign representative's request for relief. The creditor wanted to persuade the court to impose an additional condition to the conditions that such relief would have been ordinarily subject to pursuant to US law. More specifically, the creditor proposed that the court specified that the foreign representative should not use the US assets to pay professional expenses and fees without prior permission from the US court[697].

[695] US incorporated the Model Law in the Chapter 15 of the US Bankruptcy Code, see *supra* note 23, and it drafted the US version of the Model Law to follow closely the language of the Model Law. See Westbrook, Jay Lawrence, "Chapter 15 At Last" (2005) 79:3 Am Bankr LJ 713 at 713, 719.
[696] *In Re Tri-Continental Exchange Ltd.,* 349 BR 627 (Bankr ED Cal 2006) [*In re Tri Cont'l Exch. Ltd.]*
[697] *Ibid* at para 631.

The court determined that, under Chapter 15, it has the power to impose conditions in order to provide protection for local creditors. Specifically, the court said that section 1522 of the US Bankruptcy Code (the equivalent provision of article 22 of the Model Law, titled "Protection of Creditors and other Interested Parties") "conditions any discretionary relief… upon the interests of creditors and other interested entities, including the debtor, being "sufficiently protected""[698]. Relying on the Guide to Enactment, the court concluded that the standards for the interpretation of this section in connection with the section governing discretionary relief "emphasize[d] the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another."[699]

Applying this test to the facts of the case, the court decided to grant relief free of the condition proposed by the creditor, since the relief sought did not imply a remittal of assets to the foreign representative for the distribution of these assets under foreign law[700]. To the contrary, the administration and realization of these assets by the foreign representative, which was what the sought relief envisioned, was to be subject to US law. By virtue of the recognition of the foreign proceeding as a main proceeding that triggered the automatic stay, the provision of the US Bankruptcy Code that governed the use of cash collateral in local bankruptcy cases was applicable to the present case. That provision required that cash collateral be used only with the permission of the court[701]. Accordingly, the court considered this protection, which was afforded by Chapter 15 in combination with the provision governing the use of cash collateral, as

[698] *Ibid* at para 637.
[699] *Ibid* at para 637.
[700] *Ibid* at para 640, 639.
[701] *Ibid* at para 639.

sufficient protection of the creditor's rights[702]. In addition, the court said that, based on the circumstances of the case, it was not warranted to impose an additional condition because that could have adversely impacted the foreign main proceeding, which was the principal means through which the realization and the distribution of assets had to be executed[703].

This case suggests that the provision protecting creditors and other entities' interests should be interpreted narrowly. The standard developed by the court requires that a balance of opposing interests be achieved and that those interests not to be accorded a pre-established preference; this implies that the protection of one interest may come at the expense of another interest[704]. Thus, the test allows for the possibility of infringing on the local creditors' interests in favor of the benefits that will be derived from the relief granted to the foreign proceeding, such as the efficient and fair administration of the insolvency case.

The extent to which a local creditor's interest may be affected by the relief to be granted to a foreign proceeding is suggested by the decision in the *In re Sivec SRL* case[705]. In this case, the debtor, an Italian company subject to a reorganization proceeding in Italy, requested the return of the warranty sum retained by its US customer by agreement. The US customer did not respond to the request; instead, it sued the debtor for breach of contract in the US district court. The insolvency representative in the Italian reorganization proceeding filed a counterclaim for the return of the warranty retainage. Meanwhile, it obtained from a US bankruptcy court an order recognizing the Italian proceeding as a foreign main proceeding and prohibiting creditors from disposing of any assets in which the debtor might have an interest.

[702] *Ibid* at para 639.
[703] *Ibid* at para 640.
[704] *Jaffe v Samsung Elecs Co*, 737 F (3d) 14 (4th Cir 2013) at para 1952.
[705] *In Re Sivec SRL*, 476 BR 310 (Bankr ED Okla 2012).

The District court found that the debtor committed the breach and that the US customer had to return the warranty retainage. The US customer moved for declaratory relief to allow setoff[706]. The district court remanded the issue to the Bankruptcy Court that had previously recognized the foreign main proceeding. The issue that the Bankruptcy court had to decide was whether to allow setoff or to order that the US customer return the retainage for distribution in the Italian proceeding as the foreign representative had requested[707].

The Bankruptcy court decided to allow the setoff and refuse the request for remittal of the funds. Citing the Chapter 15 provisions, the court noted that it should decline to grant the relief requested if that would be manifestly against public policy or would leave the creditor's interests "clearly unprotected"[708]. The court was unconvinced that the creditor's interests would be sufficiently protected if it allowed a remittal of the retainage. Under US bankruptcy law, the US customer was a secured creditor to the extent of the amount subject to setoff[709]. By contrast, under Italian law, a claim subject to setoff was not considered as a secured claim[710]. In addition, the foreign representative requesting remittal of the funds did not give any guaranties that the creditor's interests in the retainage would be protected in the foreign proceeding. Since the US customer was viewed in the foreign proceeding as a debtor and not a creditor, it was not given notice about the proceeding or of the claim filing deadline, and no funds were set aside to satisfy its late claim. Consequently, the US customer would, at best, have been treated as an unsecured and late creditor that might have received nothing on its claim. Based on this, the court concluded that the US creditor's "treatment in Italy would be vastly different than in the United

[706] *Ibid* at para 315.
[707] *Ibid* at para 318.
[708] *Ibid* at para 323.
[709] *Ibid* at para 324.
[710] *Ibid* at para 324.

Sates: its security interest [was] not merely threatened in the Italian proceeding, it [did] not exist."[711]

Accordingly, the limit that the provision protecting the interests of creditors puts on the power to grant discretionary relief under the Model Law can be summarized as follows. A creditor's interest, which would be valid and enforceable if the creditor had asserted the claim in a local insolvency proceeding, cannot be affected by the relief granted to a foreign representative to such an extent that can no longer be said that the creditor has an interest in the debtor's assets. The creditor's interests can be threatened, but not extinguished. The decision suggests that, under the Model Law, courts have a real tool for the protection of local interests.

The protection offered to local interests is complemented by the public policy exception; nevertheless, the use of this exception is recommended by the Guide to Enactment only in "exceptional situations concerning matters of fundamental importance for the enacting State"[712]. The large majority of US cases that had considered the application of the public policy provision suggests that US courts followed the recommendation to interpret the provision restrictively.

In the *Ephedra* case[713], the Monitor in a Canadian insolvency proceeding requested the recognition and enforcement in the US of a claim resolution procedure meant to assess and value all creditors' claims, including the claims of the plaintiffs in US actions commenced against the debtor for personal injuries and wrongful deaths allegedly caused by ephedra contained in the products marketed by the debtor. Some of the plaintiffs that have lodged their claims in the Canadian proceeding objected to the granting of such relief. They argued relying on the public

[711] *Ibid* at para 324 citing *In re Treco,* 240 F (3d) 148 (2d 2001) at paras 160 – 161 [*In re Treco*].
[712] The Guide to Enactment, *supra* note 223 at paras 89, 86 – 89.
[713] *In Re Ephedra Products Liability Litigation (Muscletech Research and Development, Inc., et al.),* 349 BR 333 (SDNY 2006) [*Ephedra*]

policy exception under Chapter 15 that the relief would deprive them of due process and trial by jury[714]. Regarding the due process part of the argument, the Canadian court order approving the procedure permitted "the Claim officer to refuse to receive evidence and to liquidate claims without granting interested parties an opportunity to be heard"[715]. At the US court's initiative, the foreign representative applied for an amendment of the order that would remedy these deficiencies; the Canadian court amended the order. As for the lack of a right to trial by jury, the court said that recognition and enforcement of the procedure cannot be refused pursuant to the public policy exception "simply because the procedure alone does not include a right to jury"[716]. Even if the court recognized that "the constitutional right to a jury trial [was] an important component of [the US] legal system"[717], it considered that "the notion that a fair and impartial verdict cannot be rendered in the absence of a jury trial defies the experience of most of the civilized world"[718]. Accordingly, albeit the right to jury embodied a fundamental public policy, namely it ensured fair and impartial trial[719], a foreign proceeding that fails to provide such right will not be considered contrary to the policy this right furthers, provided that the foreign preceeding offers other safeguards ensuring fairness and impartiality[720]. Having concluded that, after the order approving the procedure for the resolution of claims was amended as suggested by the US court, the procedure complied with the US notion of trial fairness, the court granted the relief requested.

[714] *Ibid* at para 335.
[715] *Ibid* at para 335.
[716] *Ibid* at para 336.
[717] *Ibid* at para 337.
[718] *Ibid* at para 337.
[719] The court stated that the historical function of a jury was "to stand as a bulwark against government abuse" see *Ephedra, ibid* at para 337.
[720] *Ibid* at para 336 "More recently, in *Ackermann v. Levine,* 788 F.2d 830 (2d Cir. 1986), the Second Circuit expressly reaffirmed "[t]he narrowness of the public policy exception to enforcement [of foreign judgments]," adding that, "[a]s Judge Cardozo so lucidly observed: 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.'" *Ackermann,* 788 F.2d at 842 (quoting *Loucks v. Standard Oil Co.,* 224 N.Y. 99, 110-11, 120 N.E. 198 (1918) (Cardozo, J.))".

Further, in *Ernst & Young*[721] the objecting creditors to a petition for relief under Chapter 15 advanced two arguments while invoking the public policy objection. First, the creditors affirmed that they might receive less in the foreign proceeding than what they would receive in a local proceeding as the foreign proceeding included creditors form Canada and Israel[722]. The court found this argument unconvincing because "[a]ll wronged [creditors] should share in the assets accumulated in the [foreign proceeding], regardless of nationality or locale"[723]. Second, the objecting parties argued that the administrative costs of the foreign proceeding might deplete the debtor's assets leaving little value to be distributed to the creditors. The court considered this argument equally unconvincing. More specifically, it stated that "[costs] of liquidation are a reality, whether through a foreign proceeding, or through a United States bankruptcy case."[724] Accordingly, the court found that neither of the objections of the creditors raised concerns related to a fundamental US public policy[725]; to the contrary, the foreign proceeding complied with basic principles of insolvency laws, as, for instance, the distribution of the debtor's assets in a collective proceeding in which all the debtor's creditors are allowed to participate.

In addition, the court in *Metcalfe and Mansfield*[726] allowed recognition and enforcement of a Canadian insolvency order providing for non-debtor releases granted in a CCAA proceeding, despite the fact that such an order might not have been accorded in a US restructuring proceeding under equivalent circumstances[727]. In considering whether or not such recognition and enforcement would infringe US public policy under the relevant Model Law based provision, the

[721] *In Re Ernst & Young,* Inc, 383 BR 773 (Bankr D Colo 2008) [*Ernst & Young*].
[722] *Ibid* at para 781.
[723] *Ibid* at para 781.
[724] *Ibid*.
[725] *Ibid; In Re Gold & Honey,* Ltd, 410 BR 357 (Bankr EDNY 2009) at para 372 [*Gold and Honey*].
[726] *In Re Metcalfe & Mansfield Alternative Investments*, 421 BR 685 (Bankr SDNY 2010) [*Metcalfe and Mansfield*].
[727] *Ibid* at paras 697, 698.

court stated that "[t]he relief granted in the foreign proceeding and the relief available in a US proceeding need not be identical"[728]. It added that when interpreting the public policy exception, courts should primarily determine whether the procedures used in the foreign proceeding met the local fundamental standards of fairness[729].

One of the few cases where discretionary relief was refused pursuant to the public policy provision is *Gold and Honey*[730]. The court refused to recognize, under Chapter 15, an Israeli receivership commenced against a debtor after an insolvency proceeding had been opened in the US against the same debtor because, besides the fact that the Israeli receivership was not a collective proceeding as understood under Chapter 15, its recognition would have been manifestly contrary the US public policy[731]. The court held that recognition of the Israeli receivership would "severely impinge" [732] on the most fundamental public policies that the automatic stay that followed the commencement of the US proceeding tried to further, more particularly, the public policy "preventing one creditor from obtaining an advantage over other creditors, and providing for the efficient and orderly distribution of the debtor's assets to all creditors in accordance with their relative priorities." [733] Accordingly, the court's refusal to recognize the foreign proceeding on the public policy ground suggests that the policies of fundamental importance, whose potential violation by the relief requested would warrant a refusal of deference, include the basic policies that underlie insolvency laws.

[728] *Ibid* at para 697.
[729] *Ibid* at para 697 citing *Cunard SS Co Ltd v Salen Reefer Servs AB*, 773 F (2d) 452, 457 (2d Cir 1985).
[730] *Gold and Honey*, *supra* note 725.
[731] *Ibid* at paras 370, 372, 373.
[732] *Ibid* at para 372.
[733] *Ibid* at para 372.

Another case where the public policy exception was found to be applicable is *In re Toft*[734]. In that case, the foreign representative appointed in a German insolvency proceeding requested the court under Chapter 15 to recognize an Email Interception Order granted in the German proceeding and to enforce the foreign court's order by compelling two US located internet service providers (ISP) to grant access to the debtor's current and future e-mails stored on these ISP's servers[735]. Importantly, no notice was given to the debtor about this motion and the foreign representative requested that no notice be given to the debtor in the future so as to facilitate the investigation of affairs of the debtor, which was refusing to cooperate in the German proceeding. Relying on the cases just discussed, the court recognized that the public policy provision should be interpreted narrowly, but it concluded that this was "one of the rare cases that call[ed] for its application."[736] The court found that US law differed from German law regarding the interception and disclosure of e-mail communication; while German law permitted relief equivalent to that requested, the *ex parte* disclosure and interception of e-mail communication was illegal under US law[737]. The court acknowledged that the fact that the US and German law differed on the relevant matters was not sufficient to cross the threshold put by the public policy provision[738]. However, the relief sought crossed that threshold since it "would impinge severely a U.S. constitutional or statutory right"[739], namely "privacy rights subject to a comprehensive

[734] *In Re Dr. Juergen Toft,* 453 BR 189 (Bankr SDNY 2011) [*In re Toft*].
[735] *Ibid* at para 189.
[736] *Ibid* at para 195.
[737] *Ibid* at paras 196-97 citing the *Wiretap Act*, 18 USC § 2511 (2012) and the *Privacy Act*, 18 USC § 2701 (2012).
[738] *Ibid* at para 198 relying on *In re Treco, supra* note 711 at para 158*; Ephedra, supra* note 713 at paras 336-37; *Metcalf and Mansfield, supra* note 726 at paras 698-99; *cf In re Garcia Avila,* 296 BR 95 (Bankr SDNY 2003); *In re Board of Directors of Multicanal SA,* 307 BR 384 391 (Bankr SDNY 2004).
[739] *Ibid* at para 198 quoting *In re Qimonda AG Bankr Litig,* 433 BR 547 (ED Va 2010) at 570.

scheme of statutory protection, available to aliens, build on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States"[740].

The inquiry on the US judgments considering the public policy provision under Chapter 15 revealed that courts interpreted and applied the provision narrowly. First, the courts correctly recognized that, as the drafters of the Model Law advised[741], the public policy exception should be used only when the foreign proceeding or the relief sought threatened fundamental policies of the receiving country. Second, the courts have interpreted the fundamental policies notion restrictively. They have limited the notion to policies underlying rules that ensure trial fairness, rules based on constitutional safeguards and rules that further the basic principles of insolvency laws. In addition, they have recognized that the mere difference between local laws and foreign laws does not warrant the application of the public policy exception[742]; for the exception to be applied, deference to a foreign proceeding, or to the laws applied in such a proceeding, should hinder at least one of the local fundamental public policies, as listed above. Thus, the fact that the foreign insolvency laws deal with an issue differently than the local insolvency laws is not sufficient to refuse cooperation pursuant to the public policy provision; this is significant for the workability of the Model Law. The opposite would have hindered the promotion of the primary goals of this Law, such as the efficient administration of cross-border cases. If the courts would see every departure from local imperative rules as a violation of a fundamental public policy, "very few foreign decisions would ever be recognized since most foreign proceedings would, in

[740] *Ibid* at para 198.
[741] The Thirtieth Session Report, *supra* note 18 at para 171.
[742] *Metcalfe and Mansfield*, *supra* note 726 at para 697.

one or the other aspect, depart from procedures which, internally, constituted matters governed by imperative rules"[743].

The cases where the court found the public policy exception to apply suggest that countries, under the Model Law, have an effective mechanism for the protection of the most important local public policies. This should assuage concerns that a legal framework based on modified universalism, by strongly encouraging international cooperation in cross-border insolvency cases, will lead to countries compromising on fundamental public interests.

4.4.2 British Judgments

The British courts, like Canadian courts, have recognized that they have jurisdiction to grant relief to a foreign representative under local insolvency laws to the same extent as they would have granted relief to a local insolvency representative. The *Larsen v. Navios*[744] case is illustrative of this. In this case, the debtor was a company subject to bankruptcy proceedings in Denmark. After the debtor was assigned into bankruptcy, one of the debtors of the bankrupt company acquired a claim against the debtor by way of assignment for the purpose of setting off the amount payable under the acquired claim against the amount that it owed to the bankrupt company. Under the insolvency law of Denmark, the post-insolvency assignment set off could not succeed[745]. Also, if the bankruptcy proceeding had taken place in England, then the exercise of such set off rights would have been prevented, as a matter of English law[746].

[743] The Thirtieth Session Report, *supra* note 18 at para 171.
[744] *Larsen v Navios, supra* note 547.
[745] *Ibid* at para 9.
[746] *Ibid* at para 10.

The foreign representatives trying to recover what the debtor of the bankrupt was owing to the bankrupt brought proceeding in England pursuant to jurisdiction selection clauses included into the contract from which the debt arose. The debtor, by way of defense, held that it was not liable because it could exercise set off rights. The foreign representative applied to the court for an order recognizing the foreign proceeding as a foreign main proceeding and for relief under article 21 CBIR (the equivalent of article 21 of the Model Law) for an order preventing the debtor of the bankrupt to rely on the set off rights that that debtor claimed to be entitled to exercise. The court recognized the proceeding as a foreign main proceeding and granted the order sought. The British court found that it had jurisdiction under article 21 to prevent the debtor from relying on the set off rights because a foreign representative was entitled to the same relief that an English insolvency representative would have been entitled to if the foreign proceeding had been commenced in England at the date of the opening of the foreign proceeding[747].

This case demonstrates that the application of the Model Law provisions are effective at preventing parties involved in a cross-border insolvency from taking advantage of the international nature of the insolvency of the debtor by trying to gain an advantage to the detriment of all the creditors generally. Consequently, the foreign representatives under the Model Law provisions have access to an efficient mechanism for preventing a race of creditors to the court.

Unlike their Canadian counterparts, the British courts do not recognize that they have jurisdiction under the Model Law provisions to recognize and enforce foreign insolvency orders. This follows from the United Kingdom Supreme Court judgment given in the *Rubin*[748] case. In this

[747] *Ibid* at paras 23, 24.
[748] *Rubin, supra* note 688.

case the foreign representatives in a foreign main proceeding commenced under the US Bankruptcy Code were seeking an order under articles 21 and 25 (this last article governs the cooperation between British courts and foreign courts and foreign representatives) of CBIR recognizing and enforcing a US court judgment given in the course of proceedings to set aside prior transactions (for instance, fraudulent or preferential transactions) in default of appearance. The court at first instance recognized the foreign avoidance proceeding because it considered that it was an integral part of the foreign insolvency proceeding, which was already recognized under the CBIR by this court. Nevertheless, the court considered that the Model Law was not intended to provide for the enforcement of foreign judgments[749]. Moreover, it held that it would be surprising if the Model Law had been intended to permit courts to disregard the local private international law rules. The private international law rule that the court was referring to was the common law rule governing the recognition and enforcement of judgments *in personam*. According to that rule, such judgments could not be enforced if the judgment debtors had not submitted to the jurisdiction of the foreign court that gave the judgment against them. The court of the first instance, determining that the judgments given in the avoidance proceedings were *in personam* and the judgment debtors did not submit to the jurisdiction of the US court[750], refused to order the enforcement of the foreign judgment.

On a first appeal, the court found that the judgment was an *in personam* judgment, but being a judgment rendered in the insolvency proceedings, it considered that the ordinary common law rules for enforcement of foreign judgments did not apply[751]. The court found that there were special private international law rules that applied to the enforcement of foreign insolvency

[749] *Rubin, supra* note 546 at paras 64 – 73.
[750] *Ibid* at para 50.
[751] *Rubin & Anor (Joint Receivers and Managers of the Consumers Trust) v Eurofinance SA & Ors,* [2010] EWCA Civ 895, [2011] 2 WLR 121 at para 61 [*Rubin*].

orders[752]. These were rules that were based on the common law principle applicable in cross-border insolvency proceedings – the modified universalism principle. According to this principle when a court was asked to assist a foreign insolvency proceeding, it had to assist this proceeding "by doing whatever [the assisting court] could have done in the case of domestic insolvency"[753]. Applying this principle in the circumstances of the case, it decided that it had jurisdiction to enforce the foreign judgment. As regards the CBIR, the court did not reach any decision with respect to whether this regulation empowers a court to enforce foreign insolvency judgments upon request. Nevertheless, the court said that even if such assistance was not expressly included in the Model Law, "it clearly had it in mind"[754]. It added that when considering the provision of the Model Law, that courts had to cooperate "to the maximum extent possible"[755]; the Model Law "should surely include enforcement, especially since enforcement is available under the common law"[756].

On a second appeal, the Supreme Court of the United Kingdom considered the question of whether judgments given in avoidance proceedings in default of appearance of the defendants were enforceable at common law and, alternatively, under the CBIR provisions[757]. The court reversed the court of appeal judgment and held that at common law, the enforcement of foreign judgments can be effected only through traditional rules of common law governing the

[752] In reaching this conclusion the court of appeal relied on the decision of the Privy Council in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors (of Navigator Holdings PLC and others) (Isle of Man),* [2006] UKPC 26, [2006] 3 WLR 689.
[753] *Rubin*, *supra* note 751 at para 62.
[754] *Ibid* at para 63.
[755] *Ibid*.
[756] *Ibid*.
[757] *Rubin, supra* note 688 at para 1.

recognition and enforcement of judgments[758]. Turning to the CBIR, the court held that the Model Law said nothing about the enforcement of foreign judgments, and that it was not possible that this Law to have been dealt with this matter by implication[759]. Consequently, the court decided that the Model Law did not provide for the enforcement of foreign judgments[760].

By refusing to recognize that foreign insolvency judgments can be enforced pursuant to CBIR, the British court failed to seize the opportunity for establishing more coherent and harmonized results in cross-border insolvency cases. By enforcing foreign judgments, especially those given in foreign main proceedings, the courts allow the cross-border insolvency to be administered under a single insolvency law, the law of the foreign main proceeding, as such an enforcement amounts to giving effect to the foreign insolvency law on which the foreign judgment is based[761]. In view of the differences among national insolvency laws, the enforcement of a single insolvency law would lead to consistent results across all the jurisdictions involved in the administration of a cross-border insolvency case[762].

Nevertheless, the refusal to recognize that the British courts have jurisdiction under the Model Law to enforce foreign judgments is not prejudicial to foreign representatives. The implication of the Supreme Court's judgment is that the direct enforcement of foreign orders will not be possible; the foreign representative will have to bring new proceedings in the recognizing country for orders equivalent to those given in the foreign proceeding[763]. Thus, the court in

[758] *Ibid* at paras 106 – 132. Notably, the Supreme Court refused to supplement the traditional common law rules for enforcement of foreign judgments with the real and substantial connection test, in the area of foreign insolvency orders, see *Rubin, ibid* at paras 109 – 113.
[759] *Rubin, ibid* at paras 142, 143.
[760] *Ibid* at para 144.
[761] Ho, Applying Foreign Law, *supra* note 453 at 10.
[762] The Working Group's Eighteenth Session Report, *supra* note 266 at 52.
[763] Thorp, Andrew M. & David Herbert, "British Virgin Islands: Enforcing Orders Made in Foreign Insolvency Proceedings" (25 October 2012), online:

Rubin did not leave the foreign representatives without an alternative recourse to set aside the relevant transactions[764]. The Model Law expressly allows foreign representatives to commence such proceedings at article 23[765].

If foreign representatives consider that the particular cross-border insolvency may be more effectively administered under a single law, they can apply for a remittal of local assets to the foreign proceeding. Article 21 paragraph (2) of the Model Law explicitly empowers recognizing courts to grant such relief[766]. A remittal of assets presupposes that the local assets will be dealt with according to the law of the proceeding to which they are remitted[767].

<http://www.mondaq.com/x/203202/Insolvency+Bankruptcy/Enforcing+Orders+Made+in+Foreign+Insolvency+Proceedings>.

[764] *Rubin*, *supra* note 688 at para 131.

[765] *Ibid*.

[766] The Model Law, *supra* note 18 at art 21 (2).

[767] Pottow, John A. E., "New Role for Secondary Proceedings in International Bankruptcies" (2011) 46:3 Tex Int'l LJ 579 at 582 n 20.

CHAPTER 5: Conclusion

The thesis asked the question whether modified universalism works in practice, namely whether it can act as the theoretical foundation of a legal instrument on cross-border insolvencies that when applied to actual cases would further the objective of efficiency, fairness, predictability and protection of local interests. For this purpose, the application of the UNCITRAL Model Law on cross-border insolvencies by Canadian, British and, on certain matters, US courts in cases of cross-border insolvency was studied.

From the jurisprudence studied, certain conclusions emerge. First, the courts take a liberal approach when assessing whether the conditions for recognition are met. They acknowledge that the foreign proceedings must not necessarily correspond to requirements set by local laws for local proceedings in order for these proceedings to be granted recognition. The courts recognize foreign proceedings based on broadly interpreted criteria that the Model Law determines as essential and sufficient for a foreign proceeding to qualify for recognition. Such an approach increases the instances when courts recognize foreign proceedings.

Second, the relief that the courts grant under the Model Law provisions is equivalent to that available in a local insolvency proceeding, and this proves to have considerable practical significance. The fact that the UK courts, dissimilar to their Canadian counterparts, do not recognize foreign insolvency orders unless those orders are recognizable at common law does not impact the extent of relief that is accessible to a foreign representative; a foreign representative has certain alternatives to consider. It may apply for relief similar to that contemplated by the foreign orders, or it may petition for a remittal of assets to the foreign proceeding.

As regards the provisions protecting the local interests, the US courts interpret the provisions restrictively. While assessing whether creditors and other parties' interests will be sufficiently protected if the court grants the requested relief, the US courts try to balance the relief to be granted to the foreign representative with the interests of the parties that may be affected by such relief. Such a balancing test allows the granting of relief when some local creditor's interests will be adversely affected, and thus it gives to courts a broader power to grant relief than if the provision were interpreted as requiring courts to refuse cooperation whenever there would be any negative effect on such creditor's interests. Thus, such a test emphasises cooperation. At the same time, the test does not leave local interests completely unprotected. When a creditor relying on the protection of the receiving country's laws will receive unfair treatment or its valid interests will be rendered unenforceable in the foreign proceeding, the court under this test retains the power to refuse cooperation.

The public policy provision was also given a narrow interpretation. The US courts limited the application of the provision to the situations when an act of cooperation would be against such fundamental public policies as policies underlying provisions based on constitutional safeguards, provisions ensuring trial fairness and provisions embodying the basic principles of insolvency laws.

Thus, by applying the Model Law, courts make available recognition to various insolvency proceedings and a range of relief to foreign representatives. These two elements in combination facilitate the administration of cross-border insolvencies. This objective is further promoted through narrow interpretation and application of the provisions protecting the local interests provisions. Further, despite such narrow interpretation and application of these provisions, the inquiry showed that the Model Law provisions provide courts with enough tools to protect local

creditors' interest against unfair treatment and fundamental local policies against severe infringement.

In addition, the jurisprudence from the two countries suggests that consistent interpretation of the COMI concept is possible. The courts from both countries adopted a similar interpretation of this concept – a head office function approach limited by an ascertainability requirement. A consistent approach across jurisdictions promotes legal certainty. However, the actual approach may lead to inconsistent findings of COMI due to the flexibility that this approach gives to the courts. The flexibility of the approach raises the concerns of unpredictability. However, flexibility in the COMI analysis context may be a necessary evil since it discourages forum shopping.

All this strengthens rather than weakens the claim that the Model Law works. This claim in turn suggests that modified universalism provides an effective mechanism for dealing with cases of cross-border insolvency so as to further the objectives of efficiency, fairness, predictability and protection of local interests on a practical level.

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