UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

The UNCITRAL Model Law on Cross-Border Insolvency—A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency

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I. ISSUES IN CROSS-BORDER INSOLVENCY

A. Identifying the Problems

During a discussion of the growing significance of cross-border insolvency issues at the Congress convened on the occasion of UNCITRAL's twenty-fifth anniversary in 1992, one commentator suggested:

> [I]t is not practical to think of harmonizing the bankruptcy laws of . . . different jurisdictions: in the evolution of international law we are simply too far away from any time when we could expect countries to have similar bankruptcy laws in an effort to stimulate international trade. However, in the area of international bankruptcy we can reduce the problem to a much more manageable level, and I suggest to UNCITRAL that it work in that area.[1]

The discussion at the 1992 Congress led to a proposal in 1993 that UNCITRAL should undertake work in the area of cross-border insolvency.[2] Members expressed concern about the feasibility of such a project since other international and regional organizations undertaking

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1. Carl Felsenfeld, *Open Floor Speech* (May 18-22, 1992), in UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1995, at 158; *Proposals for Possible Future Work Made at the UNCITRAL Congress: Note by the Secretariat*, U.N.doc A/CN.9/378 (1993), *reprinted in* [1993] XXIV Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/1993.

2. U.N. Doc. A/CN.9/378/Add.4(1993), *reprinted in* [1993] XXIV Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/1993.

similar projects had encountered many difficulties in agreeing on solutions and finalizing texts that could be widely accepted.[3] Despite that reluctance, the Congress agreed that the practical problems caused by disharmony of national laws governing cross-border insolvency warranted further study.[4]

Between 1993 and 1995, UNCITRAL and INSOL International held a number of joint international meetings to investigate the possibility of developing harmonized rules on cross-border insolvency.[5] In recognition of the central role to be played by the judiciary in implementing any international arrangements that States might negotiate and adopt, the meetings included the first of an ongoing series of multinational judicial conferences.[6] In addition, UNCITRAL and INSOL International undertook a number of studies to examine comparative approaches to cross-border insolvency to identify issues to be addressed in any future work.[7]

The studies showed that despite a significant growth in the practical significance of legal aspects of cross-border insolvency as a direct result of the global expansion of economic activity, that increase was not matched by the development of national insolvency laws that would facilitate the coordination and control of the international business activities of a debtor with assets located in more than one country.[8] The national laws frequently produced approaches that neither supported the rescue of financially troubled businesses nor were conducive to the fair and efficient administration of insolvency.[9] Moreover, the basic economic and social goals of insolvency proceedings could only be accomplished after reconciling incompatible national laws.[10]

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3. *See id.*

4. *See id.*

5. *Report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency*, 1994, UNCITRAL, 27th Sess., at 2, U.N. Doc. A/CN.9/398(1994), *available at* http://www.uncitral.org/english/workingroups/wg-il/398-e-pdf (last visited Mar. 22, 2004).

6. *Report on the 4th UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency*, 2001, UNCITRAL, 35th Sess., at 8, U.N. Doc. A/CN.9/518 (2002); UNCITRAL, *Papers and Programs from Previous Colloquia and Symposia Held in Conjunction with the Work of UNCITRAL*, *at* http://www.uncitral.org/english/news/colloquia-index-e.htm. Previous joint judicial colloquia include: Vienna, 1994; Toronto, 1995; New York, 1997; Munich, 1999; Vienna, 2000; London, 2001; Las Vegas, 2003; and a sixth is being planned for Sydney, 2005.

7. NEIL COOPER & REBECCA JARVIS, RECOGNITION AND ENFORCEMENT OF CROSS-BORDER INSOLVENCY: A GUIDE TO INTERNATIONAL PRACTICE at xiv (1996).

8. *Cross-Border Insolvency: Report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency: Note by the Secretariat*, 4 U.N. Doc. A/CN.9/398(1994), *reprinted in* XXV Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/1994 [hereinafter *1994 Colloquium*].

9. COOPER & JARVIS, *supra* note 7, at xiii-xiv.

10. *1994 Colloquium*, *supra* note 8.

In addition to the inadequacy of current laws, the unpredictability as to how those laws would be implemented, as well as the potential cost and delay of that implementation, added a further layer of uncertainty that could impact on capital flows and cross-border investment. The countries studied differed in their acceptance of different types of proceedings, understanding of key concepts, and the treatment that they accorded to parties with an interest in insolvency proceedings.[11] Reorganization or rescue procedures, for example, were more prevalent in some countries than others.[12] The involvement of, and treatment accorded to, secured creditors in insolvency proceedings varied widely.[13] Different countries also recognized different types of proceedings with different effects. An example:

> [I]n the context of a reorganization proceeding is the case in which one jurisdiction envisages a "debtor in possession" continuing to exercise management functions, while, under the law of another State in which a contemporaneous insolvency proceeding is being conducted with respect to the same debtor, existing management is displaced or the debtor's business is to be liquidated.[14]

Many national insolvency laws asserted the principle of universality to justify a unified proceeding where its court orders would determine the status of assets located abroad.[15] However, those laws failed to recognize insolvency proceedings based on foreign claims of universality.[16] In addition to differences between key concepts and the treatment of participants, some of the effects of insolvency proceedings, such as the application of a stay or suspension of actions against the debtor or its assets, could not be applied effectively across borders.[17]

The 1994 UNCITRAL-INSOL Colloquium on Cross-Border Insolvency reported that "in the face of gaps or inadequacies in the law, courts and practitioners attempting to harmonize administration of cross-border insolvencies might find that, at best, they had to attempt to rely on ad hoc protocols or agreements among the parties involved in administering the different insolvency proceedings."[18]

What then is needed to address these issues and facilitate the conduct of cross-border insolvencies? The 1994 Colloquium identified a

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11. *See generally* COOPER & JARVIS, *supra* note 7.
12. *Id.*
13. *Id.*
14. *1994 Colloquium*, *supra* note 8, at 5.
15. *Id.*
16. *Id.*
17. *Id.* at 7.
18. *Id.* at 6.

number of needs that could be addressed short of unification of any substantive law. Some of these included the creation of systems to facilitate preservation of assets both in liquidation and reorganization, mechanisms for recognition of duly appointed representatives of foreign proceedings and for recovery of assets, recognition of foreign court orders, and the ability to provide information to and request information from foreign insolvency proceedings.[19] Additional needs might include establishing standing for the foreign representative to apply directly to a foreign court for recognition; minimal formal requirements for such an application; evidentiary presumptions that might assist the application for recognition, such as for the authenticity of documents; expeditious consideration by the court of the application for recognition; and forms of cooperation and coordination other than exchange of information, such as the authority for direct communication between courts and foreign representatives.[20] Perhaps another requirement to facilitate the conduct of cross-border insolvency is, as identified at the 1997 Colloquium, "a new spirit which had to be one of cooperation, where each jurisdiction was prepared, where appropriate, to defer to the other and where each jurisdiction was sensitive to the concerns of the other."[21]

B. National Law Reform Efforts

The studies by UNCITRAL and INSOL identified a limited number of law reform efforts at the national level designed to foster, as a basis for assistance, a greater degree of universality in the administration of cross-border insolvency than might be achieved through the use of comity or the rules of private international law. The studies were intended to establish a flexible framework for dealing with cross-border insolvency, and they typically granted court representatives of foreign insolvency proceedings access to court as well as recognition to foreign proceedings.[22] Key features included:

> [A]n opportunity for representatives of foreign insolvency proceedings to petition the [forum] bankruptcy court for ancillary proceedings, available at the discretion of the court or perhaps mandatory, to assist in the administration of the foreign insolvency proceeding; various forms of

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19. *Id.* at 7.

20. *Id.* at 7-9, 18.

21. *Report of the United Nations Commission on International Trade Law on the Work of Its Thirtieth Session*, (1997), U.N. Doc. A/52/17 (1997), *reprinted in* [1999] XXVIII Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/1997 [hereinafter *Thirtieth Session*].

22. This summary derives from a survey undertaken as preparatory work for the *Joint Project of UNCITRAL and INSOL International on Cross-Border Insolvencies*. *See 1994 Colloquium*, *supra* note 8, at 9.

> ancillary relief including injunctions blocking actions against the foreign debtor or property in the forum and turnover of property to the foreign representative for administration in the foreign proceeding; possible suspension or dismissal of a forum bankruptcy proceeding in deference to pending foreign insolvency proceedings; opportunity for the foreign representative to petition for a full, involuntary insolvency proceeding as an alternative to a mere ancillary proceeding; before forum courts by foreign representatives treated as "special appearances", [sic] thus not subjecting the foreign representative to the jurisdiction of the forum for any other purpose; [and] for assessing foreign proceedings for purposes of determining whether to recognize court exercise of discretion as to whether to grant recognition or ancillary relief (e.g., similarity on essential points between the legal system of the forum State and the foreign State; just treatment of all creditors; comity).[23]

Notwithstanding the existence of these features in some national laws they were noted as being the exceptions. A number of limitations to the application of these types of provisions existed, ranging from mandatory recognition of prescribed countries, through selective or discretionary recognition, to recognition only on the basis of a multilateral treaty.[24] While some legal systems accepted the notion of judicial discretion to achieve recognition and cooperation, other systems required judges to act only in respect of specific powers.[25] Judges in such countries had limited discretion to operate outside those specific powers, and they were often reluctant to resort to their implicit powers.[26]

C. International Initiatives

There has also been a lack of multilateral treaty arrangements.[27] Experience has shown that despite the potential for international treaties to bring widespread harmonization, the effort to negotiate such agreements is generally substantial and, as one commentator notes, "the greater the degree of practical utility that is pursued by means of a treaty, the greater the difficulty in bringing it to fruition, and hence the greater the risk of ultimate failure."[28] The search for comity in insolvency within Europe provides a good example. The intention within Europe was to develop a bankruptcy convention that would parallel the 1968

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23. *Id.*
24. *See id.*
25. *See id.*
26. *See id.*
27. *1994 Colloquium*, *supra* note 8, at 10.
28. IAN FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW: NATIONAL AND INTERNATIONAL APPROACHES 322 (1999).

Convention on Jurisdiction and Enforcement of Judgements and Civil Commercial Matters.[29] These efforts led to the 1990 European Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention).[30] A draft European Union convention on insolvency proceedings superseded the Convention after one ratification (Cyprus).[31] Although European Union Member States came close to enacting such a convention in November 1995, implementation ultimately proved impossible.[32] The European Union revived the Convention by adopting Council Regulation on Insolvency Proceedings 1346/2000 of 29 May 2000, which entered into force on May 31, 2002.[33]

While a few treaties have been negotiated at a regional level, these arrangements are generally only possible (and suitable) for countries of the particular region whose insolvency law regimes and general commercial laws are similar. Of necessity, their application is limited to the regional group of contracting States.[34] While they undoubtedly improve the situation between contracting States, the increasing globalization of business and investment with the consequent spread of international insolvencies is likely to implicate non-participating States. Nevertheless, regional arrangements could be a useful starting point for broader cooperation.

A number of nongovernmental international initiatives were designed to provide a legal framework for harmonization of cross-border insolvency proceedings. One such project was the Model International Insolvency Cooperation Act (MIICA) developed under the auspices of Committee J of the Section on Business Law of the International Bar Association in the 1980s.[35] Although it failed to gain wide and active acceptance from governments and legislators, the MIICA ensured that the Model Law concept became a viable means to overcome the

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29. *See generally id.* at ch. 6.

30. European Convention on Certain International Aspects of Bankruptcy, *opened for signature* June 5, 1990, 30 I.L.M. 165 (1991) [hereinafter Istanbul Convention].

31. *See generally* FLETCHER, *supra* note 28, at ch. 6.

32. *Id.*

33. Council Regulation No. 1346/2000 of 29 May 2000, 2000 O.J. (L 160)1.

34. Regional multilateral treaties include in Latin America: the Montevideo Treaties of 1889 and 1940; Treaty of International Procedural Law, Mar. 19, 1940, Braz.-Colom.-Bol.-Arg.-Peru-Para., 37 AM. J. INT'L L. 116; in the Nordic region, Convention Between Denmark, Finland, Iceland, Norway and Sweden Regarding Bankruptcy (concluded in 1933, amended in 1977 and 1982) Convention Regarding Bankruptcy, Nov. 7, 1933, Den.- Fin.-Ice.-Nor.-Swed.; among the Member States of the Council of Europe: the European Convention on Certain International Aspects of Bankruptcy, Istanbul Convention, *supra* note 30 (now Council Regulation No. 1346/2000 of 29 May 2000); and the then draft Convention on Insolvency Proceedings 1995.

35. *See* Int'l Bar Ass'n, Insolvency & Creditor's Rights Committee, Key Achievements, *at* http://www.ibanet.org/committees/SBL-Jsubs2.asp#1 (last visited Mar. 22, 2004).

persistent failure to successfully conclude a global insolvency treaty.[36] Experience with MIICA also indicated the importance to the success of a project of involving governments in the negotiation process (a key element of the UNCITRAL process), particularly where the text being developed required legislative or other action by governments for its adoption.[37]

Another initiative of Committee J in the early 1990s was the development of a Cross-Border Insolvency Concordat based on rules of private international law.[38] The purpose of the Concordat was to suggest guidelines for cross-border insolvencies and reorganizations which the participants or courts could adopt as practical solutions to a variety of issues, such as designation of the administrative forum, application of that forum's priority rules, rules for cases involving more than one administrative forum, and designation of applicable rules for avoidance of certain specified pre-insolvency transactions.[39] The initial application of the Concordat was in cases that involved Canada and the United States, by some of the same judges who had been instrumental in developing the Concordat.[40] Cross-Border Insolvency Protocols based on the Concordat model have been entered into between the United States and Canada on a number of occasions, as well as between the United States and Israel, the Bahamas, the Cayman Islands and England, Bermuda and Switzerland.[41] The terms and duration of protocols vary, and amendment or modification in the course of the proceedings takes account of the changing dynamics of a multinational insolvency to facilitate solutions for unique problems that arise in the proceedings.[42]

Such case-by-case cooperation has emerged, in the words of one commentator, "as the de facto norm."[43] As regular participants in international insolvencies have observed:

> [i]n the absence of formal treaties to address the problems arising from international insolvencies, the task falls to the shoulders of insolvency practitioners to develop on a case by case basis strategies and techniques for resolving the conflicts that arise when different nations attempt to apply

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36. FLETCHER, *supra* note 28, at 326.

37. *Id.*

38. *See* BRUCE LEONARD, CO-ORDINATING CROSS-BORDER INSOLVENCY CASES 21 (Int'l Insolvency Inst. 2001).

39. *Id.* at 4.

40. *Id.*

41. *Id.* at 6.

42. *Id.*

43. Thomas Gaa, *Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?* 27 INT'L LAW. 881, 889 (Winter 1993).

> different laws and enforce different requirements upon the same set of parties.[44]

The cases which use cross-border protocols provide examples of how cooperation and coordination between the judges, courts, and the insolvency profession can improve the international regime for insolvency in the absence of comprehensive national, regional, or international law reform solutions.[45] The protocols developed have often provided innovative solutions to cross-border issues and have enabled courts to address the specific facts of individual cases.[46] Although there are limitations on the extent to which the protocols can be used to achieve more widespread harmonization of international insolvency law and practice, they are being used more often and information about them is more widely disseminated.

II. THE UNCITRAL MODEL LAW INITIATIVE

A. Introduction

As a result of the studies and consultations undertaken by UNCITRAL and INSOL International and developments in international insolvency practice, a consensus emerged from the various meetings that confirmed the view noted at the 1992 UNCITRAL Congress, that it would not be feasible in the foreseeable future to solve the problems of coordination and cooperation by way of a wholesale unification of substantive laws. Rather, the work should focus on a limited number of cross-border issues where progress likely would be made in a relatively short time, an approach that has been described as "an exercise in realism and in 'the art of the possible.'"[47] These included:

(1) cooperation among the courts of the States where the debtor's assets are located;
(2) the granting of access to local courts to representatives of foreign insolvency proceedings and creditors; and
(3) according recognition to certain orders issued by foreign courts.[48]

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44. Richard A. Gitlin & Ronald J. Silverman, *International Insolvency and the Maxwell Communication Corporation Case: One Example of Progress in the 1990s*, *in* INTERNATIONAL INSOLVENCIES: DEVELOPING PRACTICAL STRATEGIES 11-12 (Richard A. Gitlin ed., 1992).

45. *Id.*

46. *Id.* at 12.

47. FLETCHER, *supra* note 28, at 331.

48. *Report on the Working Group on Insolvency Law on the Work of Its Twentieth Session* (1996), 3 U.N. Doc. A/CN.9/433, *reprinted in* [1999] XXVIII Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/ 1997.

An intergovernmental Working Group negotiated the Model Law between 1995 and 1997 over four two-week sessions.[49] The Working Group consisted of the thirty-six Member States of the Commission, together with interested non-Member States.[50] Relevant international organizations, both intergovern-mental and nongovernmental, also participated, such as the Hague Conference on Private International Law, the European Insolvency Practitioners Association (EIPA), Instituto Iberoamericano de Derecho Internacional Económico, INSOL International, International Bar Association (IBA), and the International Chamber of Commerce.[51] Two weeks of final negotiations followed the deliberations of the Working Group during the thirtieth session of UNCITRAL (Vienna, Austria, 12-30 May 1997).[52] The Model Law was adopted by consensus on May 30, 1997.[53]

B. Purpose

The resolution of the General Assembly that recommends adoption of the Model Law to States provides a statement of the need for the Model Law, the timeliness of its conclusion, and its fundamental purpose—providing an interface between insolvency laws of different countries.[54] Recognizing the practical difficulties of harmonizing

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49. *Report of the Working Group on Insolvency Law on the Work of the Eighteenth Session* (1995), U.N. Doc. A/CN.9/419 and Corr. 1, *reprinted in* [1996] XXVII Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/1996; *Report of the Working Group on Insolvency Law on the Work of Its Nineteenth Session* (1996), U.N. Doc. A/CN.9/422, *reprinted in* [1196] XXVII Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/1996; *Report of the Working Group on Insolvency Law on the Work of Its Twentieth Session* (1996), U.N. Doc. A/CN.9/433, *reprinted in* [1997] XXVIII Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/1997; *Report of the Working Group on Insolvency Law on the Work of Its Twenty-First Session* (1997), U.N. Doc. A/CN.9/435, *reprinted in* [1999] XXVIII Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/1997 [hereinafter *Twenty-First Session*].

50. *Thirtieth Session*, *supra* note 21.

51. *Twenty-First Session*, *supra* 49.

52. *See Thirtieth Session*, *supra* note 21.

53. The Model Law is available at Thirtieth Session, Annex I [hereinafter Model Law] and the UNCITRAL website at www.uncitral.org. *Thirtieth Session*, *supra* note 21, at 1, 221. The discussion at the thirtieth session concerning the Model Law is reproduced in *Thirtieth Session*, *supra* note 21, at 12-225.

54. General Assembly resolution 52/158 of 15 December 1997 states:

> *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law*:
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> *The General Assembly*, *Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it created the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

substantive law, the Model Law respects differences between national procedural laws, and it does not address the issues of substantive law.

C. The Model Law Concept

Throughout the preparatory work, the drafters proceeded on the assumption that the final text would be a model law rather than a convention.[55] One reason for this approach was the close relationship

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> *Noting* that increased cross-border trade and investment leads to greater incidence of cases where enterprises and individuals have assets in more than one State,
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> *Noting also* that when a debtor with assets in more than one State becomes subject to an insolvency proceeding, there often exists an urgent need for cross-border cooperation and coordination in the supervision and administration of the insolvent debtor's assets and affairs,
>
> *Considering* that inadequate coordination and cooperation in cases of cross-border insolvency reduce the possibility of rescuing financially troubled but viable businesses, impede a fair and efficient administration of cross-border insolvencies, make it more likely that the debtor's assets would be concealed or dissipated and hinder reorganizations or liquidations of debtors' assets and affairs that would be the most advantageous for the creditors and other interested persons, including the debtors and the debtors' employees,
>
> *Noting* that many States lack a legislative framework that would make possible or facilitate effective cross-border coordination and cooperation,
>
> *Convinced* that fair and internationally harmonized legislation on cross-border insolvency that respects the national procedural and judicial systems and is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,
>
> *Considering* that a set of internationally harmonized model legislative provisions on cross-border insolvency is needed to assist States in modernizing their legislation governing cross-border insolvency,
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> 1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Cross-Border Insolvency contained in the annex to the present resolution;
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> 2. *Requests* the Secretary-General to transmit the text of the Model Law, together with the Guide to Enactment of the Model Law prepared by the Secretariat, to Governments and interested bodies;
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> 3. *Recommends* that all States review their legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system and, in that review, give favourable consideration to the Model Law, bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency;
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> 4. *Recommends also* that all efforts be made to ensure that the Model Law, together with the Guide, become generally known and available.

G.A. Res. 52/158, U.N. GAOR Comm. Int'l Trade L., 30th Sess., 72nd plen. mtg., U.N. Doc. A/52/17 (1997).

55. A model law is a legislative text recommended to States for adoption as part of national law. It gives enacting States a degree of freedom and flexibility to tailor the text of the law to its needs and, if appropriate, to modify or leave out some of its provisions. While it is precisely this flexibility that can ensure greater acceptance of a model law rather than a convention, States would generally be invited to make as few changes as possible in order to

between insolvency law and national judicial and civil procedure laws. When international negotiations implicate issues related to those national laws of the type conducted by UNCITRAL on a range of different legal topics, experience has shown that it is often difficult to find agreed solutions. Moreover, the desire in the Working Group to finalize and adopt a text in 1997 was accompanied by recognition that negotiation of a treaty would require more work and the resulting text would likely prove difficult to accept.[56] The IBA, in particular, noted the lack of success to date in achieving treaties in the area of cross-border insolvency and that "prospects for adopting legislation that would genuinely improve the real world of cross-border insolvency lay in model legislative provisions."[57] Other delegates felt that adoption of the model provisions should precede any consideration of the feasibility of preparing a treaty.[58] Because the procedure for ratification and adoption of a treaty is often complex and protracted,[59] a treaty could not improve the situation with respect to cross-border insolvency in the short term.[60] The view that any legislative text on international judicial cooperation had to include a requirement of reciprocity, which could only be achieved by an international treaty, was not ultimately accepted as a reason for negotiating a treaty.[61] Nor does the Model Law recommend the adoption of a reciprocity requirement.[62] The Commission decided that it should evaluate the impact of, and its experience with, the Model Law before making a decision to draft a treaty.[63]

The Commission determined that the Model Law could be more effective in modernizing international aspects of insolvency law if it were accompanied by background and explanatory information.[64] This

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achieve a satisfactory degree of unification and to provide certainty about the extent of unification. The more that a country changes the basic terms of the model, the less harmonization is achieved and the greater the potential for creating uncertainty. Kazuhiko Yamamoto, *Japanese Legislation in Cross-Border Insolvency- As Compared with the UNCITRAL Model Law*, *in* 43 JAPANESE ANN. OF INT'L L. 83-84 (Int'l Law Assn. Of Japan 2000).

56. *Thirtieth Session*, *supra* note 21, at 224.

57. United Nations Commission on International Trade Law, *Preparation of the Draft UNCITRAL Model Law on Cross-Border Insolvency* (1997), 41 U.N. Doc. A/CN.9/SR.607, *reprinted in* [1997] XXVIII Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/1997.

58. *Id.* at 30.

59. *Id.* at 32, 43, 48.

60. *Id.* at 30-52.

61. *Thirtieth Session*, *supra* note 21, at 26, 224.

62. *See generally* Model Law (text of Model Law).

63. *Thirtieth Session*, *supra* note 21, at 224.

64. *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, 9 U.N. Doc. A/CN.9/442, *reprinted in* [1999] XXVIII Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/1997 [hereinafter *Guide to Enactment*].

information would not only be useful to the executive branches and legislators preparing the necessary legislative revisions, but also for judges, practitioners, and academics.[65] Thus, the text of the Model Law is accompanied by a Guide to Enactment.[66]

D. Main Features of the Model Law

1. Scope of Application

The Model Law extends to any foreign proceeding "relating to insolvency" where the purpose of the proceeding is the reorganization or liquidation of the debtor if the proceeding is "collective" (whether judicial or administrative) and the assets and affairs of the debtor are subject to court control or supervision, where the court may be a judicial or other authority competent to control or supervise insolvency proceedings.[67] Within those parameters, a variety of collective proceedings would be eligible for recognition, whether compulsory or voluntary, corporate or individual, winding-up or reorganization, or those in which the debtor retains some measure of control over its assets, albeit under court supervision.[68]

In principle, UNCITRAL formulated the Model Law to apply to any proceeding that meets the requirements mentioned previously, independent of the nature of the debtor or its particular status under national law.[69] However, the Model Law itself refers to the possibility of excluding from its scope of application certain types of entities, such as banks or insurance companies specially regulated with regard to insolvency under the laws of the enacting State.[70] A number of reasons might support the need for such an exclusion, including the fact that the insolvency of those types of entities often gives rise to a particular need to protect vital interests of a large number of individuals; involves regulatory authorities and policies other than those contemplated by the Model Law; or requires particularly prompt and circumspect action (for

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65. *Id.*
66. *Id.*
67. Model Law art. 1(c), art. 2(a), (c).
68. These would probably include reorganization proceedings under Chapter 11 of the United States Bankruptcy Code (defining "foreign representative" as a "body" authorized to administer the proceeding and should cover a debtor in possession); the English administration order proceedings; and the English creditor's voluntary liquidation. This probably does not cover the English administrative receivership as it is essentially not collective, and the requirement for supervision of court is not met. FLETCHER, *supra* note 28, at 334.
69. Model Law art. 1.
70. Model Law art. 1(2).

instance, to avoid massive withdrawals of deposits).[71] As stated in the Guide to Enactment, "[f]or those reasons, the insolvency of such types of entities is administered in many States under a special regulatory regime."[72]

There may be reasons, however, for not excluding all cases of financial insolvency. The Guide to Enactment notes that for recognition purposes an "enacting State might wish to treat . . . a foreign insolvency proceeding, relating to a bank or an insurance company as an ordinary insolvency proceeding if the insolvency of the branch or of the assets of the foreign entity . . . does not fall under the national regulatory scheme."[73] Similarly, an enacting State might not wish to exclude the possibility of recognizing the insolvency of one of those types of entities if the insolvency law of the State of origin does not subject those proceedings to a special insolvency regime.[74] An enacting State may wish to recognize the right of the insolvency administrator, regulator, or court to seek assistance or recognition abroad in an insolvency proceeding conducted in the enacting State merely because that insolvency is subject to a special regulatory regime.[75] Even if a special regulation governs the particular insolvency, it might be desirable "to consider whether it would be useful to leave certain features of the Model Law (e.g., on cooperation and coordination and possibly on certain types of discretionary relief) applicable also to the specially regulated insolvency proceedings."[76]

2. Access

a. Foreign Representative's Access to Courts of the Enacting State

An important objective of the Model Law is to provide expedited and direct access for foreign representatives to the courts of the enacting State (often referred to as an "inbound request").[77] The Law does not rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications, which might otherwise have to

71. *Guide to Enactment*, *supra* note 64, at 61.

72. *Id.* The EC Regulation excludes similar types of entities on the basis that they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention. Council Regulation 1346/ 2000, 2000 O.J.(L 160) 1.

73. *Guide to Enactment*, *supra* note 64, at 63.

74. *Id.*

75. *Id.* at 64.

76. *Guide to Enactment*, *supra* note 64, at 62-64.

77. Model Law art. 9.

be used.[78] It facilitates a coordinated, cooperative approach to cross-border insolvency and enables fast action when needed.[79] In addition to the general right of access, a foreign representative (upon recognition) has procedural standing to commence a local insolvency proceeding in the enacting State (under the conditions applicable in that State);[80] may initiate actions to avoid or otherwise render ineffective acts detrimental to creditors;[81] may participate in an insolvency proceeding in the enacting State;[82] and may also intervene in proceedings concerning individual actions in the enacting State affecting the debtor or its assets.[83]

b. Creditors

In addition to providing direct access for foreign representatives, the Model Law confirms, on the basis of equal treatment with local creditors, that foreign creditors have access to the courts of the enacting State for the purpose of commencing an insolvency proceeding or participating in a local proceeding.[84] This right of access recognizes the key importance under a number of insolvency laws of creditor involvement in insolvency proceedings—as a party with a primary economic interest in the outcome, a creditor has a significant interest in the debtor's business once insolvency proceedings commence.[85] A key challenge for creditor involvement in cross-border insolvency is the differential treatment often accorded to local and foreign creditors, particularly with respect to priority ranking of claims. Many insolvency laws accord a lower ranking to foreign claims than to the same type of claim of a local creditor simply because the claim is made by a foreign creditor.[86] Although recognizing the principle of non-discrimination in terms of access, the Model Law makes it clear that the principle does not affect the ranking of claims in insolvency proceedings. The question of priority in distribution is left to national law, with the proviso that the country should accord a certain minimum level of treatment.[87] That minimum level requires that a country treat a foreign creditor in a

78. *Guide to Enactment*, *supra* note 64, at 178.
79. *Id.*
80. Model Law art. 11.
81. Model Law art. 23.
82. Model Law art. 12.
83. Model Law art. 24.
84. Model Law art. 13(1).
85. Model Law art. 1.
86. *Guide to Enactment*, *supra* note 64, at 104.
87. Model Law art. 13(2).

distribution at least as well as a general unsecured creditor, provided that the equivalent local claim would receive at least that treatment.[88]

c. Foreign Assistance for an Insolvency Proceeding in the Enacting State

In addition to providing a foreign representative and creditors with access to the courts of the enacting State, the Model Law authorizes the courts of the enacting State to seek assistance abroad (often referred to as an "outbound request") on behalf of a local proceeding.[89] Direct legislative authority ensures that the position of the courts is clear, particularly in States where the absence of that authority constrains courts from seeking assistance abroad, which creates potential obstacles to a coordinated international response to cross-border insolvency.[90]

3. Recognition

The Model Law simplifies proof requirements for seeking recognition and relief for foreign proceedings that avoid the generally time-consuming legalization requirements for notarial or consular procedures.[91] The Model Law requires the applicant for recognition to be a duly appointed representative in a foreign proceeding and to provide the formal certificates of the foreign court or certified copies of its decisions.[92] Those documents may be presumed to be authentic and accurate as to the facts contained in them, unless shown otherwise.[93] The Model Law acknowledges that there may be a need for the documents to be translated into the language of the recognizing State to facilitate court consideration, but does not make this mandatory.[94] While procedural matters related to notice of an application for recognition or the decision to grant recognition remain governed by the law of the enacting State, the Model Law does provide that whenever notice is to be given under that law, it should also be given, preferably individually, to known creditors that do not have addresses in the enacting State.[95] To facilitate the participation of foreign creditors in proceedings in the enacting State, the

88. Model Law art. 13(2). Footnote 2 to article 13(2) provides an alternative wording for enacting States that will continue not to recognize foreign tax or social security claims. *Id.*
89. Model Law art. 25(2).
90. *Guide to Enactment*, *supra* note 64, at 174.
91. Model Law arts. 15-17.
92. Model Law arts. 16, 19(1).
93. Model Law art. 16(2).
94. Model Law art. 15(4).
95. Model Law art. 14(1).

Model Law also specifies the information that should be included in that notice, such as the time and place for the filing of claims and the need for secured creditors to file claims.[96]

The mere fact that a foreign representative applies for recognition in the enacting State does not mean that the courts in that State will have jurisdiction over all of the assets and affairs of the debtor or the foreign representative.[97] Recognition and the assistance that flows automatically from that recognition under Model Law article 20, or at the discretion of the court under article 21, depends upon whether the "foreign proceeding" as defined in article 2 can be characterized as a foreign *main* proceeding or a foreign *non-main* proceeding.[98]

The Model Law deems a foreign proceeding to be the main proceeding if it has commenced in the State where the debtor has its "centre of main interests."[99] The Model Law does not define the term. Council Regulation 1346/2000 indicates that the term "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[100] Although it does not define the term, the Model Law establishes a presumption that, in the absence of proof to the contrary, the debtor's registered office or habitual residence would be its center of main interests.[101]

Foreign non-main proceedings are defined as those based on establishment.[102] The Model Law borrows the definition of "establishment" from what is now the EC Regulation, that is "non-transitory economic activity with human means and goods,"[103] and then extends it by adding the words "or services."[104]

Foreign proceedings initiated in a jurisdiction where the debtor lacks a center of main interests, or an establishment, do not qualify for recognition in a State that enacts the Model Law.[105] This is an important distinction for those national laws that allow jurisdiction based upon the presence of assets. However, the Model Law allows international

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96. Model Law art. 14(3).

97. Model Law art. 10.

98. *Guide to Enactment*, *supra* note 64, at 141.

99. The term was directly assimilated from the European Union Convention on Insolvency Proceedings in the interests of promoting a consistent approach to international recognition. Council Regulation 1363/2000, 2000 O.J.(L 160) 1.

100. *Id.* recital 13.

101. Model Law art. 16(3).

102. Model Law art. 2(c), (f).

103. Council Regulation 1363/2000, 2000 O.J. (L 160) 1, art. 2(h).

104. Model Law art. 2(f).

105. Model Law art. 17(2).

cooperation between courts in cases involving proceedings based on the presence of assets.[106] Article 28 goes on to provide that asset-based proceedings can be commenced in an enacting State after the recognition of foreign main proceedings (subject to certain limitations).[107]

4. Relief

The basic principle of the Model Law with regard to relief is that recognition of foreign proceedings by the court of the enacting State grants effects that are considered necessary for the orderly and fair conduct of a cross-border insolvency. As such the Model Law adopts a neutral approach, standardizing the effects of recognition (which may in fact lead to implementation of measures that are wider than those available in the State of the main proceeding), rather than importing the consequences of the foreign law into the insolvency system of the enacting State.[108] This approach provides both certainty and predictability for all parties involved in cross-border insolvency.

a. Interim Relief

Despite a legislative instruction for an early decision on an application for recognition,[109] the Model Law recognizes that in some cases there will be a need for urgent steps to be taken to protect assets of the debtor or the interests of creditors before that decision is made.[110] Accordingly, it provides that the court may grant certain interim relief pending a decision on recognition.[111] Thereafter, the basis upon which a court grants relief depends upon whether the proceedings are main or non-main proceedings.[112] Interim relief may include a stay of execution against the debtor's assets that permits the administration or realization of perishing or devaluing assets by the foreign representative; suspending the right to transfer, encumber, or otherwise dispose of the debtor's assets; and examination of witnesses or taking of evidence.[113]

106. Model Law arts. 25-27.
107. Model Law art. 28.
108. Model Law art. 21.
109. Model Law art. 17(3).
110. *Guide to Enactment*, *supra* note 64, at 137.
111. Model Law art. 19.
112. Model Law arts. 20-21.
113. Model Law art. 19(1)(a)-(c).

b. Foreign Main Proceedings

Key elements of the relief accorded upon recognition of a foreign main proceeding include a stay of actions of individual creditors against the debtor; a stay of enforcement proceedings concerning the assets of the debtor; and suspension of the debtor's right to transfer or encumber its assets.[114] These effects of recognition are mandatory in the sense that they are intended to flow automatically from the recognition of a foreign main proceeding.[115] In those States where a court order is needed for the stay or suspension to become effective, legislation implementing the Model Law should require the court to take the appropriate action.[116]

The stay of actions or enforcement proceedings is necessary to provide breathing space to allow steps to be taken to organize orderly and fair insolvency proceedings to deal with the assets of the debtor. The suspension of transfers is necessary to prevent the rapid movement of money and property across boundaries as is possible in the modern globalized economic system. The mandatory moratorium triggered by the recognition of the foreign main proceeding provides a freeze essential to prevent fraud, and to protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.

Exceptions and limitations to the scope of the stay and suspension are outside the scope of the Model Law, and they are left to the law of the enacting State.[117] Those exceptions might relate to the enforcement of secured claims, payments by the debtor made in the ordinary course of business, or the completion of open financial market transactions. Similarly, provisions governing comparable stays and suspensions in insolvency proceedings under the laws of the enacting State determine the possibility of modifying or terminating the stay or suspension.[118]

c. Foreign Non-Main Proceedings

Where the court recognizes the proceedings as non-main proceedings, the court may grant the same relief as that which applies automatically in the case of recognition of main proceedings upon the application from the foreign representative.[119] In addition to the mandatory stay and suspension, the Model Law authorizes the court to

114. Model Law art. 20(1).
115. *Guide to Enactment*, *supra* note 64, at 141.
116. *Id.* at 142.
117. Model Law art. 20(2).
118. Model Law art. 20(1).
119. Model Law art. 21(1)(a)-(c).

grant additional discretionary relief for the benefit of any foreign proceeding, whether main or not, at the request of the foreign representative.[120] That relief may include facilitating access to information about the assets of the debtor and his liabilities;[121] appointing a person to administer all or part of those assets;[122] and any other relief that may be available under the laws of the enacting State.[123] The relief granted in respect of a non-main proceeding is limited to those assets or transactions that the recognizing court determines to have an appropriate relationship to the non-main proceedings on the basis of the law of the recognizing State.[124]

5. Protection of Creditors and Other Interested Persons

The Model Law contains provisions that protect the interests of the creditors, the debtor, and other affected persons. These provisions leave it to the discretion of the court whether to grant temporary relief upon application for recognition or upon a decision to recognize a foreign proceeding: "the court must be satisfied [in granting such relief] that the interests of the creditors and other interested persons, including the debtor, are adequately protected."[125] "The court may subject the relief granted . . . to conditions it considers appropriate,"[126] and it may modify or terminate the relief granted, if requested by any person affected.[127]

In addition to these specific provisions, the Model Law provides generally that the court may refuse to take an action governed by the Law if the action would be manifestly contrary to the public policy of the enacting State.[128]

As noted above, questions of notice to interested persons, while closely related to the protection of their interests, are in general not regulated in the Model Law, which leaves them to be governed by the procedural rules of the enacting State, some of which may be of a public-order character. For example, the law of the enacting State will determine whether the debtor or another person are given any notice of an application for recognition of a foreign proceeding and the time period for giving the notice. The Model Law does provide, however, that

120. Model Law art. 21.
121. Model Law art. 21(1)(d).
122. Model Law art. 21(1)(b).
123. Model Law art. 21(1)(c).
124. Model Law art. 21(3).
125. Model Law art. 22(1).
126. Model Law art. 22(2).
127. Model Law art. 22(3).
128. Model Law art. 6.

where national law requires notice to be given to creditors, certain requirements should be met with respect to foreign creditors.[129]

6. Coordination and Cooperation

Chapter IV, a key section of the Model Code, addresses cross-border cooperation. As noted in the Guide to Enactment, the objective of the chapter is to enable courts and insolvency representatives "from two or more countries to be efficient and achieve optimal results."[130] Very often, such cooperation may be the only way to maximize the value of assets and minimize litigation, expense, and delay.[131]

A common limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvency derives from the lack of a legislative framework or uncertainty regarding the scope of the existing legislative authority for pursuit of cooperation with foreign courts.[132] Experience has shown that, irrespective of the discretion courts may traditionally enjoy in a State, the existence of a specific legislative framework is useful for promoting international cooperation in cross-border cases.[133] The Model Law fills the gap found in many national laws by expressly empowering courts to extend cooperation in the areas governed by the Model Law and to communicate directly with foreign counterparts.[134] Notably, this is not restricted to the time immediately after a decision is made to recognize a foreign proceeding.[135] The Model Law also provides for authorization for cooperation to occur at various levels in the proceedings, such as between a court in the enacting State and a foreign representative, and between a person administering the insolvency proceeding in the enacting State and a foreign court or a foreign representative.[136]

One delegate to the Working Group noted that while these provisions were the subject of much debate, many delegates who were at first hesitant ultimately agreed that a modern financial crisis required full exploitation of modern methods of communication.[137] The Working

129. Model Law art. 14(3).
130. *Guide to Enactment*, *supra* note 64, at 173.
131. *Id.*
132. *Id.* at 174.
133. *Id.*
134. Model Law art. 25.
135. *Guide to Enactment*, *supra* note 64, at 177.
136. Model Law art. 26.
137. Jay Lawrence Westbrook, *Multinational Enterprises in General Default: the UNCITRAL Model Law and Related Regional Reforms*, 76 AM. BANKER L.J. 1, 17 (Winter 2002) (paper presented at the September 2001 meeting of the German Procedure Association, Athens, Greece) (on file with the author).

Group also understood that the proper procedures and safeguards for any communications made would be furnished by local ideas of due process and natural justice.[138]

The chapter leaves certain decisions, in particular when and how to cooperate, to the courts and, subject to the supervision of the court, to the insolvency representative.[139] Recognizing, however, that the idea of such active cooperation might be a relatively new and unfamiliar idea for many judges and representatives, the Model Law suggests ways to cooperate.[140] These may include communication of information; approval of "agreements concerning the coordination of proceedings" that are increasingly important in cross-border insolvency cases; and coordination of concurrent proceedings with respect to the same debtor.[141]

7. Coordinating Concurrent Proceedings

The existence of concurrent proceedings requires greater attention to the notion of coordination and cooperation in relation to the level of engagement between the legal systems involved. As one commentator observed:

> Fundamental differences concerning the policies and approaches of the respective systems, including their treatment of different classes of claim under their distribution regimes for insolvency, can give rise to what is in effect a power struggle for control over assets and the mode of distribution to which they will be subjected.[142]

The Model Law imposes virtually no limitations on the jurisdiction of the courts in the enacting State to commence or continue insolvency proceedings. Pursuant to article 28, jurisdiction remains with the courts of the enacting State for initiation of an insolvency proceeding after recognition of a foreign main proceeding, provided that the debtor has assets in the enacting State and that the effects of the proceedings will be restricted to those assets (subject to a specific exception).[143] This exception allows for those circumstances where meaningful administration of the local proceedings may concern certain assets abroad, especially where no foreign proceeding is necessary or available in the

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138. *Id.*
139. Model Law arts. 26-27.
140. Model Law art. 27.
141. Model Law art. 27. Agreements concerning the coordination of proceedings are generally referred to as cross-border protocols.
142. FLETCHER, *supra* note 28, at 357.
143. Model Law art. 28.

State where the debtor has the assets.[144] To allow this limited cross-border effect of the local proceedings, the extension to assets abroad is necessary for cooperation and coordination, and the foreign assets must, under the law of the enacting State, be subject to administration in the enacting State.[145] Where the debtor has no assets in the enacting State, the Model Law makes it clear that there is no jurisdiction for commencing an insolvency proceeding.[146]

The Model Law deems the recognized foreign main proceeding to be proof that the debtor is insolvent for the purposes of commencing local proceedings.[147] This rule should be helpful in those legal systems where commencement of insolvency proceedings requires proof that the debtor is actually insolvent, and it thus avoids the need for repeated proofs of financial failure, which increase the likelihood that a debtor can delay the proceeding long enough to conceal or remove assets.[148]

The Model Law addresses the question of coordination between a local proceeding and a foreign proceeding concerning the same debtor,[149] and it facilitates coordination between two or more foreign proceedings concerning the same debtor.[150] The objective of these provisions is to promote cooperation, coordination, and consistency of relief to foster the decisions that would best achieve the objectives of both proceedings.[151] In order to achieve satisfactory coordination and to adapt relief to changing circumstances, the court in all situations is directed to cooperate to the maximum extent possible with foreign courts and the foreign representatives.[152]

When the local insolvency proceeding already is under way at the time that the debtor requests recognition of a foreign proceeding, the Model Law requires that any relief granted for the benefit of the foreign proceeding is consistent with the local proceeding.[153] Furthermore, the existence of the local proceeding at the time of the recognition of the foreign main proceeding prevents the operation of article 20, which provides for the automatic application of a stay of individual actions or enforcement proceedings against the debtor and a suspension of the

144. *Guide to Enactment*, *supra* note 64, at 87.
145. Model Law art. 28.
146. *See* Model Law art. 28.
147. Model Law art. 31.
148. *Guide to Enactment*, *supra* note 64, at 194, 197.
149. Model Law art. 29.
150. Model Law art. 30.
151. *Guide to Enactment*, *supra* note 64, at 193.
152. Model Law arts. 25, 30.
153. Model Law art. 29(a).

debtor's right to transfer or encumber its assets.[154] When the local proceeding begins before a recognition or an application for recognition of the foreign proceeding, the relief granted for the benefit of the foreign proceeding must be reviewed and modified or terminated if it is inconsistent with the local proceeding.[155] If the foreign proceeding is a main proceeding, the stay and suspension must also be modified or terminated if inconsistent with the local proceeding, as mandated by article 20.[156]

The Guide to Enactment makes it clear that

> [t]he salient principle embodied in [article 29] is that the commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. This principle is essential for achieving the objective of the Model Law in that it allows the court in the enacting State in all circumstances to provide relief in favour of the foreign proceeding.[157]

Nevertheless, "the article maintains the pre-eminence of the local proceeding over the foreign proceeding" by its treatment of the question of relief.[158] By adopting that approach, the Model Law avoids intrusion into the autonomy of the enacting State and the establishment of "a rigid hierarchy between the proceedings since that would unnecessarily hinder the ability of the court to cooperate and exercise its discretion under articles 19 and 21."[159]

When the court is faced with more than one foreign proceeding, article 30 calls for the relief to be tailored in such a way that it will facilitate the coordination of the foreign proceedings; if one of the foreign proceedings is a main proceeding, any relief must be consistent with that main proceeding.[160] The provision applies irrespective of whether an insolvency proceeding is pending in the enacting State or not.[161] It aims to promote coordination, cooperation, and consistency of relief granted in different proceedings, although it gives preference to foreign main proceedings.[162]

Another rule designed to enhance coordination of concurrent proceedings is the last article of the Model Law, which deals with the rate

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154. Model Law art. 29(a).
155. Model Law art. 29(b).
156. *Id.*
157. *Guide to Enactment*, *supra* note 64, at 189.
158. *Id.* at 190.
159. *Id.* at 189-90.
160. Model Law art. 30.
161. Model Law art. 30(b).
162. Model Law arts. 30(a)-(b).

of payment of creditors.[163] According to the Guide to Enactment, "[i]t is intended to avoid situations in which one creditor might obtain more favourable treatment than other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions."[164] Article 32 does not affect the ranking of claims as established by the law of the enacting State, and it is solely intended to establish the equal treatment of creditors of the same class.[165] For example, when an unsecured creditor has received 5% of its claim in a foreign insolvency proceeding, and it also participates in the insolvency proceeding in the enacting State where the rate of distribution is 15%, the creditor would receive 10% of its claim in the enacting State in order to put it in a position equal to other creditors in the enacting State.[166]

III. DEVELOPMENTS IN CROSS-BORDER INSOLVENCY LAW AND ADOPTION OF THE MODEL LAW

The growth of the practical significance of legal aspects of cross-border insolvency in the wake of the global expansion of economic activity in the early 1990s, when work on the Model Law was begun, continued unabated in the following decade. As one commentator recently noted, "technological developments in the fields of communication, travel, and e-commerce have greatly increased the ability of businesses to stretch their corporate structures, assets, and transactions across a multitude of borders."[167] The commentator also noted, however, that while national governments have increasingly sought to cooperate with other governments on certain laws and regulations related to cross-border transactions, their efforts in the area of cross-border insolvency "have significantly lagged behind efforts seen in other fields and it remains a field filled with divergent national laws and inefficient solutions to cross-border insolvencies."[168] This conclusion closely resembles the conclusion reached by the UNCITRAL-INSOL studies a decade earlier, and it appears that not much has changed. A recent publication of INSOL International[169] notes in the introduction that

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163. Model Law art. 32.

164. *Guide to Enactment*, *supra* note 64, at 198.

165. *Id.* at 190.

166. *Id.* at 198.

167. Peter J. Murphy, *Why Won't the Leaders Lead? The Need for National Governments to Replace Academics and Practitioners in the Effort to Reform the Muddled World of International Insolvency*, 34 U. MIAMI INTER-AM. L. REV. 121, 122 (Winter 2002).

168. *Id.*

169. CROSS-BORDER INSOLVENCY: A GUIDE TO RECOGNITION AND ENFORCEMENT (INSOL ed., 2003) (updating an earlier edition published in 1995).

since 1996 there have been major advances in the area of cross-border insolvency, (although the examples given are of developments internationally) in particular the UNCITRAL Model Law in 1997 and the European Insolvency Regulation in 2000.[170] It is also noted, however, that much of what the Model Law contains is missing from the 39 insolvency laws surveyed for the publication.[171]

There have been, however, some developments in national law reform. Legislation based on the Model Law has been adopted by Eritrea, Mexico, South Africa, Japan, Montenegro, Romania, and Poland. Several countries have draft legislation which implements, or is based upon, the Model Law (including, to the writer's knowledge, the United States of America, Argentina, Pakistan, and the Republic of Korea); the United Kingdom has enacted legislation which provides for the Model Law to be adopted by way of regulation; New Zealand[172] and Australia[173] have both decided in favour of adoption of the Model Law, and a number of other countries are considering adoption, including Canada and India. Moreover, adoption of the Model Law has been strongly recommended by recent reports on insolvency law reform by the Asian Development Bank,[174] the International Monetary Fund,[175] the World Bank,[176] and others as the best practice standard for addressing issues of cross-border insolvency.

Much of the legislative reform activity leading to adoption of the Model Law has been part of a larger process of reform of insolvency law. International interest in the important task of national insolvency law reform led to UNCITRAL's second project on insolvency law in 2001—the development of a legislative guide on insolvency law.[177] Given the

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170. *Id.* at i.

171. *Id.*; *see* Ronald W. Harmer, *The UNCITRAL Model Law on Cross-Border Insolvency or 'Trivial Pursuit'*, *available at* http://www.insol.org/pdf/cross_pdfs/ACL%20Ron%20Harmer%202.pdf (last visited Mar. 20, 2004).

172. NEW ZEALAND LAW COMM'N, REPORT 52: CROSS-BORDER INSOLVENCY: SHOULD NEW ZEALAND ADOPT THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY?(1999).

173. COMMONWEALTH OF AUSTRALIA, CROSS-BORDER INSOLVENCY: PROMOTING INTERNATIONAL COOPERATION AND COORDINATION, CORPORATE LAW ECONOMIC REFORM PROGRAM PROPOSALS FOR REFORM: PAPER NO. 8, 3 (2002).

174. ASIAN DEV. BANK, LAW AND POLICY REFORM AT THE ASIAN DEVELOPMENT BANK 52-53 (2000).

175. INT'L MONETARY FUND, ORDERLY AND EFFECTIVE INSOLVENCY PROCEDURES: KEY ISSUES 82(1999).

176. WORLD BANK, PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS, ¶ 80 (2001).

177. The draft Legislative Guide gained approval in principle by UNCITRAL in 2003. [2003] XXXIV Y.B. UNCITRAL 197, U.N. Doc. A/58/17, *available at* http://www.uncitral.org. It is due to be finalized by Working Group V (Insolvency Law) at a session in March/April 2004 for referral to the Commission for adoption in June 2004.

complexity of the task of national insolvency law reform, it is perhaps not surprising that adoption of the Model Law, or legislation based upon it, has not been more widespread.

The following discussion considers some of the legislation that has enacted, or provides for the enactment of, the Model Law and some of the changes to the provisions of the Model Law countries have adopted.

A. Mexico

Mexico adopted the Model Law with few changes as part of a complete reform of its insolvency law in 2000.[178] In order to reflect the provisions of its domestic insolvency law, Mexico limits the application of the law to merchants. It has adopted a reciprocity provision,[179] but it appears that adoption of the Model Law by a jurisdiction whose representative seeks recognition may be sufficient to satisfy that requirement for reciprocity.[180] A further departure relates to the stay provided against individual actions against the debtor.[181] The Model Law provides for application of the stay to the commencement or continuation of individual actions or proceedings against the debtor or its assets.[182] These provisions are omitted from the equivalent Mexican provisions, articles 299 and 300.

The first decision recognizing foreign insolvency proceedings under the provisions of the Model Law of which the author is aware was made by the Federal District Court of Mexico City on December 19, 2002.[183]

B. South Africa

The South African Cross-Border Insolvency Act was passed in 2000 and entered into force in late 2003.[184] It is based on the Model Law but, like Mexico, South Africa adopts a test of reciprocity. This requires the Minister to designate those countries to which it will accord recognition if the recognition accorded by the law of such State to proceedings under

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178. Ley de Concursos Mercantiles, D.O. 12 de Mayo de 2000(Mex.)[hereinafter Mexican Law].

179. *See* Mexican Law, *supra* note 178, art. 280. In the English version on file with the author, this is translated as "the provisions of this Title [Title 12 Cooperation in International Proceedings] shall apply if no other means is available in the international treaties to which Mexico may be a party, unless there is no international reciprocity." *Id.*

180. Westbrook, *supra* note 137, at 28.

181. Model Law arts. 20(1)(a), 21(1)(a).

182. *Id.*

183. An abstract of this decision should be available under the UNCITRAL case law reporting system CLOUT (Case Law on UNCITRAL Texts) in 2004.

184. Cross-Border Insolvency Act, 42 (2000), art. 34 (S. Afr.).

the laws of the Republic relating to insolvency "justifies the application of this Act to foreign proceedings in such State."[185] Notices designating countries for these purposes must be approved by Parliament. To the writer's knowledge, no countries have yet been designated under the Act.

C. Japan

In November 2000, Japan enacted the Law relating to Recognition and Assistance for Foreign Insolvency Proceedings (Law No. 129 of 2000), which entered into force in April 2001.[186] The Law is based on the Model Law with various adaptations and amendments.[187] The Law does not, for example, provide for the automatic effects of article 20 of the Model Law.[188] Relief, including interim relief, is available only on the basis of an application to the court by a party in interest or by the court on its own motion,[189] and it is available before the court decides on the application for recognition or at the time of, or after, the decision on that application.[190] One of the reasons suggested for deciding against making relief apply automatically on recognition was the possibility that judicial prudence in considering such an application (and, in particular, the need to consider the interests of local creditors) might frustrate the simple and rapid recognition process provided by the Model Law.[191]

The types of relief available under the Law appear to be broadly similar to those provided in articles 20 and 21 of the Model Law, with the exception of commencement of individual actions or proceedings. The Japanese law suspends individual judicial or administrative proceedings already commenced against the debtor's assets, and it stays the commencement and continuation of execution against the debtor's assets.[192] Continuation of execution by a secured creditor can be stayed, but the commencement of such execution cannot be stayed.[193] It also appears that since Japanese law does not consider the enforcement of a

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185. Cross-Border Insolvency Act, arts. 2(2)-(4)(S. Afr.).

186. Law Relating to Recognition and Assistance for Foreign Insolvency Proceedings, Law No. 129 (2000) (Japan)[hereinafter Japanese Law]. For a detailed comparison of the UNCITRAL Model Law and the Law on Recognition and Assistance of a Foreign Insolvency Proceedings see Yamamoto, *supra* note 55, at 83.

187. These comments are based upon an English translation of the Law on file with the author by Professor Junichi Matsushita and Stacey Steele (May 30, 2002); *see also* Yamamoto, *supra* note 55, at 85-86.

188. Model Law art. 20.

189. Japanese Law art. 25(1).

190. *Id.*

191. Yamamoto, *supra* note 55, at 101.

192. Yamamoto, *supra* note 55, at 102.

193. Japanese Law art. 27.

tax claim to be a judicial proceeding that would be restrained under domestic law, enforcement of such claims in Japan will not be restrained.[194]

A further departure from the Model Law is the absence of the provision in article 25 of the Model Law for direct communication between Japanese and foreign courts, although the Japanese Law does provide for such communication between the insolvency representative and the courts. One explanation for this approach is that it is difficult to envisage a need for cooperation where no local proceedings are taking place, and, where local proceedings *are* taking place, communication between insolvency representatives, who are more likely to be familiar with that type of international contact than judges, will be more efficient than communication between courts.[195] The commentator notes that the court has the inherent power to cooperate with foreign courts if it judges such cooperation to be necessary and that the "internationalization of our judicial system will make this type of cooperation much easier in the future than today."[196]

The concurrent proceedings addressed in articles 28-30 of the Model Law are also unavailable in Japan. If there is an application for recognition of foreign proceedings when there is already a local proceeding involving the same debtor, the Japanese court must dismiss the application for recognition or suspend the local proceeding.[197] It appears that the Law supports dismissal of the foreign proceeding unless (1) the foreign proceeding is a foreign main proceeding, (2) the court is satisfied that recognition of the foreign proceeding meets the general interests of creditors, and (3) there is no likelihood that recognition of the foreign proceeding would be detrimental to the interest of creditors in Japan.[198] It is difficult to predict how the second and third requirements in article 57 will be interpreted. As noted by one commentator, the approach appears to be one which favors one proceeding for one debtor at any one time, and thus it avoids issues of coordination and cooperation between multiple proceedings.[199]

194. Westbrook, *supra* note 137, at 16.
195. Yamamoto, *supra* note 55, at 109.
196. *Id.*
197. Japanese Law art. 57.
198. Japanese Law art. 57(1).
199. *See* Yamamoto, *supra* note 55, at 112.

D. United Kingdom

The Insolvency Act 2000 authorizes adoption of the Model Law by regulation, with or without modification.[200] The regulation-making procedure to be followed requires the approval of the Parliament.[201] At the time of writing, no regulations had been promulgated.

E. Romania

In December 2002, Romania enacted the Law on Regulating Private International Law Relations in the Field of Insolvency which adopts the UNCITRAL Model Law with very few changes.[202] It also includes a number of provisions that give effect to EC Regulation 1346/2000 on insolvency proceedings.[203] Article 2 specifies a number of exceptions to the application of the legislation including banks, insurance, financial and investment institutions, commodity exchange members, clearing houses, and brokerage companies and traders.[204] Article 17 includes an additional requirement of reciprocity as to the effect of foreign judgments for recognition of foreign proceedings.[205] Article 21, on application of the stay, provides an exception to the equivalent article of the Model Law (article 20(1)(c)) for transfers, encumbrances, or other disposal carried out in the ordinary course of business.[206] Under article 29 on concurrent proceedings the opening of local proceedings following the recognition of foreign main proceedings requires an establishment, not just the presence of assets, in Romania.[207]

F. Poland

In February 2003, Poland enacted a new law on insolvency and restructuring, which includes two provisions concerning international insolvency proceedings based on the UNCITRAL Model Law, with some changes and omissions.[208] The law does not provide specifically that the foreign representative is entitled to apply directly to the courts of

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200. Insolvency Act 2000, ch. 39, § 14(1) (Eng.).

201. *Id.* § 14(5).

202. Law on Regulating Private International Law Relations in the Field of Insolvency, Law No. 931/2002 (Rom.). English text of the Law, *available at* http://www.iiiglobal.org/country/romania/international_law.pdf (last visited Mar. 22, 2004). This discussion is based on an English translation of the law on file with the author.

203. *See id.* art. 3(g).

204. *Id.* art. 2.

205. *Id.* art. 17.

206. *Id.* art. 21.

207. *Id.* art. 29.

208. Law on Insolvency and Restructuring, 2003 (Pol.).

Poland;[209] however, under article 386, proceedings for recognition can only be commenced on the petition of the foreign representative, and provision is made for the foreign representative to apply for the commencement of or to participate in local proceedings, as well as to commence avoidance actions. It is not clear from Part Two whether particular courts have jurisdiction over such applications or whether a particular bankruptcy court has jurisdiction under the general provisions of the law.[210] Article 380 provides that foreign creditors (i.e., those residing or having their seat abroad) shall enjoy the same rights as domestic creditors, but clearly excludes tax and social insurance dues and certain penalties from local proceedings.[211] Article 393(2) provides that the recognition decision shall summon creditors to make their claims and include certain information as to the making of those claims.[212] Although the terms of this article are presumably wide enough to include foreign creditors, no specific means for notifying them of the recognition decision along the lines of article 14 of the Model Law appears to be included.

Although the requirements for recognition of foreign proceedings appear to be essentially similar to article 15 of the Model Law, the law does not appear to include a provision similar to article 17 on the decision to recognize, except in so far as article 392 makes it clear that foreign insolvency proceedings are subject to recognition when the "(1) case is not one within the sole jurisdiction of the Polish courts, [and](2) acknowledgment is not in contravention with the basic principles of legal order in the Republic of Poland."[213] Provisions for interim relief also do not appear to be included in Part Two.[214] With respect to the types of relief available on recognition, the law appears to make no distinction between recognition of main and secondary proceedings, although these concepts are included elsewhere in the Law, and articles 397, 398, and 401 which reflect the main provisions of articles 20 and 21 of the Model Law.[215] Provisions addressing cooperation and coordination of proceedings are broadly similar to the Model Law with one exception. Although a provision requiring communication between the person appointed in local proceedings and the foreign court or representative is included, there is no analogous

209. Model Law art. 9.
210. Law of Insolvency and Restructuring, art. 386.
211. *Id.* art. 380.
212. *Id.* art. 393(2).
213. *Id.* art. 392.
214. *Id.* Part II.
215. *Id.* arts. 397, 398, 401.

provision for cooperation.[216] Issues of consistency of relief, such as those contained in article 29(a) and (c) of the Model Law, also do not appear to be included, nor does there appear to be a rule on payment in concurrent proceedings.[217] The Law provides no guidance on the way in which cooperation may be implemented.[218]

G. New Zealand

In 1999, the New Zealand Law Commission completed a report recommending adoption by New Zealand of the Model Law which contained their draft Cross-Border Insolvency Act, which very closely follows the Model Law.[219] Article 1(2) of the draft Act excludes a registered bank, within the meaning of New Zealand's legislation, from the application of the Model Law.[220] The draft Act also includes a procedure that requires the court to consider whether it should hear independent argument from the Crown on the public policy point, before refusing to take action on the basis that it would be manifestly contrary to the public policy of New Zealand.[221] This provision ensures that the State properly argues the public policy interests in any case and deters counsel from raising public policy objections that have little or no merit.[222] The Law Commission provides an excellent analysis of the issues that need to be addressed by policy makers and legislators in considering adoption of the Model Law and drafting the relevant legislation.[223]

In December 2003, the New Zealand Government released a Cabinet Paper recommending the legislative changes required for implementation of the UNCITRAL Model Law and the adoption of supplementary provisions for a single insolvency proceeding in relation to cross-border insolvencies between New Zealand and other specified countries.[224] The paper notes that the Model Law, while providing a useful framework, represents a relatively limited form of cooperation and that, with respect to some countries, where the differences between their insolvency regime and that of New Zealand are much less acute than

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216. *Id.* Part III.
217. *Id.* Part II.
218. *Id.* Part II.
219. NEW ZEALAND LAW COMM'N, *supra* note 172, at 71.
220. *Id.* at 78.
221. *Id.* at 52.
222. *See id.*
223. *See id.* at 23-41.
224. OFFICE OF THE MINISTER OF COMMERCE, INSOLVENCY LAW REVIEW: CROSS-BORDER INSOLVENCY, (2003) (N.Z.), *available at* www.med.govt.nz/ri/insolvency/review/cabinet/cross-border.htm.

those which prompted the form of coordination adopted by the Model Law, it should be possible to go further than the Model Law.[225] In particular, it should be possible to develop detailed agreements consistent with the Model Law that would provide for automatic recognition without the need for an application of specified insolvency proceedings (SIPs) as "foreign main proceedings" under the Model Law; preclude the commencement of parallel local insolvency proceedings; and confer broad powers on the foreign representative in the SIP to administer local assets and distribute those assets to creditors.[226] The paper proposes that such an agreement would only be made where the level of regulation in the other country and the terms of the recognition agreement provide appropriate protection for the interests of New Zealand debtors and creditors and when other safeguards modifying the application of the SIP provisions in exceptional cases could be included in the legislation to avoid serious prejudice to the interests of New Zealand creditors.[227]

IV. ADOPTING THE MODEL LAW—ISSUES AND APPREHENSIONS

Despite the commercial advantages of adopting the Model Law to facilitate the conduct of cross-border insolvency cases, a number of concerns appear to stand in the way of adoption. These include apprehension that adoption of the Model Law as part of domestic insolvency law will import the insolvency law of the foreign country upon recognition of a foreign insolvency order; that protection of local creditors and the participation of local creditors in foreign proceedings is not ensured; that foreign insolvency practitioners will be allowed to administer local proceedings; that recognition of foreign court decisions and orders on insolvency detracts from a country's sovereignty and independence; that the Model Law cannot be adopted without adding a requirement for reciprocity; and that a number of practical issues make implementation difficult.

The provisions of the Model Law provide answers to some of these issues; others are not (or cannot be) directly addressed by the terms of the Model Law, as they are of a more general application than insolvency, or they relate to the implementation of insolvency law, raising questions of judicial and institutional capacity.

The implications of recognition of foreign insolvency proceedings in terms of the applicable effects of foreign law in the recognizing State

225. *See id.* para. 3.
226. *Id.* para. 13.
227. *Id.* Appendix One: Details of Recognition Framework.

were discussed during the development of the Model Law. Some delegates to the Working Group took the view that upon recognition of foreign insolvency proceedings the effects of the foreign law should apply, while others took the view that only the local effects of the commencement of insolvency proceedings should apply. The Model Law specifically rejects both of these approaches and adopts a neutral middle ground that specifies the effects, in terms of relief, that should automatically apply on recognition.[228] At the same time, it defers to local law, providing that the scope, modification, or termination of the relief applicable upon recognition are subject to provisions of the law of the enacting State that applies to such exceptions, limitations, modifications, or terminations.[229] In addition to this provision, the Model Law provides that in granting relief the court may subject that relief to such conditions as it considers appropriate,[230] and that at the request of the foreign representative or any person affected by the relief granted, or at its own motion, the court may modify or terminate that relief.[231] In terms of coordination of concurrent proceedings, the Model Law again defers to the local law by providing that relief must be coordinated and consistent with that granted in the local proceeding, whether it commenced before or after the foreign proceeding.[232]

With respect to the interests of creditors, particularly local creditors, there will always be an issue of whether recognizing foreign insolvency proceedings in a particular case will be to their advantage or disadvantage.[233] The answer depends upon the case in question and whether quarantining local assets for the benefit of local creditors will ensure a greater return to them than pooling those assets to increase the global assets available to creditors generally.[234] The answer may also depend upon whether the foreign proceedings are for liquidation or reorganization.[235] While the amount to be distributed to a creditor may be relatively straightforward to determine in the case of liquidation, in reorganization much may depend upon the particular interests of a creditor rather than simply upon the relative amounts that may be

228. Model Law art. 20.
229. Model Law art. 20(2).
230. Model Law art. 22(2).
231. Model Law art. 22(3).
232. Model Law art. 29.
233. Blake Dawson Waldron, *Promoting Regional Cooperation in the Development of Insolvency Reform*, ASIAN DEV. BANK 10 (2002).
234. *Id.*
235. *Id.*

received through quarantining or pooling.[236] Employees, for example, may have a greater interest in ongoing employment than in a distribution, while trade creditors may derive more benefit from a continuing marketplace for goods and services.[237] As one commentator notes, there is no answer to the dilemma of whether or not local creditors will be better off if countries apply cross-border recognition law.[238] He continues to state that "[i]t might be best addressed by accepting the observation that, in a system of inter-country cooperation, any loss to local interests in one case will be roughly balanced by a gain in another case."[239]

The Model Law does not and cannot address this issue. Nor, as a unilateral instrument, can it address the treatment of local creditors in foreign proceedings. It does, however, seek to ensure the equality of treatment of foreign and local creditors and to ensure that their interests are protected as far as possible.[240] When granting or denying relief, whether of an interim or discretionary nature, the court is required to ensure that the interests of creditors and other interested parties, whether foreign or local, and the debtor, adequately are protected.[241] Foreign creditors are to have the same rights as local creditors with respect to commencement of, and participation in, insolvency proceedings.[242] The rule in article 32 prevents double dipping, particularly by foreign creditors, as noted above.[243]

More generally, the form of the Model Law itself provides an element of flexibility that allows enacting States to vary the provisions to suit local conditions, as reflected in the enacting legislation discussed above. As already noted, article 6 provides an overriding protection that allows the court to refuse to take any action governed by the Model Law if it would be manifestly contrary to the public policy of the enacting State.[244]

With respect to the suggestion that a foreign insolvency practitioner might be able to administer local proceedings, it should be noted that although certain provisions of the Model Law may permit that result, it is not an automatic effect, and it would require an order of the local court. The foreign representative has certain entitlements with regard to local

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236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* at 11.
240. Model Law art. 22.
241. Model Law art. 22(1).
242. Model Law art. 13(1).
243. Model Law art. 32.
244. Model Law art. 6.

proceedings that affect the debtor.[245] For example, the foreign representative may apply to commence local insolvency proceedings[246] and, following recognition of foreign proceedings, to participate in local proceedings regarding the same debtor,[247] or intervene in local proceedings in which the debtor is a party.[248] Applying for commencement and intervening in proceedings are both subject to the requirements of local law being met.[249] As an interim measure, or as discretionary relief available after recognition, the court may entrust the foreign representative with administration or realization of all or part of the debtor's assets located in the enacting State in order to protect and preserve value. However, it is not obliged to appoint the foreign representative to perform that task, and it may designate another person, such as a local practitioner.[250]

The concern with respect to sovereignty is not one that is limited in its application to cross-border insolvency and adoption of the Model Law, but rather may apply broadly to all situations where recognition of foreign judgments and arbitral awards, as well as exposure to other decisions and processes of foreign courts, can impact upon the local legal system. The focus of the concern is the disadvantages likely to accrue from exposing one country to the legal processes and decisions of another and the consequent loss of ability to regulate one's own affairs.

A widely discussed issue that is closely related to the concern about sovereignty, is that of reciprocity. As noted above, a suggestion to include a reciprocity requirement in the Model Law was ultimately not accepted, and it consequently functions unilaterally on a global basis. Concern that this approach might lead to recognition of inbound requests but not outbound requests has led some countries to include a reciprocity provision in legislation enacting the Model Law.[251] An issue of concern with that approach, however, is the implementation of the reciprocity requirement. To facilitate cross-border insolvency, a determination is required as to whether another State's legislation is sufficiently similar to qualify as being reciprocal. To ensure efficient conduct of the proceedings that determination should be made as quickly as possible and by reference to clear and objective criteria. That might be achieved by designating in the law those countries whose laws are regarded as

245. Model Law arts. 11-12.
246. Model Law art. 11.
247. Model Law art. 12.
248. Model Law art. 24.
249. *See* Model Law art. 13(1)
250. Model Law, arts. 19(1)(b), 21(1)(e), 21(2).
251. Waldron, *supra* note 233, at 10.

satisfying the requirement. Other approaches, such as a legislative formulation that defines reciprocal treatment by reference to whether or not another country has enacted a law "based on the Model Law," or a requirement that courts consider foreign law on a case-by-case basis, are unlikely to achieve that quick and certain result. In the first instance, the flexibility allowed by the Model Law and the likelihood of local variations in enactment will require close scrutiny of enacting legislation to ensure the required level of compliance with the requirement. The second approach is likely to involve delay while the court conducts the necessary investigations, which may include, in order to give a true picture of the foreign law, consideration of difficult questions of implementation of that law.

The question of how to implement the reciprocity requirement is cited as one of the reasons for the delay in entry into force of the South African legislation, which requires a determination to be made as to which countries will offer effectively reciprocal treatment and a designation of those countries under the legislation.[252] It is not clear how other countries such as Mexico and Romania, which specify the need for reciprocal treatment but not for the designation of countries that satisfy that requirement, will approach the issue. One commentator on the Japanese law observed that the principle of reciprocity was much criticized in Japan, not only because reciprocity has proven, historically, not to be a useful means of achieving harmonization of law, but also because creditors and other actors in insolvency proceedings who have limited capacity to influence the legislative policy of their governments should not be penalized because of that policy.[253]

Enacting a law such as the Model Law is a first step in facilitating the conduct of cross-border insolvency cases, but it must be accompanied by proper implementation. This is heavily reliant upon adequate institutional and judicial capacity, as well as the manner in which countries address a number of practical questions. Although questions of capacity are beyond the scope of a legal text such as a model law, practical questions relating to coordination and cooperation and, in particular, the means by which that might take place can be addressed. The Model Law does include some suggestions as to how coordination might be achieved, but it leaves decisions as to how and when to cooperate up to the courts.

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252. Cross-Border Insolvency Act, 42, § 2(2)(a)-(b) (2000) (S. Afr.).

253. Yamamoto, *supra* note 55, at 93.

V. IMPLEMENTING COORDINATION AND COOPERATION

The Model Law provides a framework for cooperation to enable courts and insolvency administrators from two or more countries to conduct proceedings efficiently to achieve optimal results. Although it indicates some means by which cooperation might take place, it leaves decisions as to how and when to cooperate up to the courts. The Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency (Toronto, 1995) emphasized the importance of granting the courts flexibility and discretion in cooperating with foreign courts or foreign representatives.[254] The judges involved in those cases gave reports of a number of cases in which judicial cooperation in fact occurred. A number of points emerged from those reports that might be summarized as follows: (a) communication between courts is possible but should be done carefully and with appropriate safeguards for the protection of substantive and procedural rights of the parties; (b) communication should be done openly, in the presence of the parties involved who should be given advance notice except in extreme circumstances; (c) communications that might be exchanged are various and include: e.g., exchanges of formal court orders or judgments; supply of informal writings of general information, questions and observations; and transmission of transcripts of court proceedings; (d) means of communication include, for example, telephone, facsimile, electronic mail facilities, and video; and (e) where communication is necessary and is intelligently used, there could be considerable benefits for the persons involved in, and affected by, the cross-border insolvency.[255]

In all cases where communication is desirable and especially in jurisdictions where the notion of such communication is new or where judges and administrators have no experience in communicating with foreign courts, there is need for guidance as to how the considerations listed above can be implemented in practice. It is also desirable that judges are familiar with foreign insolvency laws that they may encounter and understand how foreign insolvency laws work. The work of a number of international and regional organizations has played, and continues to play, an important role in facilitating this development of knowledge and experience.[256] UNCITRAL will continue to sponsor,

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254. *Cross-Border Insolvency: Report on UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency: Note by the Secretariat*, U.N. Doc. A/CN.9/413 (1995), *reprinted in* XXVI Y.B. UNCITRAL, U.N. Doc. A/CN.9/SER.A/1995.

255. *Guide to Enactment*, *supra* note 64, at 178.

256. For example, the Asian Development Bank, the IMF, the World Bank, the EBRD, UNCITRAL, INSOL, the ALI and others.

jointly with INSOL International, multinational judicial colloquia to facilitate discussion of cross-border insolvency issues amongst judges and court officials and to disseminate information on current practices and developments. The sixth of such events is planned for Sydney, March 2005, in conjunction with the Seventh INSOL Quadrennial Congress.

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