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The UNCITRAL Insolvency Initiative: A Five Year Review

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The UNCITRAL Insolvency Initiative: A Five Year Review

by
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Introduction

The history of cross-border initiatives in insolvency has been largely a story of bilateral treaties and, where multilateral treaties have been negotiated, has been limited in scope to applying to regional collections of countries. This may be seen especially in the work of South American states, the Nordic Council, the Council of Europe, the European Community (later Union) and, more recently OHADA,[1] leading to the creation of conventions applying uniquely to the member states of these organisations. The 1990s have been a particularly productive period for this type of initiative, seeing the adoption of the Council of Europe's Istanbul Convention 1990, which, however, remains without force due to insufficient ratifications,[2] the European Insolvency Convention 1995 produced by the European Union that failed to negotiate the final hurdle before coming into force and accordingly lapsed,[3] the European Regulation on Insolvency Proceedings 2000, its successor, that has now in 2002 come into force,[4] as well as the OHADA Uniform Law on Insolvency 1998, an instrument that harmonises domestic law and introduces a co-operation framework for cross-border instances in Central and West Africa.[5]

The movement towards work on a global scale has been slow to occur, despite the recognition that globalisation has promoted worldwide economic crises needing solutions in jurisdictions of very diverse legal origins, histories and cultures. One of the fundamental difficulties of work on a global scale is not just the question of time, distance and resources, which are the usual background to all international initiatives. It is also the question of the appropriate instrument or organisation that may be used to draw together representatives of sufficient number of jurisdictions and interested parties, so as to ensure that the product that emerges adequately reflects the consensus of the international community. This will assist the acceptance in a sufficient number of jurisdictions of the texts to make the application practicable and its utility evident for users of the texts. As an example of a global initiative, one of the few texts that may be said to have a

[1]The French acronym for the Organisation for the Harmonisation of Commercial Law in Africa.
[2](1991) 30 ILM 65. See Lowry, The Harmonisation of Bankruptcy Law in Europe: The Role of the Council of Europe (1985) JBL 73.
[3]See Balz, The European Union Convention on Insolvency Proceedings (1996) 70 ABLJ 485, Fletcher, The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions [1998] 33 TILJ 119 and Johnson, The European Union Convention on Insolvency Proceedings: A Critique of the Convention's Corporate Rescue Paradigm (1996) 5 IIR 80.
[4]Council Regulation (EC) No 1346/2000 on Insolvency Proceedings of 29 May 2000 OJ 2000 L160/1 (30 June 2000).
[5]See by this author, Insolvency Law Initiatives in Developing Economies: The OHADA Uniform Law [2000] 6 Ins Law 257.

truly international remit is the UNCITRAL Model Law on Cross-Border Insolvency adopted in May 1997 and intended for the use of any nation desirous of taking on board a fully coherent system for the management of international insolvencies. Five years on, despite the interest of a great many states in its use, it remains an open question as to when this text will see wider currency through being adopted for use in the member states of the United Nations.

The Work of UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 to act as the conduit by which the United Nations would play a more active role in reducing the disparities caused by domestic rules governing international trade. The United Nations sees UNCITRAL as being the vehicle through which the United Nations can play a role in reducing or removing obstacles to international commerce.[6] Its general mandate is to harmonise and unify the law relating to international trade. There are 36 member states, elected by the General Assembly for terms of 6 years. Membership is structured so as to be representative of the world's geographic regions as well as principal economic and legal systems. The work of UNCITRAL is carried out through the formation of working groups composed of all the member states that meet on an annual or biannual basis. Other member states of the United Nations are invited to attend the sessions with the status of observers, as are other interested international organisations. UNCITRAL has an enviable and successful record of developing conventions and model laws in commercial and business law areas, including sale of goods, transport of goods, commercial arbitration, public procurement, international payment systems and electronic commerce.[7] One of the reasons UNCITRAL is said to be particularly successful at securing adherence to is conventions is that it is very selective about the projects in which it undertakes reform and will often seek to secure an early consensus from likely participants as to the desirability of the project it wishes to undertake and the likelihood of success at securing a convention or Model Law. In this respect, UNCITRAL's record of 'positive and practical achievement' aids the outcome of adoption of the texts it produces.[8] The work it carries out is further aided by the maintenance of a case-law database on UNCITRAL texts (CLOUT), currently covering a limited number of conventions and also the technical assistance and advice provided to member states of the United Nations wishing to adopt these texts with national and regional seminars and symposia in conjunction with the work of its sessions regularly being conducted.

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[6]Outline Introduction at <www.uncitral.org>.

[7]The UNCITRAL Arbitration Rules of 15 December 1976, the Convention on the Carriage of Goods by Sea of 31 March 1978 ('Hamburg Rules') and the Convention on the International Sale of Goods of 11 April 1980 ('Vienna Convention') are examples of UNCITRAL measures that have known some success.

[8]See Harmer, UNCITRAL Model Law on Cross-Border Insolvency (1997) 6 IIR 145 at 153.

UNCITRAL and Insolvency

The history behind UNCITRAL's involvement in the insolvency arena came largely as a result of an initiative by non-governmental organisations in the sector. INSOL,[9] an organisation representing insolvency practitioners on a worldwide basis, first floated the idea, with input also being provided by Committee J (Insolvency and Creditors' Rights) of the International Bar Association.[10] At a Congress on International Trade Law held in New York in 1992, proposals were made to the twenty-fifth session of UNCITRAL that the organisation should consider undertaking work on international aspects of insolvency. The proposals described the unlikely possibility of obtaining unification of insolvency rules, given the state of evolution of international law and the different development of national legislation. A recommendation was, however, made to the effect that the problems of international law could be reduced to a manageable level by focusing on issues relating to the management of assets wherever they are located, as opposed to issues deriving from the law of the jurisdiction where proceedings are conducted.[11]

The note made by the Secretariat following the twenty-sixth session describes the areas of potential conflict in brief, these being the effect of liquidation proceedings on assets located in another jurisdiction, the nature of cross-border judicial assistance, the rights of creditors to participate in insolvency proceedings, the priority rules in asset distributions, cross-border compositions, recognition of security interests and the setting aside of transactions prejudicial to creditors.[12] The views of the Secretariat were that the lack of harmony in these areas in particular acted as obstacles to world trade leading to, among other things, increased protectionism for own creditors and a reluctance to give assistance to foreign courts and administrators. Furthermore, a consequence of this approach would undoubtedly be the maintenance of parallel proceedings in a greater number of jurisdictions without any form of co-ordination, leading to unequal treatment of creditors, conflicts between the proceedings and a waste of resources.[13] The cautious conclusion to which the Secretariat came was that UNCITRAL should bear in mind these difficulties to see whether a project in insolvency was worthwhile and furthermore should identify those aspects of international insolvency law capable of harmonisation and the nature of the instrument appropriate to the task.[14]

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[9]International Association of Insolvency Practitioners.
[10]See Herrmann, International Co-Operation on Cross-Border Insolvency Issues (1996) 24 IBL 218.
[11]Note by the Secretariat, Addendum on Cross-Border Insolvency to Report of Twenty Sixth Session of UNCITRAL (Vienna, 5-23 July 1993) (A/CN.9/378/Add.4). A copy may be seen at <his.com/~pildb/378-add4.html>.
[12]Ibid. at paras 11-31.
[13]Ibid. at para. 49.
[14]Ibid. at para 52.

In furtherance of this objective, UNCITRAL organised a Colloquium in Vienna in April 1994, co-sponsored by INSOL. Suggestions emanating from the Colloquium was that work by UNCITRAL at the early stage should focus on a number of limited issues, including aiming to facilitate judicial co-operation, encourage court access for foreign insolvency administrators and the recognition of foreign insolvency proceedings. The first meeting of the UNCITRAL Working Group on insolvency in fact took place in Vienna in 1995. A Report and Survey, drafted by Harmer and Flaschen in 1995 on behalf of INSOL and submitted to UNCITRAL, were said to be instrumental in persuading UNCITRAL to embark on a project to create a framework for co-operation in international insolvency cases.[15] The efforts at this colloquium were summarised in a note issued in 1995,[16] which pointed to the practical problems caused by the lack of harmony between national rules in the area as warranting, despite the earlier caution expressed, further study of the issues and work on a possible solution.[17] A high degree of receptivity was noted to the interest expressed by UNCITRAL in a project and three small areas of possible work were identified, including the areas noted above as well as the possibility of formulating a set of model legislative provisions on insolvency.[18]

The UNCITRAL project was finally given some impetus by the favourable attitudes of some of the member states involved, although four sessions were to go by before a definitive text was produced in 1997.[19] In the interim, two judicial colloquia were held, jointly organised by INSOL and UNCITRAL, at which the participants concluded that the Model Law offered a 'fair legislative foundation' on which judges could build co-operation protocols with the result that the parties in insolvency would be 'fairly and reasonably' maintained with the integrity of the courts unaffected.[20] The lengthy deliberative process was said to have occurred largely because the project began with a certain reluctance by some countries to take substantial steps toward co-operation. In the end, there were substantial compromises reached, which reflected the concerns of many of the delegations from member and non-member states as well as non-governmental organisations that were keen participants in the process. In the discussions, although a significant minority of participants favoured the conclusion of a convention, the format chosen in the end was that of a Model Law, which, as will be seen below, would allow countries to enact the measure rapidly as part of their domestic legislation.

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[15]See Cooper, The UNCITRAL Model Law on Cross-Border Insolvency <www.insol.org/NLnov97pt5.htm>.

[16]Note by the Secretariat, Addendum on Cross-Border Insolvency to Report of Twenty Seventh Session of UNCITRAL (Vienna, 31 May-17 June 1994) (A/CN.9/398). A copy may be seen at <his.com/~pildb/acn9-398.html>.

[17]Ibid. at para. 1.

[18]Ibid. at paras. 17-19.

[19]For a detailed account of the deliberative process, see Glosband, The UNCITRAL Working Group on Insolvency Law (1997) <www.bostonbar.org/sections_&_committees/bankruptcy_law/doc_center/uncitral.htm> and <…/ubcitral2.htm>.

[20]See Farley, UNCITRAL/INSOL Judicial Colloquium 1997: Report (1998) 6 IIR 139 at 142.

The final text of the Model Law on Cross-Border Insolvency was adopted by UNCITRAL in May 1997.[21] Although English was the working language in the drafting process and the other language texts were based on the English draft, all six language versions are considered equally official. The text does not use statutory language completely familiar to either common-law or civil law jurisdictions, being essentially a compromise between different legislative traditions. It is accompanied, however, by a Guide to Enactment, which was produced in order to assist legislative draftsmen in adapting the Model Law to local conditions.[22] The Model Law was approved by the General Assembly on 15 December 1997, in a resolution noting that the inadequate co-ordination and co-operation existing in cases of cross-border insolvency reduced the possibility of rescuing viable businesses. This lack of co-operation also impedes the proper and efficient conduct of proceedings and results in a significant disadvantage for creditors and employees. The text of the resolution goes on to recommend that member-states review their insolvency legislation and give favourable consideration to enacting the Model Law and, furthermore, that UNCITRAL should make all efforts to ensure that the Model Law and Guide to Enactment become generally known and available for consideration by member states and interested bodies.[23]

Introduction to the Model Law: Choice of Format and Outline

A model law is a legislative text recommended by UNCITRAL to member states of the United Nations for adoption into their domestic legal system. A member state may choose for the purposes of incorporation to tailor the text to its needs and to modify or exclude some of its provisions. It is this flexibility that UNCITRAL believes will ensure greater acceptance of the model law format as opposed to a convention or treaty dealing with the same issues. Nevertheless, overall acceptance of the model law format may well require member states to incorporate the entirety of the text into their domestic legal system. This is on grounds that to omit any provision could lead to member states being reluctant to incorporate these rules, unless they knew whether their trading partners intended a similar adoption and what the format of that adoption would take. This might lead courts to deny recognition to the orders of other courts by reason of the apparent lack of reciprocity of provisions. The recommendation by UNCITRAL is that member states make as few changes as possible, which normally encourages a greater degree of unification and provides certainty to users of the model law about the extent of the unification. The model law format is felt particularly appropriate for the modernisation of national laws where member states will need to make adjustments to the text to accommodate requirements varying from system to system, including nomenclature, differences in judicial

[21](1997) 36 ILM 1386 with an Introductory Note by Burman and Westbrook; see also <www.un.or.at/uncitral/english/texts/insolven/mlinsolv.htm>.
[22]<www.un.or.at/uncitral/english/sessions/unc/unc-30/acn9-442.htm>.
[23]Resolution No. 52/158 <www.un.org/ga/documents/gares52/res52158.htm>.

systems and hierarchies as well as differences in procedural matters. The model law is appropriate in these instances because it does not require too strict a uniformity and it can be adapted so as to establish a common denominator between widely disparate national systems at varying stages of development, a particularly useful device for jurisdictions seeking to enhance their legal corpus with ready-made texts. UNCITRAL also believes that the model law format provides short-term access to legislative texts that are simple to put together because of the relative lease in securing consensus in the negotiations for such a text. In the long run, however, the existence of these texts and their incorporation is believed to provide an incentive towards unification. Model laws are accompanied in most cases by a Guide to Enactment setting out the background and information relevant to the text, which could assist legislators considering adaptation of the text into domestic law.[24]

The Model Law in question is a relatively brief document at only 32 articles.[25] There are four key areas into which the document can be divided. These include the scope of the Model Law, rules for access by representatives of foreign insolvency proceedings, including the treatment of foreign creditors, and the effects of domestic recognition of foreign procedures. Finally, and most importantly, there are rules for co-operation and for co-ordination of simultaneous proceedings in several jurisdictions over the same debtor. In a few instances, noted below, alternative formulations are given for some provisions for adaptation to the requirements of the state's domestic legislation in question. The text is preceded by a preamble, a legislative form not often seen in common-law jurisdictions, which is instructive as to the purpose of the Model Law. These are stated to be co-operation between courts, greater legal certainty for trade and investment, the protection of the interests of all creditors and the debtor, the protection and maximisation of assets in the insolvency and the ease in rescuing financially troubled businesses, thus protecting investment and preserving employment.[26] Nevertheless, this succinct statement of the basic policy objectives of the Model Law is not intended to confer substantive rights.[27]

General Provisions[28]

The general provisions defining the scope of the law contain a number of key definitions. Jurisdiction is provided in cases of requests for assistance in

[24]Note by the Secretariat, Addendum on Possible Future Work on Insolvency Law to Report of the Twenty Second Session of the Working Group on Insolvency Law (Vienna, 6-17 December 1999) (A/CN.9/WG.V/WP.50) at paras. 162-164.

[25]See Krings, Recent Achievements in the International Unification of Insolvency and Bankruptcy Law (Abstract) (1997) <www.unidroit.org/english/publications/art-97-4.htm> noting that these provisions are nevertheless the most detailed of all the recent texts in this area.

[26]See Harmer, op. cit. at 148 where he argues that, although the fashion for recitals in legislation seems to have lapsed, it would be unfortunate if this were the only reason for omitting what he considers to be an important statement of objectives.

[27]Guide to Enactment, para. 54.

[28]Chapter I, Articles 1-8, Model Law (references below to Chapters and Articles will be to the Model Law).

insolvency matters, whether these requests emanate from the domestic or foreign court.[29] It is extended to instances of concurrent proceedings involving the same debtor and permits the foreign creditor and other interested persons in domestic proceedings.[30] The only real qualification to the types of insolvencies covered is that the proceeding must be collective in nature, thus excluding single-creditor enforcement of security, as found in receivership.[31] Furthermore, the administration of the debtor's assets must ultimately be subject to court supervision or control, although the beginning of proceedings may be by judicial or administrative act. The definitions are said to be carefully constructed so as to include proceedings of the 'debtor in possession' type.[32]

In addition to the definitions of proceedings that are to be recognised under the Model Law, a further qualification is provided by the overall classification of proceedings in the Model Law into two further types: 'main' and 'non-main.' 'Main' proceedings are defined as proceedings taking place in the country where the debtor has the 'centre of its main interests.'[33] This definition, taken from the European Insolvency Convention, is said to represent a compromise between the civil law concept of the 'real seat' and the common-law presumption of the state of domicile or incorporation governing proceedings involving the debtor, thus allowing courts to find jurisdiction. In relation to incorporated entities, the Model Law raises the presumption that a company's place of incorporation is the centre of its main interests, unless proof to the contrary is brought.[34] 'Non-main' proceedings are taken to mean proceedings in any other country, provided that the debtor has at least an establishment in that country. This is taken to mean a place where the debtor uses human endeavour, goods or services to carry on an economic activity in a 'non-transitory' way.[35] The concept of 'establishment' also comes from the European Insolvency Convention and is taken to require some permanency in the debtor's activities in any country for the courts there to properly exercise jurisdiction, thus avoiding jurisdiction based on the fleeting presence of the debtor or assets.

The classification of proceedings into one or other type does not have an effect on their recognition by other states.[36] However, the Model Law also leaves open the possibility that territorial proceedings may be opened in other jurisdictions where the debtor has assets and whose effect will be limited to the assets

[29]Article 1(1)(a)-(b).
[30]Article 1(1)(c)-(d).
[31]The problem of appropriate definitions is noted in the Guide to Enactment at para. 50, where member states are advised to carefully select the terminology to be used consistently in the domestic translation of the Model Law proposals.
[32]Article 2(a). This is independent of whether the management is ousted as part of the insolvency procedure, it being common in accelerated proceedings in France for the debtor to remain in control subject to the supervision of an administrator.
[33]Article 2(b).
[34]Article 16(3).
[35]Article 2(c), (f).
[36]Guide to Enactment, para. 73.

present within the jurisdiction only.[37] Member states are free to enact that jurisdiction based on assets will not suffice for the opening of proceedings and may require that the presence of an establishment becomes the minimum necessary for opening proceedings. Thus, member states can give effect to their internal policy regarding the most efficient way of securing creditor protection. In any event, the tailoring of relief for the purposes of foreign proceedings would also allow for the administration of assets in a way compatible with the avowed policy aim.[38]

Proceedings of a rescue nature and liquidation are covered as are interim proceedings, because of the view taken that, in many instances, these proceedings, although not titled as such, amount to 'full' proceedings.[39] Because co-operation is not conditional on a specific finding of the debtor's insolvency, pre-insolvency financial difficulties are also covered. An option is given in the Model Law for specific types of insolvencies to be excluded, such as those of banks and insurance companies, often subject to a specialised insolvency regime.[40] The Model Law also permits the exclusion of 'consumer' insolvencies, which may only have an incidental international element, by referring to the possibility that states may choose to treat insolvencies of consumers and non-traders where debts have been incurred predominantly for personal or household purposes.[41] However, the Model Law is widely drafted so as to be able to apply to both natural persons and artificial entities, thus covering insolvencies of incorporated bodies as well as those of sole traders and partnerships. In any event, no distinction is made between civil and commercial entities, a division often used in civil law countries.

The general provisions are rounded off with a definition of the domestic court competent to decide matters in connection with the Model Law and a definition covering the appropriate insolvency practitioner authorised to act on behalf of a domestic insolvency in another jurisdiction.[42] The Model Law is stated not to interfere with any obligations of the domestic jurisdiction arising out of any other treaty or agreement nor does it prevent states from refusing to take a particular measure under the Model Law where to do so would offend against public policy in that jurisdiction.[43] The provisions of the Model Law will not exclude any additional assistance a court can offer in the context of international insolvencies and courts are encouraged to interpret the Model Law with regard to its international nature and the purpose for which it is enacted.[44]

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[37]Article 28.
[38]Guide to Enactment, paras. 184-186.
[39]Ibid., para. 69.
[40]Article 1(2). This exclusion is also found in the European Insolvency Convention 1995.
[41]Guide to Enactment para. 66. The United States has in fact exercised this choice.
[42]Articles 4-5.
[43]Articles 3, 6.
[44]Articles 7-8.

Access by Foreign Representatives and Creditors[45]

The Model Law gives a representative of a foreign insolvency the right to direct access to domestic courts, often a necessary means to achieving co-ordination of insolvency proceedings.[46] The foreign representative is protected from being subject to domestic jurisdiction for all other matters merely because of submission for the purposes of the instant proceedings.[47] Standing is also given to a foreign representative to initiate insolvency proceedings in the host jurisdiction where the necessary pre-conditions, for example those required to file a petition, are satisfied.[48] A similar right is given to participate in existing domestic insolvency proceedings.[49] The Model Law provides that foreign creditors are to be treated in the same way as local creditors and gives them the same rights to commence and participate in domestic insolvency proceedings.[50] This right is subject to one important qualification, in that the domestic jurisdiction can provide that local rules as to priorities and the ranking of claims will apply. Nevertheless, a safeguard against overt discrimination is provided in that the domestic jurisdiction must specify that foreign creditors will not be given a ranking lower than general non-preference claims unless local creditors in a similar position are similarly treated.[51] The Model Law also allows the domestic jurisdiction the option of whether to allow foreign revenue claims in any domestic insolvency proceedings.[52] The Model Law also irons out some of the disadvantages to which foreign creditors are subject by requiring notice to be given to them in any situation where domestic creditors are informed. Notice may be given individually or by any method the court deems appropriate and will include information on when proofs need be made, if these are required, and what form these are to take.[53]

Recognition of Foreign Proceedings and Relief[54]

The essential difference between civil and common-law approaches to recognition and enforcement of judgments stems from the treatment of the foreign judgment. The civil law, through the process of exequatur, adopts the foreign judgment, effectively giving it the same status as a domestic judgment. The common-law does not adopt the foreign judgment but enforces requests for relief made by foreign representatives under the principle of comity. Whatever method is employed, it is clear that the recognition and enforcement process faces a number of procedural and substantive law hurdles in many jurisdictions,

[45]Chapter II, Articles 9-14.
[46]Article 9.
[47]Article 10.
[48]Article 11.
[49]Article 12.
[50]Article 13(1).
[51]This provision is included to avoid the claims of foreign creditors being ranked lowest, in contravention of the non-discrimination principle. Guide to Enactment, para. 104.
[52]Article 13(2).
[53]Article 14.
[54]Chapter III, Articles 15-23.

leading to unwarranted delay and expense. The Model Law takes the view that recognition is the key to co-operation and makes it an important procedural step with consequent effects and entitlements for the foreign representative. The Model Law's provisions are designed to expedite the recognition process in order to save on costs of administration.

A certificate from a foreign court or a certified copy of the judgment or any evidence the domestic court deems acceptable is the only document necessary for the application for recognition, subject to any local requirement for translation and to the production of a statement identifying all known proceedings afoot concerning the same debtor.[55] The domestic court is entitled to presume that the documents are genuine and that the certificates are conclusive proof of any assertion contained in them.[56] Recognition is thus, unless challenged by any interested party, made into a simple procedure relying almost wholly on the production of documents. The Model Law requires recognition of proceedings at the earliest opportunity after a request is made.[57] The foreign representative is required to inform the court of any change in status of foreign proceedings or the representative's appointment as well as where the existence of further foreign proceedings becomes known.[58] The court still retains substantial discretion under the foregoing provisions to modify or terminate recognition if the grounds for recognition are shown to be wholly or partially lacking or, indeed, have ceased to exist.[59] This discretion is said by commentators to be positive in that courts will exercise vigilance over the perennial worry of forum shopping by participants in the insolvency process and lead to the interests of parties being protected by proper determination of the issues by a court.[60]

The Model Law also permits interim relief to be sought by the foreign representative while an application for recognition is pending and where the relief is urgently needed to protect the debtor's assets or the creditors' interests. Any notice the court requires to be given must be adhered to.[61] Only if the relief sought would interfere with the interests of main proceedings occurring elsewhere can the court refuse.[62] Presumably this would apply where a number of foreign representatives of both main and non-main proceedings are seeking recognition. Relief, once granted, terminates automatically at the application hearing, unless extended.[63] Recognition of proceedings as a foreign main proceeding produces certain mandatory effects, including a stay of action or of execution of any judgment already obtained. Transfers of interests in the

[55]Article 15.
[56]Article 16(1)-(2).
[57]Article 17(1)-(3).
[58]Article 18.
[59]Article 17(4).
[60]See Prior, The UNCITRAL Model Law on Cross-Border Insolvency (1998) 14 IL&P 215.
[61]Article 19(1)-(2).
[62]Article 19(4).
[63]Article 19(3).

debtor's assets are also limited.[64] Recognition of foreign main proceedings is subject to any limitations that would apply under domestic laws and does not affect the opening of local proceedings involving the same debtor or the beginning of litigation if necessary to preserve a claim against the debtor.[65]

Additional relief is available under the Model Law to foreign representatives of both main and non-main proceedings including staying actions or execution of judgments and freezing transactions involving the debtor's assets to the extent the relief sought has not already been granted under Article 20. Other relief includes turning over assets to the foreign representative, obtaining information and taking evidence as permitted by local rules for the purposes of foreign proceedings. One important distinction is made between representatives of main and non-main proceedings, in that the latter may use the relief under this article only with regard to assets that the domestic court considers fall within the ambit of non-main proceedings.[66] Interim relief and relief under this article are also subject to proper consideration by the domestic court of the need to protect the interests of the debtor, creditors or any interested parties.[67] The effect of recognition is also to give the foreign representative standing to initiate avoidance actions, although where the recognition relates to non-main proceedings, standing is limited to cover only assets related to those proceedings.[68] Similar standing is given to intervene in any proceedings to which the debtor is a party.[69]

Co-operation and Co-ordination[70]

By far the most forward-looking part of the Model Law, Chapter IV is based on the ideal of co-operation between courts and representatives. Domestic courts are empowered to communicate directly with foreign courts and representatives and co-operate to the maximum extent possible.[71] Domestic insolvency personnel are also similarly entitled to co-operate with foreign courts and representatives.[72] Co-operation may occur in a number of ways set out in a non-exhaustive list in the Model Law to which states are invited to add. Types of co-operation listed include appointing personnel at the direction of the court, communicating information about the debtor's assets, co-ordinating supervision of the debtor's assets or proceedings involving the debtor.[73] These provisions are said to be prescriptive in that co-operation is seen as the basis for the proper use of the Model Law and courts are required to use co-operation methods

[64] Article 20(1).
[65] Article 20(2)-(4).
[66] Article 21.
[67] Article 22.
[68] Article 23.
[69] Article 24.
[70] Chapter IV, Articles 25-27 & Chapter V, Articles 28-32.
[71] Article 25.
[72] Article 26.
[73] Article 27.

wherever possible. This may prove to be the most useful of the Model Law's provisions, although the institutions in some countries without experience in co-operation may find adjustment to an almost mandatory ethos of co-operation difficult at the outset.

The other method for ensuring efficient administration of insolvency proceedings is through the co-ordination of multiple proceedings taking place concurrently. This is a frequent scenario in international insolvency law. The Model Law approaches the problem by attempting to promote the ideal of co-ordination, thus lessening conflict between the interests likely to be competing. Where foreign main proceedings are recognised, although this raises a presumption that the debtor is insolvent and thus domestic proceedings could be opened, the effect of domestic proceedings will be limited to assets present within the jurisdiction as well as to those related to that jurisdiction.[74] Nevertheless, the relief already granted to foreign proceedings will be reviewed to ensure it is not inconsistent with the needs of domestic proceedings. Similarly, relief granted where recognition of foreign proceedings, whether of the main or non-main type, is made and where domestic proceedings are already in existence, must also be consistent.[75] The question of competing foreign proceedings is also addressed with the domestic court required to ensure consistency and co-ordination.[76] This consistency is also achieved through introducing the 'hotchpot' rule, preventing creditors who have already received a dividend in foreign proceedings from receiving any more until comparable creditors have had an equivalent distribution in domestic proceedings.[77]

Adopting the Model Law: The Views of Governments

Since its production, the Model Law has only been adopted by a limited number of countries: Eritrea, Mexico, South Africa and Montenegro.[78] Mexico's adoption of the Model Law occurred as part of a radical overhaul of its insolvency law framework through the Commercial Bankruptcy Law passed in May 2000. South Africa, which co-sponsored the General Assembly resolution calling for the adoption of the Model Law by member-states, had been actively considering the Model Law for some time. Justice Zulman, a participant in the UNCITRAL Working Group, produced an Interim Report on Trans-national Insolvency in 1995 and a Final Report in May 1998.[79] The latter concluded that 'the creation of the Model Law is of considerable significance and represents a major step forward in the field of cross-border insolvency.'[80] Several recommendations were made in the report to the effect that the enactment by South Africa of the Model Law was a very desirable step, particularly as it was preferable to the

[74]Article 28, 31.
[75]Article 29.
[76]Article 30.
[77]Article 32.
[78]Information from the Status of Texts section at the UNCITRAL Website (as at 20 June 2002).
[79]Produced under the aegis of the Rand Afrikaans University Research Unit for Banking Law.
[80]See Zulman, Final Report, para. 8.7.

cumbersome task of negotiating separate bilateral or multilateral treaties.[81] As an interim measure, it was recommended that South Africa enact a measure by way of amendments to the Insolvency Act 1936 and Companies Act 1977 to introduce a co-operation framework similar to that in the United Kingdom and designate all of South Africa's major trading partners.[82] In the long term, the Model Law was to be enacted following consultation as to its form. Draft legislation was also produced at the same time to assist the consultation process.[83] Final legislation was produced in the shape of the Cross-Border Insolvency Act, which was given Presidential Assent on 8 December 2000. Furthermore, the United Kingdom has, within legislation recently passed amending parts of the insolvency law framework, included a section providing for the Model Law to be brought into operation through regulations in a statutory instrument.[84]

A number of other countries are known to be considering the Model Law for adoption, including Australia, Canada, New Zealand and the United States. Other countries reported to be favourable include Thailand.[85] Malaysia has also expressed an interest in the conclusion of the text of the model law.[86] Interest by Australia dates back to a report by the Australian Law Reform Commission published in 1996.[87] This recommended that the Federal Government should give a high priority to Australia's participation in the then current UNCITRAL process, although nothing is known about whether draft legislation has been prepared for adoption of the Model Law into Australian law.[88] The United States is known to have introduced legislation into Congress in early 1999 providing for the enactment of the Model Law as an amendment to the Bankruptcy Code, although progress of the legislation has been erratic.[89] This legislative attempt followed the recommendation of the National Bankruptcy Review Commission made in a report published in 1997, subject to the retention of existing s304 provision on comity and the exclusion of consumers resident in the United States. Furthermore, the question of recognition of foreign tax claims was to be left to the evolution of case-law principles.[90]

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[81]Ibid. at para. 20.2.
[82]Ibid. at para. 20.8.
[83]The consultation documents and a Cross-Border Insolvency Bill were made available at the South African Law Commission website at <www.law.wits.ac.za/salc/ >.
[84]s14, Insolvency Act 2000.
[85]According to Stewart, UNCITRAL Model Law and Cross-Border Insolvency, paper delivered at conference on 'Legal Aspects of Cross-Border Insolvency,' BIICL, London, 14 July 1998.
[86]See Omar, Statement on Agenda Item 148, Report of UNCITRAL on the Work of its Thirtieth Session (6 October 1997) <www.undp.org/missions/malaysia/uncitral.htm>.
[87]Australian Law Reform Commission Report No. 80: Legal Risk in International Transactions (1996) <uniserve.edu.au/alrc/report80/ALRC80Ch4.html>.
[88]Ibid. in Chapter 4, paras. 4.50-4.51 and Recommendation no. 26.
[89]Bankruptcy Reform Act 1999 (Congress Bill No. HR 833), introduced on 24 February 1999, whose s901 would insert a new Chapter 15 entitled 'Ancillary and Other Cross-Border Cases' into Title 11 of the United States Code.
[90]United States National Bankruptcy Review Commission Report: Bankruptcy: The Next Twenty Years (1997) <162.140.225.1/report/10transn.html>, Recommendations nos. 2.2.1, 2.2.2, 2.2.5 and 2.2.6 in Chapter titled: Transnational Insolvency.

The Law Commission of New Zealand has recommended that New Zealand adopt the Model Law for a number of cogent reasons.[91] These include the need to develop effective laws on the global market to which New Zealand belongs and for these laws to reflect trading conditions on the international market. In addition, the existence of economic factors such as the need to tackle cross-border insolvency issues, especially fraud, means that international measures are desirable. There is also the likelihood that foreign investors will view New Zealand favourably if the Model Law were enacted and the fact that the favourable drafting of the text reflects genuine concerns over the intrusion of foreign proceedings into local systems and the inadequacy of present domestic law. Nevertheless, it is intended that the Model Law not be brought into effect until the New Zealand Government is satisfied that a number of countries, with which there are major trading relationships, will be adopting the Model Law.[92] Harmer refers to this problem of reciprocity when he states that problems could arise if countries became intent on securing reciprocity on the question of enactments based on the Model Law. His view is that the Model Law itself guarantees reciprocity and that leadership by countries in adopting the Model Law will be of major importance in securing widespread acceptance of its benefits.[93]

Adopting the Model Law: The Views of Practitioners and Other Bodies

The views of national governments are, of course, important in determining the likelihood that legislation incorporating the Model Law will be forthcoming. Nevertheless, the success of any measure is predicated on insolvency practitioners becoming rapidly familiar with its use and being willing to co-operate in the manner the Model Law sets out. Opinions have been expressed from a number of quarters in the world of practice and academia. In Canada, one view is that the Model Law will help alleviate the current difficulties arising when attempts are made to effect rescue of an ailing enterprise in more than one jurisdiction.[94] In the United States, the text has been welcomed, with commentators optimistic about the chances of it being approved by a number of important jurisdictions around the world.[95] In Switzerland, the view expressed by one of that country's delegates to the UNCITRAL sessions, is that the Model Law offers the:

> "…reasonable equilibrium [that] must be reached between the ideal of a single international insolvency by consent of the creditors – which can not

[91]New Zealand Law Commission Report No 52 (February 1999): 'Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency?'
[92]Ibid. at paras. 112-113.
[93]See Harmer, op. cit. at 152.
[94]See Sandler, New Law will ease Rescue of Ailing Multinationals (1997) <ohh1.osler.com/Resources/outfall97_1.html>.
[95]See Pines, International Bankruptcy Law Proposed (1997) <ljx.com/practice/internat/1117itbn.html> citing the views of Westbrook and Felsenfeld.

> be achieved except in the context of a treaty - and the protection of local creditors' interests within a foreign insolvency."[96]

In South Africa, the judicial establishment and organisation representing legal practitioners are reported as having stated that enactment of the Model Law is desirable as it would allow foreign trading partners knowledge of the likely regime to apply in cases of cross-border insolvency and promote confidence and certainty with regard to the position of creditors.[97] In Chile, the Model Law has been considered a significant contribution to the effort to solve the problem of international insolvencies.[98] In France, one view stated is that the UNCITRAL Model Law is both:

> "...ambitious and measured. Ambitious because [it] seeks to propose to States common rules for the treatment of international insolvencies.... Measured, because the rules do not require States to introduce profound legislative changes..."[99]

In the United Kingdom, speakers at a conference in July 1998 expressed the overall view that the Model Law was a desirable option and that the United Kingdom Government, in view of the increasing number of insolvencies with an international impact, should be encouraged to give active consideration to enacting the Model Law, as has now been made possible through the adoption of specific enabling provisions.[100]

Future Work by UNCITRAL

UNCITRAL has at current before it proposals presented by the Australian Government into possible future work in the insolvency arena. The proposals are drawn up in light of the global financial crises affecting many jurisdictions in the late 1990s and the work conducted by international bodies in respect of economic and financial matters, on which insolvency law has a bearing inasmuch as strong insolvency and debtor-creditor regimes are seen as important means for preventing or limiting the effects of financial crises. The effect of a good domestic legal system geared towards co-operation would also facilitate cross-border workouts and rescues.[101] The recommendation of the working group to UNCITRAL was for the development of proposals, either in the form of a model law or model legislative principles, aimed at encouraging the

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[96]See Markus, Zum internationalen insolvenzrecht (1997) <www.treuhander.ch/04-97/Recht/09dmarku/09dmarku.html>.

[97]See Coutsoudis, UNCITRAL Model Law on Cross-Border Insolvency (1999) <www.law-online.co.za/int%20trade%20law/cross%20border%20insolvency.htm>.

[98]See Sandoval and Jegó, International Insolvency: UNCITRAL's New Model Law (1997) <www.natlaw.com/bulletin/1997/r9711/971114d.htm>.

[99]See Vallens, La faillite internationale - vers une loi modèle? PA 1996.72.21.

[100]Papers delivered by Moss, Stewart and Rajak, at conference on 'Legal Aspects of Cross-Border Insolvency,' BIICL, London 14 July 1998.

[101]Provisional Agenda, Twenty Second Session of the Working Group on Insolvency Law (Vienna, 6-17 December 1999) (A/CN.9/WG.V/WP.49) at para. 1.

adoption of an ideal corporate insolvency law. Despite the recognition of the difficulties inherent in trying to achieve deep harmonisation of insolvency systems in this manner, the recommendation was that preparatory work first determines what efforts other international bodies in the field were making. This could lead to co-ordination between the various organisations, so that a proper contribution could be made by UNCITRAL to work in this field without unnecessary duplication of effort or inconsistency between the resulting texts.[102] Indeed, participants in a recent symposium on the issue of involvement by international bodies revealed the often-frustrating lack of co-ordination between such bodies, although the overall consensus was that the work that often produced sophisticated and modern texts was desirable.[103]

This may well be true given the plethora of bodies acting in the insolvency field although their work is not principally concerned with the harmonisation or renovation of legal systems. These organisations work mainly within the international financial system and deal with insolvency matters only insofar as they recognise that effective insolvency regimes play a major role in strengthening economic and financial systems in any jurisdiction. As examples, there might be cited the work of the Asian Development Bank, which hosts a project providing regional technical assistance for the updating of insolvency laws of its member states.[104] A study has been carried out into the relationship between corporate debt and recovery and corporate insolvency in eleven Asian economies. Part of the comparison involved identifying areas of similarity and differences and in light of this developing key areas for evaluation as well as a model for best practice, on which reforms might be attempted. This is then accompanied by technical aid for reform projects the participating Governments wish to carry out. Similarly, the Legal Department of the International Monetary Fund has produced in May 1999 a report entitled 'Orderly and effective Insolvency Procedures: Key Issues,' discussing policy choices facing countries intent on designing new insolvency regimes. This report, based on a comparative survey of selected country legislation, outlines issues relating to possible reform strategies in light of universal importance, although it does not attempt to set standards or preferences with regard to the choices it outlines, ranging broadly between pro-creditor and pro-debtor orientations, and leaves the selection and implementation of reforms to national institutions.[105] There is also the American Law Institute's Transnational Insolvency Project, which began in 1994 and which seeks to examine the laws applicable in the member states of NAFTA. The project consists of two phases. The first will create a text summarising the domestic and international aspects of laws in each country relating to insolvency law and practice and will also include details of business practices. The second

[102]Ibid. at paras. 2-4.
[103]Papers by Herrmann, Cattaui Livanos, Weatherill, Kronke and Kessedjian, given at the Schmitthoff Symposium, Queen Mary and Westfield College, London, 1-3 June 2000, First Session on 'Law, International Commerce and the Formulating Agencies – the Future of Harmonisation and Formulating Agencies'.
[104]Based on material available at <www.adb.org>.
[105]Based on material available at <www.imf.org>.

phase will then seek to exchange ideas for specific procedures on the basis of a principle of co-operation that will allow for better cross-border treatment of insolvency procedures.[106]

Other players in the international field include the Privatisation and Enterprise Reform Unit of the OECD, which has been involved since 1992 in a process of developing legal rules and policies for mainly transition and developing economies in the areas of corporate law, insolvency and privatisation.[107] Insolvency law work has centred on the relationship between insolvency law and practice and the needs for restructuring enterprises as well as any implications for privatisation of state-owned businesses. The projects undertaken have recently looked at the law reform potential in Russia and, in the context of co-operation with the World Bank, Asia in relation to progress in insolvency law reform and the design of effective insolvency systems to also include a framework for international insolvency. Finally, the World Bank is leading an initiative with the aim of improving the stability of the international financial system. The aim is to build a consensus with regard to the role of insolvency in assisting the management of financial crises through the availability of a sound insolvency system providing good regulation of the debtor-creditor relationship. The World Bank aims, following its 1999 project to map out insolvency systems on a worldwide basis, to provide principles and guidelines to countries wishing to update their insolvency laws. In partnership with other international organisations, a taskforce has been set up, together with advisory panels and working groups comprising over 70 international experts to produce these principles, expected to be published following a series of regional workshops aimed at obtaining views on the proposals.[108]

Apart from the economic organisations noted above, non-governmental organisations such as the International Bar Association and INSOL continue to play an instrumental role in encouraging UNCITRAL to take work in the insolvency field further. The UNCITRAL Working Group has in fact met on several occasions since 1999 when the Australian proposals were first mooted. A Colloquium was held in Vienna in late 2000, under the auspices of UNCITRAL, INSOL and the IBA, from which a report was issued making recommendations as to future progress. Having taken many of the ideas the report expressed, the Working Group has authored a draft legislative guide on insolvency law with the aim of complementing the production of a comprehensive statement of key objectives and core features for a strong insolvency regime that would also feature out of court restructurings. Together, the statement and legislative guide would form a template for states wishing to update their insolvency laws in line with internationally accepted criteria. Information indicates that the Working

[106]See Westbrook, Creating International Insolvency Law (1996) 70 ABLJ 563 at 564-7.
[107]Based on material available at <www.oecd.org>.
[108]Based on Johnson, Towards International Standards on Insolvency: the Catalytic Role of the World Bank, paper delivered at the Schmitthoff Symposium (noted at fn. 103 above).

Group intends to meet at the end of 2002 in order to pursue the objectives and it is likely that a Legislative Guide will make its appearance in due course.[109]

Summary

The search for an international solution has come a long way since first the problem of cross-border insolvencies was diagnosed and attempts made at effecting a cure. There is not much doubt that the further development of insolvency, even at the domestic level, is tied to an international outlook. The issues, however, governing the organisation of insolvencies at the international level raise complex and occasional perplexing questions that frequently involve references back to domestic law. This is irrespective of the fact that traditional rules based on jurisdictions adhering to either territorialism or universality as precepts have been increasingly seen as inadequate to deal with the rise in the number of international insolvencies. High profile failures and financial difficulties in corporate, commercial and banking sectors have created a need for urgent remedies and long-term solutions. They have also been the source of domestic anxieties about the effectiveness of domestic rules in seeking to contain insolvencies of this nature. The focus on co-operation initiated in a number of advanced commercial nations provides a partial solution to the problems posed by strict adherence to traditional rules. Many co-operation measures exist as domestic assistance provisions or as bilateral and multilateral treaties. These are not, however, necessarily an effective substitute for proper international agreement on meeting the needs for the organisation of insolvencies across frontiers. Some of the further conditions for the success of international insolvency initiatives have been determined as including goodwill by courts and personnel involved, effective structures enhancing co-operation, effective structures in domestic law and an element of judicial restraint allowing for the best choices to be made about where insolvency proceedings should take place involving debtors. Courts have been, however, traditionally reluctant to act unilaterally without the support given through enabling rules.

In the context of the quest for international regulation, the adoption of the Model Law represents for many the most important step taken in the emergence of a truly international framework for co-operation in insolvencies. This is in contrast to the limitations of uniquely domestic legislation as well as previous efforts on a regional scale, not all of which have met with success. The reputation of UNCITRAL as a promoter of harmonisation measures at the international level has done much to ensure that this text genuinely represents the concerns of national governments and domestic courts. This is because it respects the concerns of domestic jurisdictions for the efficient administration of assets present within the country and the protection of creditors without sacrificing the principle of equality of treatment for all those affected by the insolvency. The Model Law also permits more concentration to be placed on rescue, because co-

[109]Provisional Agenda, Twenty Sixth Session of the Working Group on Insolvency Law (New York, 13-17 May 2002) at paras. 7-14.

ordination across jurisdictions becomes a greater possibility and the sale of viable businesses constituted by elements across national boundaries is facilitated. Where domestic laws contain such possibilities, assistance becomes more effective and the future of the constituent elements of the viable business, which may include very important assets, becomes more assured. Related benefits will include the preservation of associated employment and increased social advantages in the long-term. In addition, the change in emphasis from the stricter treaty forms to the use of Model Laws generally means that the adoption of texts can be simplified and domestic legal systems will be able to adjust relatively swiftly.

The UNCITRAL approach can also be seen behind the development of the OHADA text,[110] an example of a regional initiative among a small group of nations sharing common legal and economic antecedents. This approach may also be especially beneficial in states with less developed legal structures, where legal reforms and the renovation of a commercial environment is an imperative requiring legislative forms capable of swift enactment. Nevertheless, whether the Model Law is destined for success in dependent on the attitude taken by larger trading countries towards its enactment and the lead this gives to other jurisdictions worldwide. Overall, however, the view may be rightly taken that the enactment of the Model Law in as many jurisdictions as possible could only be of great utility to international business. The later work by UNCITRAL on a statement of objectives for insolvency regimes could only, given the range of regimes available in the world at various stages of evolution, be of great benefit. It is conceivable that this would prompt many nations, where corporate rescue is not yet an option, to consider incorporating this concept into their domestic laws and the proposals for a Legislative Guide could only assist this. In summary, it may be said that UNCITRAL's venture into the insolvency law field has been considered and measured. The Model Law project has been ambitious but may, in due course, prove to be quite successful, provided that the slow trickle of nations adopting it becomes more than just a symbolic attempt by emerging economies to appear reformist and commercially attractive. Nevertheless, it is precisely considerations of commerce that may well prompt, as the New Zealand Law Commission have clearly stated,[111] more nations to adopt the Model Law given their trading partners are doing so. In the long term, this work may well prove to be one of UNCITRAL's enduring legacies in the long contentious and, in the not so distant past, apparently irresolvable area of international insolvency law.

20 June 2002

[110] Fn. 5 above.
[111] Fn. 92 above.