# UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

## The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview

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The United Nations Commission on International Trade Law (Commission or UNCITRAL) adopted the text of a Model Law on Cross-Border Insolvency May 31, 1997 (Model Law).[1] The aim of this instrument is to provide rules concerning subjects that include the recognition and enforcement of foreign insolvency proceedings, access by foreign representatives to the courts of States that enact the Model Law, the rights of foreign creditors, coordination of multiple insolvency proceedings, cooperation between courts, cooperation between representatives, and cooperation between courts and representatives.

## I. INTRODUCTION

### *A. General Remarks*

One of the first treaties in the field of cross-border insolvency was a treaty between Utrecht and Holland,[2] concluded in Utrecht in 1679.[3] I was born in Holland and graduated from the University of Utrecht School of Law. Currently, I live in Utrecht and work in Holland. I do not believe in predestination, and I do not think that this is the reason why I am interested in cross-border insolvency, but some coincidences cannot be denied. Today, Utrecht and Holland belong to the same country, the Netherlands. The days in which each province maintained its own insolvency law have long past, and we can no longer imagine a time when we needed a treaty to deal with problems in the field of cross-border insolvency between these two provinces.

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1. *Report of UNCITRAL on the Work of its Thirtieth Session*, U.N. GAOR, 52d Sess., Annex 1, at 68-78, U.N. Doc. A/52/17 (1997) [hereinafter *UNCITRAL Thirtieth Session Report*].

2. As it is my impression that the geographic definition of "Holland" is not commonly known, I would like to clarify that "Holland" is not a country, but a part of the Netherlands. Today there are two Dutch provinces called "Holland": South Holland (whose capital is The Hague and whose largest city is Rotterdam) and North Holland (whose capital is Haarlem and whose largest city is Amsterdam). Utrecht is another Dutch province (whose capital is Utrecht).

3. *See* KURT H. NADELMANN, CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE 303 (1972).

However, it is surprising that, worldwide, there are still few treaties on cross-border insolvency. The reason why there is no longer a treaty between Utrecht and Holland is because it is not needed at present; but this cannot be the reason why there are so few international instruments that address cross-border insolvency. Worldwide, there are still many problems and unanswered questions when insolvencies involving international aspects arise. This, certainly, is an undesirable situation. Trade and commerce have become increasingly international. Debtors may have assets in several different countries, and their representatives may wish to collect such assets in order to distribute them among the creditors in their own country. The representatives may owe money to creditors who are domiciled in another country.

To illustrate this point, collateral securities that are governed by the law of country A may have been vested in goods in country B, the law of which does not recognize this specific security. Also, the law of country C may provide that a debt ceases to exist as the result of a specific way of terminating the insolvency proceeding, whereas the law of country D does not recognize such a legal consequence. Moreover, in country E an insolvency proceeding may be opened against a natural person or a consumer, whereas the law of country F may contain an exclusion of consumer insolvencies. Therefore, because the person who benefits the most from the absence of coordination and cooperation in the field of cross-border insolvency is the malicious debtor, UNCITRAL's initiative must be welcomed vociferously.

### *B. Universality and Territoriality*

One cannot describe the law in the field of cross-border insolvency without paying attention to the notions of universality and territoriality.[4] Those who adhere to the universality approach start from the principle that all the assets are to be administered in one insolvency proceeding, wherever they are located. An insolvency proceeding commenced in one country will have full effect in other countries. It is important to note, however, that this is possible only if other countries recognize the concept of universality. Although it is possible that the law of the country in which the insolvency proceeding is opened (*lex concursus*) to embrace, unilaterally, the universality principle, it cannot in itself determine the effects of that approach abroad. The sovereignty of other countries prevents the *lex concursus* from defining its scope outside its own

4. *See* Paul Volken, *Cross-Border Insolvency: Co-operation and Judicial Assistance*, 19 F. INT'L 23 (1993); *see also* U. Drobnig, *Cross-Border Insolvency: General Problems*, 19 F. INT'L 9 (1993).

territory. The only thing the *lex concursus* can provide is that nothing in the *lex concursus* prevents the insolvency proceeding from having consequences in other jurisdictions.

The other basic view of cross-border insolvency is the territoriality principle. The territoriality approach begins with the rule that the effects of an insolvency proceeding do not reach further than the sovereignty of the State where the insolvency proceeding is opened. The effects are limited to the territory of that State.

Generally speaking, the territoriality principle is more or less based on constitutional grounds, whereas those who support the universality principle have a keener eye for the needs of practice. From the point of view of creditors or their representatives, the disadvantages of the territoriality principle are obvious. When the assets of insolvent debtors are located in a number of countries, an insolvency proceeding has to be undertaken in each country. This is costly because a number of liquidators must be appointed, and each court may require that costs be paid to the liquidator in the particular jurisdiction. When a claim is filed in several proceedings, it is possible that the claim will be recognized in proceeding A but refused in proceeding B. When, from a financial point of view, it is necessary to file claims in more than one proceeding, large multinationals have an advantage over small creditors, for whom it may be too complicated and costly to file a claim abroad.

On the other hand, a country that applies the universality principle without any restrictions runs the risk that a foreign liquidator may assume control over the assets and remove them to his home country. As a result, assets that could have been distributed among local creditors may be funneled into foreign hands.

In practice, no country applies either the universality principle or the territoriality principle without any deviation. Every domestic insolvency law is a mixture of those two principles. However, considerable differences between legal systems exist.[5] At a March 1995 colloquium organized in Toronto by UNCITRAL and the International Association of Insolvency Practitioners (Insol), an Expert Committee's Report was

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5. For a survey of the different laws, see generally RECOGNITION AND ENFORCEMENT OF CROSS-BORDER INSOLVENCY, A GUIDE TO INTERNATIONAL PRACTICE (Neil Cooper & Rebecca Jarvis eds., 1996); DENNIS CAMPBELL, INTERNATIONAL CORPORATE INSOLVENCY LAW (1992). For a specific description of English law, see generally PHILLIP SMART, CROSS-BORDER INSOLVENCY (1991). For a survey of the laws relating to recognition of foreign judgments in general, see ENFORCEMENT OF FOREIGN JUDGEMENTS WORLDWIDE (Charles Platto & William G. Horton eds., 2d ed. 1993). For a survey of the material rules on corporate insolvency in Europe, see HARRY RAJAK, PETER HORROCKS, & JOE BANNISTER, EUROPEAN CORPORATE INSOLVENCY, A PRACTICAL GUIDE 445-78 (1995) (noting a brief a description of Dutch law by W.F.Th. Corpelijn and M. Herschdorfer).

distributed that described the wide variety of insolvency laws throughout the world.[6] The Expert Committee distinguished six categories of countries:

> (1) Countries with specific legislation providing for mandatory recognition of foreign insolvency proceedings opened in certain specified countries;
> (2) Countries with express legislation providing for selective recognition or a practice of discretionary recognition;
> (3) Countries that feature a practice of discretionary recognition;
> (4) Countries that are signatories to multilateral treaties dealing with access and recognition;
> (5) Countries with legislation based on the principle of strict territoriality but with differing practice;
> (6) countries that are wholly territorial.[7]

In the view of the colloquium's participants, the countries in category 1[8] were in a good position, while the countries in category 6 were not. Regrettably, the Expert Committee put the Netherlands in category 6.[9] Although the legal system of the Netherlands is not wholly territorial,[10] Dutch law on this point is undeniably closed to foreign insolvency proceedings (see Section III). It is unfortunate that the various legal systems of the world do not better conform to each other.

### *C. Unity*

Another notion that occurs in discussions about cross-border insolvency is "unity." Sometimes this notion and universality are bracketed together, if not used as synonyms. Although the relevance of this may be somewhat academic, I would like to say a few words about it. It is good to bear in mind that the universality principle does not necessarily mean that every aspect of an insolvency proceeding is governed by one single legal system. Suppose an insolvency proceeding is opened in the Netherlands against a debtor. The debtor has already employed someone in France. The liquidator in the Netherlands wants to terminate the labor contract. Given the differences between the social security systems that exist in the two countries, it would not be advisable

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6. *See* Expert Committee's Report on Six Categories of Domestic Insolvency Law at Toronto Colloquium of UNCITRAL and the International Association of Insolvency Practitioners (ann. Mar. 1995) [hereinafter *Expert Committee's Report*].

7. *Id.*

8. As a matter of fact, Australia was the sole country that fit within category 1, and even then only partly so.

9. *See Expert Committee's Report*, *supra* note 6.

10. This is recognized by the Expert Committee which noted that the Netherlands has indicated that it may be retreating slightly from this policy.

for the Dutch liquidator to observe only the time limits set by Dutch insolvency law for terminating labor contracts. In other words, even under a strict universality approach, it is possible that some aspects of the insolvency proceeding would be governed by law other than the *lex concursus*. If, however, all aspects are governed by one single law, the *lex concursus*, it can be said that unity exists.

### *D. Previous History*

Throughout the whole world there are only a few multilateral treaties in the field of cross-border insolvency. Denmark, Sweden, Norway, Finland, and Iceland signed such a treaty, the Nordic Bankruptcy Convention, on November 7, 1933.[11] Several countries in South America signed two similar treaties, the so-called Montevideo Treaties on International Commercial Law.[12] No other multilateral conventions are known to this author. Although Committee J of the International Bar Association (IBA) drafted a model law,[13] no country adopted it.

In Europe, the situation is as follows. Article 220 of the Convention on the European Communities, signed on March 25, 1957, obliges each Member State of the European Community to negotiate in order to facilitate the recognition and execution of judgments from other Member States.[14] These negotiations resulted in the Convention of Brussels of September 25, 1968,[15] referred to as "EEX" in Dutch. Under article 1 § 2, insolvency proceedings are excluded from the scope of the EEX. In 1970, an Expert Committee presented a first draft of a convention that was intended to cover insolvency proceedings.[16] Because of the subsequent entry of Denmark, Ireland, and the United Kingdom to the European Community, this first draft required modification. The revised draft, presented in 1982, was substantially based on the universality

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11. *See* M. Bogdan, *The Nordic Bankruptcy Convention: A Healthy Sexagenarian?*, *in* COMPARABILITY & EVALUATION, ESSAYS ON COMPARATIVE LAW, PRIVATE INTERNATIONAL LAW AND INTERNATIONAL ARBITRATION, IN HONOUR OF DIMITRA KOKKINI-IATRIDOU 27 (K. Boele-Woelki et al. eds., 1994).

12. *See* Juan M. Dobson, *The Montevideo Private International Law Treaties of 1889 and 1940 and International Bankruptcies*, *in* CROSS BORDER INSOLVENCY: COMPARATIVE DIMENSIONS 237-48 (Ian F. Fletcher ed., 1990).

13. Committee J of the International Bar Association, *Draft of a Model International Insolvency Act (MIICA)*, *in* CHAPTER 11 AND PRACTICE: A GUIDE TO REORGANIZATION 33:60, 33:127 (James F. Queenan Jr. et al. eds., 1994).

14. *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957.

15. Both the original Convention and the Protocol are to be found in European Communities: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, July 28, 1990, 29 I.L.M. 1413, 1433, 1439.

16. *See* Doc. EEC nr. 3.3271/1/XIV/70.

principle.[17] In order to appease those countries that favored of the territoriality principle, a set of complicated rules was established in the convention with respect to collateral securities. This approach turned out to be too complex and too ambitious.

Meanwhile, the Council of Europe took the initiative to draw up a convention. This Convention[18] was signed by Belgium, Cyprus, France, Greece, Italy, Luxembourg, and Turkey in Istanbul on June 5, 1990. Until now, only Cyprus has ratified the Convention. One reason for the lack of success is, perhaps, the possibility of reservations; those who ratify the existing draft risk absence of reciprocity.

At an informal meeting of the Ministers of Justice of the European Community in May 1989, an ad hoc group was established to formulate a European convention on insolvency proceedings. The negotiations of this group resulted in the European Union Convention of Insolvency Proceedings (EU Convention).[19] Article 49 § 2 provides that the EU Convention must have been signed by May 24, 1996. The aim of this article was to prevent "slow Member States" from wasting too much time before they signed. By April 1996, fourteen Member States had signed the EU Convention and only the United Kingdom had not yet done so. In the spring of 1996, the British cattle population was hit by "the mad-cow disease." The European Union took measures to prevent British beef from being exported to the rest of Europe. To protest against these measures, the United Kingdom decided to block the decision-making mechanisms in the European Union, and to this day, it has not signed the Convention.

The reason why the most interesting and promising attempt to achieve a convention on cross-border insolvency law has not met with success until now lies, originally, in mad cows. It is my personal view that, if the United Kingdom persists in its refusal to sign the EU Convention, the fourteen other Member States of the European Union should ratify a convention with the same content as the present EU Convention. This would be a convention outside of the scope of the European Union that happens to be concluded between fourteen Member States of the European Union. The current EU Convention would need

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17. *See* EEC Bull. Supp. 2/82, at 9.

18. European Convention on Certain International Aspects of Bankruptcy, June 5, 1990, Europ. T.S. No. 136 (1990), 30 I.L.M. 165.

19. The EU Convention has not been published by the European Union because the United Kingdom has not yet signed the convention. For the same reason, the Explanatory Memorandum is not published. However, the text of the EU Convention is published as HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, SEVENTH REPORT, 1995, Cmnd. 9213, at 1 (My thanks go to Lynn Mear for helping me to find this reference).

only to be modified to reflect a change of jurisdiction away from the Court of Justice of the European Communities.

Few international instruments deal with cross-border insolvency. Since practice demands such an instrument, the lack of rules in this field is lamentable. This is the reason why UNCITRAL and Insol took the initiative to organize a colloquium in Vienna in 1994 to discuss the necessity of an agreement. Subsequently, they organized a judicial colloquium in Toronto in 1995 to hear the opinions of judges and legislators from all over the world.[20] The conclusion drawn at the end of this colloquium was that an international instrument is desirable. However, the general feeling was that a convention would be too ambitious; the participants preferred a model law.

From November 1995 to January 1997, a UNCITRAL Working Group met four times, alternately in Vienna and New York,[21] to prepare a draft that could be presented to the UNCITRAL Commission. At the end of the last meeting, the Working Group produced a draft that was incomplete, but provided rules for most of the aspects that the Working Group wanted to address. Despite the fact that this draft was not yet finished, the Working Group decided to present it to the Commission, hoping that the draft would be finished by the time the Commission met. This optimism turned out to be well-founded. During its session in May 1997, UNCITRAL completed and adopted the text. During its 72nd plenary meeting of its 52nd session, the U.N. General Assembly adopted a resolution in which it recommended that all States reconsider their cross-border insolvency laws in light of the new Model Law.[22] In addition, the General Assembly recommended that States exert all efforts possible to make known and available both the Model Law and the Guide to Enactment.[23] This Article can also be seen as such an effort.

Many countries were represented in the Working Group and in the Commission, in many cases by the same delegates. The IBA and Insol were represented as well. While the Netherlands has the status of an observer in both the Working Group and the Commission, in practice,

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20. *See Report on UNCITRAL-Insol Judicial Colloquium on Cross-Border Insolvency*, U.N. GAOR, 28th Sess., U.N. Doc. A/CN.9/413 (1995).

21. *See Report of the Working Group on Insolvency Law on the Work of the Eighteenth Session*, U.N. GAOR, 29th Sess., at 5, U.N. Doc. A/CN.9/419 (1995); *Report of the Working Group on Insolvency Law on the Work of the Nineteenth Session*, U.N. GAOR, 30th Sess., at 5, U.N. Doc. A/CN.9/422 (1996); *Report of the Working Group on Insolvency Law on the Work of Its Twentieth Session*, U.N. GAOR, 30th Sess., at 5, U.N. Doc. A/CN.9/433 (1996).

22. *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law*, U.N. GAOR 52d Sess., 72d plen. Mtg., Agenda Item 148, at 2, U.N. Doc. A/RES/52/158.

23. *Id.*

there is no difference between observers and participants. In fact, some observers took the floor much more often than many participants. The Working Group was even chaired by an observer. The difference between observers and participants only becomes relevant when there is a vote, a rare occurrence in UNCITRAL, because the Commission strives for consensus.

The names of the States that took the floor are not mentioned in the reports of the Working Group or the Commission. I shall not do so either in this Article because delegations must feel free to speak. They must not fear that they will be reproached for having given in too easily or for changing their minds.

### *E. Model Law or Convention?*

#### 1. Why a Model Law?

The question as to whether the instrument should be a model law or convention was discussed at length at the May 1997 UNCITRAL meeting, as well as sessions of the Working Group. Some countries preferred to draft a convention to serve as such an instrument. These countries felt that reciprocity was needed and that it could only be achieved by a convention. The prevailing view, however, was that we should try to make a model law first. I agree with this approach because the Istanbul Convention has shown that a convention may be too ambitious. A model law is better than an unratified convention. A convention ratified by too few countries is worse than a partially enacted model law. A convention is an "all-or-nothing" instrument, a "take-it-or-leave-it" text. The risk that too many countries would not "take it" was too great. Initiatives of the European Union have shown that drafting a convention may take a very long time. The prevailing view is that drafting a model law takes much less time, and history has proved this true. It is much easier to draft text to which nobody is bound than a binding convention, even if the solutions adopted in a model law could have appeared in a convention as well. In principle, a convention may have more value than a model law and, therefore, be a better instrument. However, those who strive for the best may not achieve anything at all. Only after the Model Law has some success should we think of drafting a convention. We may get more experience with respect to cross-border insolvency in the meantime. Those countries that want to jump into a convention immediately should bear in mind that one cannot jump very far without making a step first. This Model Law may be just a first step.

2. UNCITRAL Model Law and the EU Convention

The EU Convention certainly served as a source of inspiration during the UNCITRAL meetings, but from the beginning it was clear that the UNCITRAL instrument should be cast in a different mold. In Europe, countries are relatively familiar with one another, and they are more familiar with each other's procedures. On the European level, it is easier to sign a binding text than on the global level. Countries are somewhat afraid to recognize procedures from countries that have a completely different legal system. At this stage, it would be difficult to achieve multilateral conventions between countries with very different legal traditions.

3. Character of a Model Law

The Model Law is drafted as if it is a part of the legislation of a country that has enacted it. Therefore, the words "this State" occur in the Model Law regularly. The Model Law is merely a recommendation, and countries are free to enact it as they wish. Countries may want to leave out certain provisions or add some provisions of their own legislation. The Model Law was meant to serve as an example for those countries that do not yet have legislation for the recognition of foreign insolvency proceedings. For the countries that do have some provisions in the field of cross-border insolvency, the Model Law can be used as an example of how to modify their legislation.

I shall describe the Model Law in this Article from the viewpoint of a country that has enacted it. When I write in this Article that a country is bound to do something, or can no longer do something, or that a foreign representative has certain powers or a judge can make a certain decision, the reader should bear in mind that this would only be the case in a country that has enacted the Model Law without any modification. The Model Law itself is a recommendation, and, therefore, it does not create any rights or obligations.

## II. CONTENT OF THE MODEL LAW

### *A. Introduction*

1. Introductory Remarks

Normally, an author who comments upon a law, a court decision, or any other text in a law journal, should be critical, showing what is right and what is wrong. This contribution is no exception. However, since I played a role in the Model Law's creation as the representative of my country, I am not totally unbiased. I shall criticize where I can, but

nevertheless my criticism is marginal. It concerns mainly the wording, if anything at all. I do not agree with everything that is in the Model Law, but I am deeply convinced that UNCITRAL did a good job and that the Model Law is a well-balanced draft. I think it is a product of cooperation by many delegations from all over the world, which represents an equilibrium between the needs of practice and the needs of a fair and just proceeding.

2. Main Lines of the Model Law

The general idea behind the Model Law is that there are only three things that are important in a cross-border insolvency: speed, speed, and more speed. This requires a certain mentality. To put it bluntly: act first, think later. However, this does not mean that action is undertaken thoughtlessly under the Model Law. Nor does it mean that irreversible actions should be undertaken without due consideration. The Model Law has many substantive safeguards. To avoid the dissipation of assets that may result from time-consuming procedures or considerations, the Model Law also provides for a system that enables quick action. It flows from the philosophy behind the Model Law that, if there is any rule in the laws of the enacting State that is less restrictive or more flexible than the Model Law, that specific rule prevails. The Model Law does not modify the existing material rules concerning insolvency proceedings in the enacting State. The State effecting the opening of the proceedings does not export the effects it attaches to the insolvency proceeding; the law of the State where the foreign proceeding is recognized determines which effects are given to the proceeding. Foreign main proceedings can have more effects than foreign secondary or non-main proceedings.[24]

The Model Law is based on nine general principles that are similar to the general principles discussed by the Working Group.[25] I changed the wording of the principles because the discussions of the Working Group revealed that some principles could be formulated more precisely. In addition to the seven principles in the report of the Working Group, I have included Principles 6 and 7 because I feel they are fundamental rules of the Model Law. The general principles are as follows:

(1) The court of the enacting State shall recognize only one foreign proceeding as a foreign main proceeding.

(2) The recognition of a foreign proceeding shall not restrict the right to commence a local proceeding.

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24. See discussion *infra* Parts II.C.1-3 for definitions of terms used in this paragraph.

25. *See Report of the Working Group on Insolvency Law on the Work of Its Twenty-First Session*, U.N. GAOR, 30th Sess., U.N. Doc. A/CN.9/435 (1997).

> (3) A local proceeding shall prevail over the effects of a foreign proceeding and over relief granted to a foreign representative, regardless of whether the local proceeding was opened prior to or after the recognition of a foreign proceeding.
> (4) When there are two or more proceedings, there shall be cooperation and coordination.
> (5) A foreign proceeding shall be recognized as a foreign main proceeding if the foreign proceeding is opened in the State where the debtor maintains the center of his main interests. A foreign proceeding shall be recognized as a foreign non-main proceeding if the foreign proceeding is opened in a State where the debtor has an establishment.
> (6) Upon recognition of a foreign proceeding as a foreign main proceeding, some types of relief will come into effect automatically. They will be in effect until modified or terminated by the court. Upon recognition of a foreign proceeding as a foreign main proceeding, some other types of relief may be granted by the court, but they will not come into effect automatically. Upon recognition of a foreign proceeding as a foreign non-main proceeding, relief can only come into effect if it is granted by the court.
> (7) Coordination may include granting relief to the foreign representative. In granting relief to a foreign representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative.
> (8) Creditors shall be allowed to file claims in any proceeding. Payments to creditors from multiple proceedings shall be equalized.
> (9) If there are surplus proceeds of a local non-main proceeding, they shall be transferred to the main proceeding.[26]

The most important rules of the Model Law are the following. A foreign representative has direct access to the judicial authorities of this State. As soon as he has filed an application for recognition of the proceeding in which he is appointed, the court of this State may grant relief of a provisional nature. The foreign proceeding must be recognized in this State if certain conditions are met, such as conditions with regard to the nature of the foreign proceeding, the foreign representative, the request, and the competence of the court in this State.

The decision of this State to recognize a foreign proceeding should not take much time. The recognition "automatically" has some effects when the foreign proceeding is recognized as a foreign main proceeding. A foreign main proceeding takes place in the State where the debtor maintains his main interests. These automatic effects are meant, in principle, to be temporary until the court of this State terminates or

26. Although the Working Group was in agreement with this principle, there is no article in the Model Law that contains this rule.

modifies them. When the foreign proceeding is recognized as a non-main proceeding, there are no automatic effects; the court of this State has discretionary power to grant relief.

Furthermore, the Model Law provides rules concerning cooperation of judicial authorities and representatives and coordination of several proceedings.

3. General Remarks

Sometimes the drafters of the Model Law ask, so to speak, the national legislators to "complete" the Model Law. One reason for this is that the drafters did not want to require a rule because national legislations may be too diverse to harmonize. Another reason is that often a technical provision that is proper to a particular national legislation needs to be inserted. In both situations, the drafters placed text in italics between square brackets to "instruct" the national legislators to complete the text in their own way.

The Model Law is written in the six official languages of the United Nations: Arabic, Chinese, English, French, Russian, and Spanish. This Article is based on the English version.

*B. Preamble*

The preamble states:

> The purpose of this law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
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> (a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
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> (b) greater legal certainty for trade and investment;
>
> (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
>
> (d) protection and maximization of the value of the debtor's assets; and
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> (e) facilitation of the rescue of financially troubled business, thereby protecting investment and preserving employment.

The preamble is of relatively little importance because its purpose is certainly not to create rights or obligations. Perhaps the function of the preamble is to provide a summary of the aims of the Model Law. I do not believe many countries will adopt the preamble since, in some countries, it is not normal for the goals of an act to be set forth in the preamble. But even those countries that routinely include such summaries in preambles

to legislation may hesitate to adopt this preamble because not all parties will agree with the goals expressed therein. For example, the objective of protecting and maximizing the value of the debtor's assets may conflict with the aim of facilitating the rescue of financially troubled businesses. What should a liquidator do in the situation where he can choose between selling a company for two million Dutch guilders after having fired fifty percent of the employees and selling that same company for one million Dutch guilders and preserving full employment? The answer depends on the appropriate national legislation. In the Netherlands, there is a discussion going on about this question. At least two decisions of the Hoge Raad (Dutch Supreme Court) show that the liquidator must protect not only the interests of the creditors, but also the interests of others (especially what can be translated as "social interests").[27]

### *C. Scope of Application*

#### 1. Situations Where the Model Law Applies

Article 1 does not need much explanation. One could ask what the purpose is of the first paragraph, which defines the scope of the Model Law by mentioning the situations where the Model Law is applicable. However, the other articles of the Model Law make that clear. While the first paragraph does not create any rights or obligations, the provision is useful for the legislation of some countries. The Commission seems to have imbued the first paragraph in this article with the idea: if it does not do any do good, it does not do any harm either. If keeping the first paragraph may help some countries to enact the Model Law, why should it be deleted? Other countries that have no use for such a paragraph (such as the Netherlands) may choose to enact the Model Law without it.

#### 2. Exclusions of Proceedings Concerning Certain Types of Debtors

Much more important than § 1 of article 1 is § 2, which excludes proceedings concerning certain types of debtors from the scope of the Model Law. Just as important as § 2 is what is *not* excluded from the scope of the Model Law: consumer insolvencies.

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27. *See* Ontvanger der directe belastingen Tilburg/Gerritse (in the capacity of liquidator in the proceedings of Sigmacon and others), Hoge Raad, 24 Feb. 1995, 1996 Nederlandse Jurisprudentie 472; Société Nouvelle Textile Saint Maclou/1. G., 2. He., 3 Ho. (van Schuppen), Hoge Raad, 16 Apr. 1996, 1996 Nederlandse Jurisprudentie 727.

a. Types of Entities

Article 1 § 2 excludes "any types of entities" from the scope of the Model Law. This can be interpreted broadly, but credit institutions (banks) and insurance companies are given as examples. This portion of the Model Law concerns entities that are, by their special nature, not subjected to the ordinary insolvency rules. For instance, a credit institution can play an important role in an economy. The failure of a bank may have much more far-reaching consequences than the failure of a bakery shop. Credit institutions have much more creditors than many other debtors and are subjected to supervision by a public authority. This authority must have the ability to take action quickly, preferably before the insolvency becomes widely known. The same goes for insurance companies. It is much more devastating when a policy-holder who has paid for life insurance for forty years does not get paid because his insurance company is bankrupt, than when someone who ordered and paid for a book by mail does not get the book because an insolvency proceeding is opened against the book store.

Just because national legislations have special rules for the insolvency of credit institutions and insurance companies, a blanket exclusion from the scope of the Model Law is not necessarily advisable. A national legislator may support special rules for banks and insurance companies and, at the same time, hope that insolvency proceedings opened against these institutions will be recognized abroad, or accept that foreign insolvency proceedings against these entities have some effects in its own country.

Nevertheless, § 2 allows an exclusion for such institutions. A justification for this may be illustrated by examining a hypothetical bank that maintains its centre of main interests in country A and a branch in country B. The financial authorities in country A exercise supervision with respect to credit institutions. The authorities in country B may have the ability, according to their own law, to open an insolvency proceeding against the branch of the bank. Hence, the actions of the authorities in country B may conflict with the supervision that is exercised in country A.

The Model Law does not provide definitions of banks and insurance companies. Discussions about these definitions in directives of the European Union were lengthy. The Working Group and the Commission were wise enough to avoid such discussions, leaving it up to the national legislations to devise definitions.

Banks and insurance companies are just examples of entities that can be excluded from the scope of the Model Law. Some countries may have

special insolvency regulations for those companies that play an important role in the functioning of society (i.e., electricity companies, water companies, railroad companies, and the like).

b. Consumers

The Commission discussed at length whether consumer insolvencies should be excluded from the scope of the Model Law. Those who were in favor of such an exclusion put forward that it was a Model Law of the United Nations Commission on International *Trade* Law, that it should be constrained to trade and that its scope should not be extended to consumers. I think this is just playing with words.

Another argument suggested that countries that exclude consumers from being subjected to an insolvency proceeding should not be obliged to extend to consumers the same insolvency regulations that apply to traders. This argument is not convincing since the Model Law is a recommendation without any binding force. Those who believe there is such a suggestion in the Model Law, because there is not an exclusion of consumer insolvencies, do not understand the character of the Model Law. In the European Union, there are some countries, such as Belgium, in which a natural person can only be subjected to an insolvency proceeding when acting in the capacity of a trader. When the governments of the European Union signed the EU Convention, they agreed to recognize consumer insolvencies opened in other countries. At the same time, countries such as Belgium are not obligated whatsoever to change their internal law. In such countries, consumers who do not have the capacity of traders cannot be subjected to insolvency proceedings.

One can perfectly imagine that a country that does not allow an insolvency proceeding to be opened against a natural person within its boundaries may have to recognize foreign proceedings opened in another country against a natural person. In my view, problems would arise if many countries refused to recognize consumer insolvencies. If a consumer maintains assets abroad, I cannot understand why these assets should not be sold and distributed among the foreign creditors. In Dutch case law, a man bought two luxurious villas on the Spanish coast to avoid paying his ex-wife alimony.[28] There is no reason why these villas should

28. *See* Hof Den Bosch 6 July 1993, KG 406. The decision did not address the question of whether an insolvency proceeding can be opened against consumers; there is no such restriction in Dutch law. The relevant question was whether a Dutch insolvency proceeding has, according to Dutch law, extraterritorial effect. However, in my view the case demonstrates the unfairness of excluding consumers from insolvency proceedings.

not be sold by the liquidator. Fortunately, the Dutch court ruled that the man should cooperate with the Dutch liquidator to sell the villa.[29]

The Commission did not focus on whether consumer insolvencies should be recognized. Delegates from the participating countries were not able to convince each other that preference should be given to their own system, and, therefore, the rules of each legal system remained unchanged. Since countries that do not want to recognize consumer insolvencies will not change their position, the real question was: should the Model Law contain an explicit option for the exclusion of consumer insolvencies? The prevailing view was there should not be an explicit option in the text or in a footnote because it is preferable to have uniformity in the text. An explicit option would likely have encouraged national legislators to adopt the exclusion of consumer insolvencies.

In my view, it is better to avoid an explicit option. Options in a text like this should be kept to a minimum. If an option were included to meet the wishes of certain countries, other countries would propose options with respect to other subjects. This situation had to be avoided. The compromise agreed upon was directed to those jurisdictions that have provisions for consumer insolvency or whose insolvency law provides special treatment for the insolvency of nontraders. In such jurisdictions, the legislature may wish to exclude from the scope of application of the Model Law those insolvencies that relate to nontraders or to natural persons residing in the enacting State whose debts were incurred predominantly for personal or household purposes, rather than for commercial or business purposes.[30]

The Guide to Enactment also suggests that the enacting State may wish to provide that such an exclusion would not apply in cases where the total debts exceeded a certain amount.[31]

### *D. Definitions*

#### 1. Foreign Proceeding

Article 2(a) states:

> For the purpose of this Law, "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or

29. *Id.*

30. *See Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, U.N. GAOR, 30th Sess., ¶ 66, U.N. Doc. A/CN.9/442 (1997) [hereinafter *Guide to Enactment*].

31. *See id.*

> supervision by a foreign court, for the purpose of reorganization or liquidation.

The notion of "foreign proceeding" is central to the Model Law, since the most important questions to settle in this Model Law are: when should foreign proceedings be recognized and how can coordination between foreign proceedings be achieved? Maybe it would have been better to use the words "foreign *insolvency* proceeding," instead of just "foreign proceeding." This, however, would have had a certain risk, since the notion of "insolvency" differs from one legal system to another. The definition of "foreign proceeding" consists of six elements:

> (1) *The proceeding has a collective nature.* The UNCITRAL documents do not explain at length what was meant by this, but in the majority of cases it will be clear. In my view, it means that all creditors may seek satisfaction only through the insolvency proceeding, and that individual actions are precluded.
> (2) *The proceeding has either a judicial or administrative nature.* In the legislation of some countries, such as Ireland and the United Kingdom, the "creditor's voluntary winding up," proceeding is not opened by a judicial authority. These proceedings still fall within the scope of the Model Law.
> (3) *The proceeding has been opened in a foreign State.* This element is self-evident.
> (4) *The proceeding is pursuant to a law relating to insolvency.* The drafters did not define the notion of "insolvency," and I am glad they did not. Defining "insolvency" would have been an extremely difficult, if not impossible, task and certainly too time consuming. Such a definition would have to cover all the different notions that exist worldwide. For example, one legislation takes as a criterion the proportion between the assets and the debts, while another legislation looks to the financial perspectives of a debtor. A third one uses a criterion based on accounting, or, as in Dutch legislation, whether the debts remain unpaid. Therefore, what "insolvency" means is left to national law. This can be deduced from the fact that the words "*a* law" are used, instead of the words "the law of the enacting State." The words "pursuant to a law relating to insolvency" make clear that proceedings not regulated by an insolvency code, but which are governed by a civil code or a trade code, are included in the definition as well.
> (5) *The assets and affairs of the debtor are subject to control or supervision by the court.* One member of the UNCITRAL meetings suggested that the fifth element of the definition should be that the proceeding entails the total or partial divestment of the debtor in the sense that the powers of administration and disposal over all or part of the assets are transferred to another person, the liquidator, or that those powers are limited through intervention and control of the debtor's actions. Objections were raised against this wording in the fifth element because it gives the

> impression that what is known in several legislatures as "the debtor in possession" would not be covered by the definition. Since that wording of the fifth element says nothing about possession, these objections are unfounded. The accepted wording of the fifth element should be broadly interpreted, so that a total or partial divestment of the debtor is comprehended.
>
> In some jurisdictions, the control or supervision by the court is only indirect. This is the case in the Netherlands. Under Dutch law, during a liquidation proceeding, the powers of administration and disposal of the assets are transferred to the liquidator, and the use of these powers is subject to the control and supervision by the court. This indirect control and supervision of the debtor's assets and affairs is also covered by the definition of "foreign proceeding."
>
> In some legal systems, such as that of the Netherlands, the words "affairs of the debtor" do not make much sense. However, they may make sense in other jurisdictions, and, therefore, they can be useful. Nevertheless, a proceeding that is opened in a country where only "assets" are subject to control and supervision is covered by the definition.
>
> (6) *The aim of the proceeding is a reorganization or a liquidation.* The terms "reorganization" and "liquidation" are not defined, but in insolvency-land it will be clear what they mean.

Article 2(a) states explicitly that an interim proceeding that has the five elements falls within the definition. One can think of at least two types of interim proceedings. The first type is a proceeding that is opened by way of a provisional measure. Under some countries' laws, it is possible to have a provisional measure of a collective nature that precedes the "real proceeding." The second type of an interim proceeding is a proceeding that is only, in theory, interim in nature. In practice, it is the proceeding in which liquidation or reorganization takes place. The only goal of the "definitive proceeding" that follows the interim proceeding is to conclude the liquidation or reorganization. Both types of interim proceedings are covered by the definition.

2. Foreign Main Proceeding

Article 2, subparagraph (b) states: "For the purpose of this Law, 'foreign main proceeding' means a foreign proceeding taking place in the State where the debtor has the centre of its main interests." The drafters of the Model Law copied the words of article 2(b) from the EU Convention. This is not the place to describe the EU Convention, but one should bear in mind that, although the definition comes from that Convention, the function and effect of a foreign main proceeding under the Convention differ greatly from those under the Model Law.

The words "centre of main interests" were discussed at length at the UNCITRAL meetings. Those who were in favor of the language did not deny a certain lack of precision, but posited the absence of a better alternative. I support this view. During the negotiations of the EU Convention, the discussions on the definition were lengthy, and no better definition could be agreed upon.

Some of the delegates at the UNCITRAL meetings sought to define "foreign main proceeding" as the proceeding that takes place in the State where the debtor has its registered office. They reasoned that because in an insolvency situation time and money are scarce, lengthy discussions about where the centre of the main interests is located can be avoided by taking the registered office as the decisive criterion. However, this view did not garner much support. The registered office may be located in a sunny tax haven where the debtor has only a postbox and nothing else. To reduce the risk of protracted disputes about the interpretation of this definition, article 16 § 3 contains a rebuttable presumption: the debtor's registered office is presumed to be the centre of the debtor's main interests.

Another proposal was to include more than one criterion to define the notion of "foreign main proceeding." For instance, one can think of the situation where the first foreign representative who asks for recognition is presumed to be appointed in a foreign main proceeding. Fortunately, this proposal was rejected. Serious problems could arise if more than one criterion to define "foreign main proceeding" existed. For example, say a foreign proceeding is recognized as a foreign main proceeding but, subsequently, recognition is sought of another foreign proceeding that was opened in the State where the debtor has its centre of main interests. Should the first recognition be converted into a foreign "non-main" proceeding? What happens if the first foreign representative has already undertaken activities that cannot be undone? Or should the foreign proceeding that was recognized as a foreign main proceeding remain the foreign main proceeding? Such a result would mean that the representative who is appointed in a less important proceeding has more power than the representative who is appointed in a more important proceeding. Since one of the principles of the Model Law is that only one proceeding can be recognized as a foreign main proceeding, I am glad that the Model Law provides only one criterion with which to define the notion.

3. Foreign Non-Main Proceeding

Article 2, subparagraph (c) states: "For the purpose of this Law, 'foreign non-main proceeding' means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor maintains an establishment within the meaning of subparagraph (f) of this article." The definition is more or less self-evident. A non-main proceeding may be opened when there is no main proceeding. For this reason, the drafters of the Model Law held the view that words such as "secondary proceeding" or "ancillary proceeding" were not appropriate; these words suggest there is a "primary" or a "main" proceeding as well. From a logical point of view, this is perfectly correct, though I find the term "non-main proceeding" a linguistic monstrosity. I admit, however, that I have not been able to find better words, even in my own language. Therefore, we must accept the use of these words.

In my view, the words "other than a foreign main proceeding" are superfluous. Suppose that a debtor has the centre of his main interests in one State and an establishment in that State as well, but in another city. The words "other than a foreign main proceeding" were included to make sure that the proceeding that has been opened in that State is a foreign main proceeding. Before these words were added, still there was no doubt that such a foreign proceeding should be characterized as a foreign main proceeding. However, the words do no harm; if legislators feel they can be useful, they should be retained.

4. Foreign Representative

Article 2, subparagraph (d) states: "For the purpose of this Law, 'foreign representative' means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding." The word "representative" was chosen in order to avoid a word that would be associated with a specific legislation, like "trustee," "administrator," or "liquidator."

The word should not be interpreted in a strictly legal sense. For example, one should not ask *who* is represented, the debtor or the creditors? The answer to this question can differ from one jurisdiction to another, since there are debtor-orientated law systems and creditor-orientated law systems. Another point is that real "*representation*" systems do not exist in some law systems. For instance, in the Netherlands there is discussion about whether the person who is appointed to administer the reorganization of liquidation can be said to represent somebody else, whether it be the debtor or the creditors. One

final remark is that, in some legal systems, it sounds strange for the appointed person to be able to act as a representative of a *proceeding*. Only persons, whether legal or natural, can be represented, but something as impersonal as a proceeding cannot. Nobody should be concerned with this kind of hairsplitting; the word "representative" must be translated in such a way that it fits into the legislation of the enacting State.

Two elements of the definition must be highlighted. First, it is good to bear in mind that, in some countries, not only a natural person, but also a body can be appointed to administer the reorganization or the liquidation. Such a body falls within the definition and must be recognized as a foreign representative. Secondly, subparagraph (d) states explicitly that a representative, appointed on an interim basis, falls within the scope of the Model Law.

5. Foreign Court

Article 2, subparagraph (e) states: "For the purpose of this Law, 'foreign court' means a judicial or other authority competent to control or supervise a foreign proceeding." The definition is self-evident. It should be emphasized that a "non-judicial" authority can also be a foreign court in the sense of the Model Law. A foreign court that is competent to open a proceeding in the sense of subparagraph (a) falls within the definition.

6. Establishment

Article 2, subparagraph (f) states: "For the purpose of this Law, 'establishment' means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services." The notion of "establishment" is an important one. The enacting State is not obliged to recognize a proceeding that is opened in a country where the debtor has neither the centre of its main interests nor an establishment. Therefore, we need a definition of "establishment" to distinguish between foreign main proceedings and foreign non-main proceedings, and between those proceedings that must be recognized as foreign non-main proceedings and proceedings that do not need to be recognized at all.

The history of this definition is as follows. During the negotiations that led to the EU Convention, there were two competing views. The first was that the number of secondary proceedings (as they are called in that Convention) should be kept to a minimum. Otherwise, the costs would increase, the complexity would grow, and the coordination of the proceedings would be more time-consuming. The opposite view was that restrictions on opening secondary proceedings would be an unacceptable

infringement of the sovereignty of States. Those countries that did not want to have their sovereignty limited were opposed to the rule that a secondary proceeding could be opened only in a country where the debtor has an establishment. Likewise, those countries that did not want a multitude of secondary proceedings were opposed to the rule that secondary proceedings could be based on the mere presence of assets. Therefore, the definition of "establishment" is a much more touchy subject than it may appear at first sight. The compromise reached was that the existence of an establishment is a condition for the opening of a secondary proceeding, while at the same time, the definition of "establishment" remained a general one.

The definition in the Model Law is almost identical to the definition in the EU Convention. One should bear in mind that the notion of "establishment" does not play the same role in the EU Convention as it does in the Model Law. Under the EU Convention, a secondary proceeding cannot be opened in a certain country if the debtor does not have an establishment there. Under the Model Law, on the other hand, a non-main proceeding can be opened, as we will see, in a country where the debtor has only assets and no establishment. However, if a proceeding is opened in a country where the debtor has no establishment, the proceeding cannot be recognized in another country as a foreign non-main proceeding. In other words, under the EU Convention, the notion of "establishment" is important to determine whether a proceeding can be *opened*, while under the Model Law it is relevant to the question of whether a proceeding must be *recognized*.

From the history of the EU Convention, one can deduce the following remarks about the definition of "establishment." A "place of operations" is understood as a place from which economic activities are exercised on the market externally. The condition that the economic activity has to be carried out with human resources demonstrates the need for a minimum level of organization. A purely occasional place of operations cannot be defined as an "establishment." The words "non-transitory" are used to avoid minimum time requirements.

As I already mentioned, the definitions in the EU Convention and the Model Law are *almost* the same. The words "or services" are added in the Model Law. The phrase "with human means and goods or services" may be interpreted in various ways. One interpretation is that the debtor must carry out an activity with human means and either goods or services. Another interpretation is that the debtor must carry out a nontransitory economic activity with either human means and goods or services. In this interpretation, there can be an establishment if the debtor does not carry out a nontransitory economic activity with human means

and goods; just services would be sufficient. The latter interpretation is clearly incorrect.

The addition of the words "or services" is of little importance. They would only come into play in the situation where a debtor performs services without using any goods. Only then would the addition of the words "or services" have any practical meaning. Even if one can think of a situation where services are performed without any goods, one has to admit that, in such a case, an insolvency proceeding is not very useful. Why ask for the opening of an insolvency proceeding when there is nothing to liquidate?

### *E. Miscellaneous Provisions*

#### 1. International Obligations of the Enacting State

Article 3 states: "To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail." This article expresses the supremacy of international obligations of the enacting State over internal law. In some legal systems, such as the Dutch one, it is not necessary to enact this provision. Article 94 of the Dutch Constitution states that internal legal rules do not apply when they are incompatible with conventions and decisions of international organizations that are binding for everyone. For some other jurisdictions, it may be necessary to implement article 3. The Guide to Enactment recognizes that legislators may wish to consider whether to take steps to avoid an unnecessarily broad interpretation of international treaties.[32] Obviously, a broad interpretation would diminish the effects of the Model Law. In this respect, it should be noted that the Court of Justice of the European Communities has ruled that the EEX does not apply if the decision on which recognition is sought is based on an action which derives directly from insolvency law and which is closely connected to the insolvency proceedings.[33] Such is the case with actions that are based on (and not only affected by) insolvency law and that are only made possible during the insolvency proceedings directly related to them. Such proceedings include actions to set aside acts detrimental to the general body of creditors, actions on the personal liability of directors based upon insolvency law, actions to admit or rank the claim, and disputes between

32. *See id.* ¶ 77.
33. *See* Case 133/78, Gourdain v. Nadler, 1979 E.C.R. CELEX LEXIS 69, 73 (1979).

the representative and the debtor as to whether an asset belongs to the bankrupt's estate.

2. Competent Court or Authority

Article 4 states:

> The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

A pertinent footnote states:

> A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in Article 4 or elsewhere in Chapter I, the following provision: Nothing in this Law affects the provisions in force in this State governing the authority of [*insert the title of the government-appointed person or body*].[34]

This article does not require much in the way of explanation. Its value is to increase insolvency legislation's transparency and ease of use, particularly for the foreign representative. Furthermore, the enacting State must designate the court or authority competent to determine the application for recognition.

3. Authorization of a Representative to Act in a Foreign State

Article 5 states:

> A [*insert title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in a foreign State on behalf of a proceeding under [*identify laws of the enacting State relating to insolvency*], as permitted by the applicable foreign law.

Most articles in the Model Law concern "inbound traffic." Article 5, on the other hand, concerns "outbound traffic." The laws of some States do not explicitly authorize representatives appointed in that State to act abroad. In some cases, this absence of an explicit provision has resulted in situations where the representative has not been able to act as a foreign representative abroad. This article is meant especially for those jurisdictions in which the lack of such a provision has proved problematic. One may argue that implementation of this provision is useful for other countries as well. In countries that do not allow the foreign representative to have more power than he has under his own law, this provision makes clear that he can act abroad. However, I would not

34. *UNCITRAL Thirtieth Session Report*, *supra* note 1, art. 4, note a.

be surprised if many countries refuse to implement this article. For instance, Dutch law does not contain an explicit authorization for representatives appointed in the Netherlands. This, however, has never been an obstacle for Dutch representatives acting abroad.

Whether the foreign representative can exercise any powers in the country where wants to act and, if so, the scope of that power, clearly depends on the law of that country. Article 5 does not change this rule. One could even argue that a foreign representative from country A can act in country B if such action is allowed by the laws of country B, even if the representative cannot act abroad according to the legislation of country A.

4. Public Policy Exception

Article 6 states: "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State." Article 6 contains a public policy exception: the court need not render a decision that is contrary to the public policy of its State. One may ask whether this article is really necessary. Even if it had not been included in the Model Law, in my view, no court would feel obliged to render a decision that is contrary to the public policy of its State. Additionally, these kinds of articles seem to be more appropriate in a treaty than in a Model Law. However, the value of this article may be that it encourages States to enact the Model Law. During the session of the Commission, some observed that this article should be interpreted in a restrictive sense. I agree wholeheartedly and believe that public policy should be confined to fundamental principles of law. In some States, such as the Netherlands, a distinction is made between domestic public policy and international public policy. International public policy is less restrictive than domestic public policy. Courts observing international public policy may be inclined to say, "Okay, it is not the way we would do it, but we can accept it." This is because international cooperation would be hampered if every country demanded that foreign countries have the same proceeding and the same rules as they have themselves.

To stress the need for a restrictive interpretation of the notion of "public policy," article 6 states that the court can refuse to take action if that action would prove *manifestly* against "the public policy of this State."

5. Additional Assistance under Other Laws

Article 7 states: "Nothing in this Law limits the power of a court or a [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to provide additional assistance to a foreign representative under other laws of this State." One can imagine that the law of a State enacting the Model Law contains other provisions that enable the court or representative to give additional or alternative forms of assistance to the foreign representative that are not contained in the provisions of the Model Law. It would be contrary to the purpose of the Model Law to say that, in such a case, the assistance given to the foreign representative should be limited to the level made possible by the Model Law. In my view, such an interpretation flows from the philosophy behind the Model Law that it cannot have any restrictive effects. Therefore, the reader may decide whether this article is necessary.

It is not quite clear why this provision is restricted to assistance to a foreign *representative*, and why it does not say anything about assistance to a foreign *court*. Some national law may contain provisions that enable the national representatives and courts to cooperate more with foreign courts than is possible under the Model Law. In such a situation, the Model Law does not limit either the power of a court or a representative to cooperate to that broader extent. This provision was included in the Model Law at a very late stage. The fact that delegates did not have the time to examine this article at their respective capitals may explain the absence of a similar provision with respect to cooperation with foreign courts.

6. Interpretation

Article 8 states: "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application, and the observance of good faith." Normally, a provision such as article 8 appears in private law treaties. However, a similar article appears in another UNCITRAL Model Law as well: the Model Law on Electronic Commerce.[35] To my knowledge, Dutch legislation does not contain a provision prescribing how a law should be interpreted. It is self-evident that a law should promote the observance of good faith.

35. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 763.

### *F. Access of Foreign Representatives and Creditors to Courts in the Enacting State*

#### 1. Right of Direct Access

Article 9 states: "A foreign representative is entitled to apply directly to a court in this State." This article aims only to express the principle of direct access by a foreign representative to a court in the enacting State. In some jurisdictions, a foreign representative has access to the courts, but only through the intermediary of diplomatic channels, such as consulates or embassies. In other jurisdictions, a foreign representative has direct access to the courts, but he must get permission to have standing in those courts. The aim of article 9 is to remove these kinds of obstacles. In an insolvency situation, quick action can be essential. If the representative has to use diplomatic channels first, or if he would need permission to have standing, an action may not be undertaken as quickly as required by the circumstances.

This article does not indicate to which court the foreign representative has direct access. The Model Law does not contain a rule concerning the relative competence of courts within the enacting State. This is why in article 9 the words "*a* court" are used that is the foreign representative has direct access to "*a*" court of the enacting State. Provisions of internal procedural law of the enacting State must provide the rules of relative competence within that State.

One may ask whether the legislation of a State that has enacted this provision can still require the foreign representative to be represented by a solicitor or a lawyer. For instance, Dutch law requires the petitioner or claimant to be represented by a lawyer, even if the petitioner or claimant is a lawyer himself. Dutch law does not make an exception for representatives in insolvency proceedings. In my view, article 9 does not stand in the way of such a requirement. From a legal point of view, since the lawyer or solicitor presents the petition or files the claim on behalf of the foreign representative, it is the foreign representative who presents the petition or files the claim. The petitioner or claimant has a right of direct access to the courts, albeit through counsel. A wise foreign representative will ask legal assistance of a local lawyer to take advantage of his expertise.

The text of article 9 does not require that the proceeding in which the foreign representative is appointed must already be recognized. One could imagine a situation in which the foreign representative has a right of direct access only after recognition of the proceeding in which he is appointed. In that context, it would be possible to require the use of diplomatic channels or permission to have standing with respect to an

application for recognition. Fortunately, the Model Law does not contain such requirements. Quick action is often most urgent at the moment recognition is applied for. In most cases, this will be when the debtor wishes to move his assets to a place where they are hard to find. It is worth noting that article 19 gives the foreign representative the right to ask for provisional measures from the time of filing an application for recognition until the application is decided upon. In other words, during the period he may ask for provisional measures, he also has the right of direct access.

On the basis of article 9, the foreign representative has a right of direct access even after recognition is refused. In practice, foreign representatives will not try to undertake any new action after a court of the enacting State refused to recognize the foreign proceeding; courts will rarely admit a new claim. On the other hand, the foreign representative may have new information which could make a second application for recognition more successful than the first. In such a case, the representative must have a right of direct access.

2. Limited Jurisdiction

Article 10 states:

> The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this state for any purpose other than the application.

Insolvency practitioners feared that, in some jurisdictions, a foreign representative who had made an application for recognition would expose himself to an all-embracing jurisdiction. In such jurisdictions, it should be clear that an application for recognition alone is not sufficient grounds for the court of the enacting State to assert jurisdiction over the foreign representative as to matters that have nothing to do with the insolvency proceeding. This is why certain delegations proposed a provision such as article 9. If the foreign representative appears in the courts of the enacting State for the purpose of requesting recognition, the entire estate under his supervision is not exposed to the jurisdiction of these courts.

This article does not grant any type of immunity to the foreign representative. For example, if a foreign representative commits a crime in the enacting State, he can, of course, be subjected to the jurisdiction of that State. Another example is that he can be held responsible and liable for administering the reorganization in a bad way.

For some States, article 9 may appear superfluous, since their legislation does not contain a rule that allows a court to have jurisdiction over a person making an application on the sole ground that the applicant has appeared before the court. However, these States may wish to reassure foreign representatives that the possibility of an all-embracing jurisdiction does not exist by implementing this article.

3. Application by a Foreign Representative to Commence an Insolvency Proceeding Under the Law of the Enacting State

Article 11 states: "A foreign representative is entitled to apply to commence a proceeding under [*identify laws of the enacting State relating to insolvency*] if the conditions for commencing such a proceeding are otherwise met." In some jurisdictions, it is doubtful whether a foreign representative could apply to commence an insolvency proceeding in the enacting State in the absence of a provision similar to article 11. The drafters of the Model Law included article 11 to ensure that a foreign representative could file an application for the opening of an insolvency proceeding. In a common law system, one may say that the foreign representative has "standing" to apply to commence such a proceeding. In the language of countries that are more civil law orientated, it is appropriate to say that the foreign representative has "procedural legitimation" or the "competence" to apply to open such a proceeding.

The Working Group undertook lengthy discussions about whether a foreign representative who is appointed in a foreign non-main proceeding should be able to apply for an insolvency proceeding, or whether this right should be reserved to a foreign representative of a main proceeding. The solution finally adopted was that the Model Law should not distinguish between a foreign main representative and a foreign non-main representative. If the foreign representative is appointed in a proceeding opened in a country where the debtor maintains the centre of its main interests, he can ask for the opening of an insolvency proceeding in the enacting State, provided that the other conditions for commencing such a proceeding are met. In other words, a foreign main representative can apply for the opening of a non-main insolvency proceeding in the enacting State.

The reverse solution is possible as well. Even if the foreign representative is appointed in a proceeding opened in a country where the debtor does not maintain the centre of his main interests, he can request the opening of an insolvency proceeding in a country where the debtor does ,maintain the centre of his main interests. In other words, the foreign

non-main representative can also ask for the opening of a main proceeding in the enacting State.

The drafters of the EU Convention chose another solution. Article 29 of the EU Convention provides that the opening of a secondary proceeding may be requested by the liquidator in the main proceeding as well as by any other person empowered under the law of the contracting State to request the opening of insolvency proceedings within the territory of the State in which the secondary proceedings are requested. Therefore, if the law of the State where the opening of the secondary proceeding is sought does not allow the "secondary liquidator" to open such a proceeding, then the "secondary liquidator" does not have that right. *A fortiori*, a "secondary liquidator" cannot ask for the opening of a main proceeding in another country, at least as long as that other country does not permit such action explicitly in its legislation. The EU Convention does not give the "secondary liquidator" the power to open a main proceeding because some Contracting States want to limit the number of secondary proceedings, which can prove fairly costly. A consequence is that those countries also seek to restrict their own possibilities of opening secondary proceedings.

The drafters of the Model Law decided not to follow the precedent set by the EU Convention. A restriction of sovereignty can be agreed upon within the framework of the European Union, but it is not an option on a global level. Moreover, during the sessions of the Working Group and the Commission some arguments were put forward for giving the non-main representative the power to ask for the opening of a main proceeding in another State. One argument was that, if a foreign representative could not ask for the opening of a main proceeding, he could ask a creditor to request the opening. In this way, a "prohibition" for a foreign non-main representative would be quite meaningless. Another argument put forward was that a foreign non-main representative may have some interest in asking for the opening of a main proceeding.

The conditions under which an insolvency proceeding can be commenced in the enacting State are not modified by article 11. If one or more conditions stipulated in the legislation of the enacting State are not met, article 11 does not mean that a proceeding nevertheless should be commenced if a foreign representative so requests. The words are reminiscent of the provision of "treaty language," but that is not really problematic; the purpose of these words is clear. One of the consequences of the language is that a foreign representative may request the opening of a main proceeding only in a State where the debtor maintains his centre of main interests.

The foreign representative can ask for the opening of a proceeding even if the proceeding for which he was appointed has not yet been recognized by the court of the enacting State. That a foreign representative can ask for the opening of a proceeding can be crucial in cases involving an urgent need to preserve the assets. The words "if the conditions for commencing such a proceeding are otherwise met" are meant as an additional safeguard. Another consequence of this language is that a debtor's insolvency must be proved. As long as the proceeding in which the foreign representative is appointed has not been recognized, article 31 does not apply, and there is no presumption that the debtor is insolvent.

4. Participation of a Foreign Representative in an Insolvency Proceeding

Article 12 states: "Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under [*identify laws of the enacting State relating to insolvency*]." The purpose of this article is to give to the foreign representative "standing," "procedural legitimation," or "competence" to participate in an insolvency proceeding. Contrary to article 11, article 12 requires the proceeding in which the foreign representative is appointed to be recognized. The article does not give any specific rights to the foreign representative. The Working Group and the Commission were aware that the word "participate" is not the most precise word available. The reason for this choice of language is that it was difficult, if not impossible, to find a word that would fit in every legal system of the world. Legislators who enact the Model Law shall find an appropriate translation. In any event, the drafters intended "participate" to mean the making of petitions, requests, or submissions concerning issues such as protection, realization, or distribution of assets, or cooperation and coordination with the foreign proceeding.

5. Access of Foreign Creditors to an Insolvency Proceeding

Article 13 states:

> 1. Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [*identify laws of the enacting State relating to insolvency*] as creditors in this State.
> 2. Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [*identify laws of the enacting State relating to insolvency*], except that the claims of foreign creditors shall not be ranked

> lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].

A pertinent footnote states:

> The enacting State may wish to consider the following alternative wording to replace Article 13(2):
>
> Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [*identify laws of the enacting State relating to insolvency*] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [*identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims*].[36]

This article contains the rule that in principle every creditor has the same rights regarding the commencement of and the participation in an insolvency proceeding, with the exception mentioned in paragraph two. One could observe that the word "foreign" is not sufficiently clear. What is the criterion with which the distinction between a creditor and a foreign creditor is based? Is it his nationality, domicile, or something else? Since article 13 states that foreign creditors have the same rights as creditors *in this State*, the suggestion was made that the criterion should be the domicile. However, it is obvious that the criterion may be based on other factors as well. Some proposed that the language read that "all creditors" must be treated in the same way, but this proposal did not get enough support.

The drafters of the Model Law did not choose the rule that only local creditors can request the opening of an insolvency proceeding. Under the EU Convention, the right to request the opening of a territorial proceeding before the opening of a main proceeding is given only to creditors who maintain their domicile, habitual residence, or registered office in the Contracting State where the establishment of the debtor is situated, or to creditors whose claims arise from the operation of that establishment (article 3 § 4). The reason for this rule is, as we have seen with respect to other rules, that a number of parties to the EU Convention wanted to limit the number of territorial or secondary proceedings. The drafters of the

36. *UNCITRAL Thirtieth Session Report*, *supra* note 1, art. 13, note b.

Model Law did not share this view. The effects of a foreign proceeding under the EU Convention are more far-reaching than the effects of a foreign proceeding under the Model Law. Moreover, under the EU Convention, a foreign proceeding has an automatic effect in foreign States, whereas under the Model Law at least a request for recognition is required. One could argue that the need for coordination under the EU Convention is more urgent than under the Model Law and that such a coordination is easier when the number of territorial non-main proceedings is kept to a minimum. Another argument is that, within the framework of the European Union, States are willing to sacrifice a small portion of their sovereignty in so far as they accept that they cannot open a territorial proceeding in all circumstances. Such a sacrifice cannot be asked of States within the framework of UNCITRAL.

The philosophy behind the Model Law is that nothing in it prevents legislators from giving more rights to foreign creditors than to local creditors. For instance, article 108 of the Dutch Insolvency Act (DIA) states that the court must fix a date before which creditors must file their claims and that there must be a period of fourteen days between this date and the meeting of creditors. The period of fourteen days is meant to give the liquidator some time to verify the filed claims. If a claim is filed after the deadline but during this period of fourteen days, the claim can nevertheless be recognized if the liquidator and creditors do not object, provided that such a claim is filed at least two days before the meeting of creditors. However, under article 127 § 3, if a creditor from a foreign State files his claim too late, but before the meeting of creditors, and his tardiness is due to the fact that he lives abroad, his claim must be verified, even if there would be objections. In this sense, a foreign creditor gets better treatment than a local creditor. Such a rule remains possible in States that enact the Model Law.

There are two versions of paragraph two: one version in the text of the Model Law and one in a footnote. The textual version of paragraph 2 contains the rule that a distinction may be made between unsecured creditors and privileged creditors, and between creditors who have a right in rem and creditors who do not have such a right. Some laws have provisions assigning a special ranking to foreign creditors (i.e., the lowest ranking). It is clear that the principle of nondiscrimination would be meaningless if claims of foreign creditors were ranked lowest. Therefore, paragraph two stipulates that foreign claims may not be ranked lower than general unsecured claims. However, some laws contain the rule that certain claims, even if they are domestic, are ranked lower than the general unsecured claims. This can be the case, for example, if claims for a penalty or a deferred-payment are involved. That is why paragraph 2

contains an exception to the rule that paragraph 1 does not affect the ranking of claims: if the foreign creditor has a claim of the same nature as a domestic claim that is ranked lower than a general unsecured claim, the claim of a foreign creditor may be ranked lower than a general unsecured claim as well. In short, article 13 contains three rules:

> (1) In principle, all creditors have the same rights and their claims have the same ranking;
> (2) As an exception to this principle, claims of foreign creditors may be ranked as general nonpreference claims, but no lower; and
> (3) As an exception to the exception, the claim of a foreign creditor may be ranked lower than a general nonpreference claim if the creditor has a claim of the same nature as a claim of a domestic creditor that is ranked lower than a general nonpreference claim.

Hopefully, legislators will not adopt these exceptions. While it is nice for a foreign creditor to know that he has the right to request the opening of a proceeding and to file his claim, such rights are useless when the foreign creditor receives only a small percentage of the debt owed, if anything at all. A creditor, whether foreign or domestic, requires a security interest because he wants his money in case something goes wrong. Why should a foreign creditor lose his security when something does go wrong? The wide use of the exceptions to article 13 would hamper international commerce. To assume that local interests are protected by providing that foreign claims are ranked as general nonpreference claims is shortsighted. Foreign traders or foreign credit institutions will be less willing to deal with persons who are domiciled in a country that has such provisions.

The second version of paragraph two is contained in a footnote. The mere fact that the second version is only mentioned in a footnote and not presented as a full-fledged alternative leads one to conclude that the Commission prefers the other version. The version in the footnote differs from the version in the text in that it provides wording for States that refuse to recognize foreign tax and social security claims. For some States, it is unacceptable for tax and social security authorities from other States to file claims in an insolvency proceeding opened in their territory. These States can readily accept that foreign private persons are treated equally as creditors domiciled in their own territory, but they cannot accept local creditors receiving a smaller share of the revenues because of the fact that foreign public authorities also get a share.

To conclude the comments on article 13 § 1, one remark of minor importance is appropriate here. It does not seem quite right to say that creditors have a right regarding the *commencement*. A creditor does not open or commence an insolvency proceeding in most jurisdictions, the court does. It would have been preferable for the Model Law to state that

foreign creditors have the same rights regarding the request for opening a proceeding as local creditors. Although the Working Group had noted this point and agreed upon better wording, the text has not been amended. Nevertheless, the purpose of article 13 is clear.

6. Notification to Foreign Creditors of an Insolvency Proceeding

Article 14 states:

> 1. Whenever under [*identify laws of the enacting State relating to insolvency*] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.
> 2. Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other similar formality is required.
> 3. When notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:
>
> (a) indicate a reasonable time period for filing claims and specify the place for their filing;
>
> (b) indicate whether secured creditors need to file their secured claims; and
>
> (c) contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

It is crucial for creditors to be informed about the opening of an insolvency proceeding. They may have the right to file claims, be heard, or vote at the meeting of creditors for a composition, but as long as they are unaware of the insolvency proceeding these rights are meaningless. Therefore, each insolvency law contains provisions concerning notification to creditors. The need for such a provision flows from the principle of equal treatment of all creditors. Foreign creditors must be notified whenever notification is required for creditors in the enacting State.

The appropriate manner of notification differs from State to State, be it by publication in a local newspaper or an official gazette, or by individual notices. However, if the form of notification were left completely to national law, foreign creditors would be in an unfavorable position. There is still legislation in small island States that requires that notices be affixed to the door of the courthouse. If this is the only prescribed form of notification, it is clear that foreign creditors never will become aware of the insolvency proceeding. But even under a less

archaic rule, foreign creditors can be disadvantaged. If notification may be given by way of publication in a local newspaper, foreign creditors who usually do not read the particular newspaper will not be informed of the insolvency proceeding. Hence, paragraph 2 requires individual notification for foreign creditors. While this is the principle, in practice this rule may be insufficiently flexible. That is why paragraph 2 leaves discretion to the court to allow other forms of notification. A case for judicial discretion can be made when individual notification would be too costly, or if there is another way of notifying foreign creditors that is equally effective but less cumbersome. To summarize the rule in paragraphs 1 and 2: if local law requires notification to creditors, whether individually or not, foreign creditors must be notified individually, unless the court decides otherwise.

Some States may use special procedures for notification abroad, for example requiring the sending of a notification through diplomatic channels. In the context of insolvency proceedings, this manner of notification is undesirable because it is too time-consuming. This is why article 14 states that "no letters rogatory or other, similar formality is required." Those States that do not recognize English as an official language may not be familiar with the words "letters rogatory." Therefore, the words "or other, similar formality" are added in paragraph 2 to clear up any misunderstandings.

The Working Group and the Commission contemplated whether the rule that no letters rogatory or other, similar formalities are required is compatible with some multilateral treaties in this field, such as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Convention) that was adopted in The Hague under the auspices of the Hague Conference on Private International Law.[37] In the Guide to Enactment, it is noted that the aim of the above Convention is to simplify the method of notification for judicial proceedings.[38] However, the manner of notification under the Hague Convention is still too cumbersome in insolvency proceedings. Each State that enacts the Model Law has to consider whether the "prohibition" of letters rogatory is compatible with the Hague Convention. The Guide to Enactment notes that since the aim of the Hague Convention is to simplify notification, any further simplification fits with this aim and, therefore, does not conflict with the Hague Convention.[39]

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37. *See Report of UNCITRAL on the Work of Its Twenty-Ninth Session*, U.N. GAOR, 51st Sess., Annex 1, Supp. No. 17, U.N. Doc. A/51/17 (1996).

38. *See Guide to Enactment*, *supra* note 30, ¶ 10.

39. *See id.*

The drafters of the Model Law found it undesirable to require the language in which notification should be given. They did not decide whether notifications should be in the language of the creditor, the language of the country where the insolvency proceeding was opened, or the language of the contract on which the claim is based. The drafters also refused to suggest that notification be given in each of the six official languages of the United Nations. Such a requirement would be too inflexible. The language issue is left to other provisions of the legislation of the enacting State.

The main purpose of article 14 is to ensure that foreign creditors are informed that a proceeding has been opened. It is somewhat strange that this is not stated explicitly in this provision. However, it goes without saying that, if foreign creditors must be informed of anything at all, it is the opening of the proceeding. The notification must set forth the reasonable time period for filing claims and specify the place of filing. Although the Model Law is not meant to specify material rules for insolvency proceedings, the fact that the time period must be *reasonable* suggests that the Model Law "orders" States, in the process of deciding whether to enact it, to consider the reasonableness of the time periods contained in their legislation.

The notification to foreign creditors must also indicate whether secured creditors need to file their secured claims, and any other information required to be included pursuant to the law of the enacting State and the orders of the court.

At this juncture, a remark about the Dutch Insolvency Act (DIA) is appropriate. In principle, the Dutch suspension of payment proceeding does not have any consequences for preference and alimony claims. Article 275 § 2 of DIA states that these claims cannot be filed. Nevertheless, if a creditor does file such a claim, he loses his preference. Article 256 § 2 of DIA states that the representative must notify every known creditor and that the notification must warn that a creditor with a preference claim loses his preference if he files his claim. In practice, creditors with a preference claim file their claim with the reservation that they are filing only in so far as the preference may turn out to be insufficient for the entire claim. This practice is endorsed by Dutch case law.[40] While this is permitted by case law only and not by the Dutch Insolvency Act, I submit that, under the Model Law, the Dutch representative is also bound to give this information to foreign creditors.

40. *See* Nederlandsch-Engelsch Handelssyndicaat/van'sGravesloot, HR 15 March 1940, NJ 1131 (ann. PS); *see also* O./De Vleeschmeesters, HR 31 May 1996, NJ 108 (ann. ThMDB).

The Dutch liquidation proceeding is treated in a similar manner. Preference claims and secured claims can be filed. However, if the creditor of such a claim participates in the voting at the meeting of creditors, he is deemed to have waived either the preference or his security. The Dutch representative should then inform the foreign creditors of this consequence.

The Working Group considered whether article 14 should mention other types of notification that must be given to foreign creditors. One question was whether the representative should be obligated to inform the foreign creditors of the penalties laid down for the nonobservance of the given time limits. The conclusion was that it would be too difficult to describe how detailed such information should be. It is worth noting that article 40 § 2 of the EU Convention contains such an obligation to inform the foreign creditors about penalties.

Another question posed at the meetings of the Working Group was whether foreign creditors must be informed about the total value of debts and assets of the debtor. Fortunately, the prevailing view was that this information need not be given. It is extremely difficult to calculate the value of the assets. In case of the insolvency of a company, the value may depend on whether the company can be sold as a unit or in parts, and whether it can be sold as a going concern or not.

The above discussion concerns creditors who are known. There may many creditors that are not known, sometimes because debtors did not keep adequate records. Paragraph 1 empowers the court to order that appropriate steps be taken to notify creditors whose addresses are not yet known. If, for example, it is known that creditors are domiciled in country X, but it is not known who these creditors are or what their addresses are, the court may order that the insolvency proceeding be published in a local newspaper of country X.

As a final note, it is striking that in article 13 the words "foreign creditors" are used, whereas in article 14 the words "creditors that do not have addresses in this State" occur. In my view, the creditors of article 13 are meant to be the same creditors referred to in article 14. The difference in wording should not lead to any difference in interpretation.

### *G. Recognition of a Foreign Proceeding and Relief*

#### 1. Introduction

Chapter III contains the most important provisions of the Model Law. This chapter addresses the application for recognition of a foreign proceeding and the relief granted thereby. It sets out the application's requirements, states that the foreign proceeding must be recognized once

the applicant meets these requirements, and indicates the effects of recognition.

There are two types of effects. The first type is automatic in the sense that it flows from recognition itself. The second type of effect only occurs upon court order.

2. Application for Recognition of a Foreign Proceeding

Article 15 states:

> (1) A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
> (2) An application for recognition shall be accompanied by:
> (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
> (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
> (c) in the absence of evidence referred to in subparagraphs (a) and (b) any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.
> (3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
> (4) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

This article defines the core procedural requirements for an application by a foreign representative for recognition. In conjunction with article 16, this article provides a simple structure for obtaining recognition. Again, prompt action is crucial in an insolvency situation. Therefore, the requirements for obtaining recognition should be kept to a minimum. Article 15 § 1 states that the foreign representative may apply to the court for recognition of the foreign proceeding in which he has been appointed. One may ask whether such a provision is necessary, since article 9 provides that the foreign representative is entitled to apply directly to a court in the enacting State. Article 9 contains no restrictions, so the application for recognition is included. In my view, the first paragraph of article 15 is superfluous. However, the Working Group considered this paragraph useful, reasoning that its inclusion would not hurt.

The Working Group considered the question whether the right to apply for recognition should also be given to foreign creditors. They concluded that such a right should not be given to foreign creditors. I agree because the interest of creditors is payment. It is doubtful whether

this interest is served by granting them the right to apply for recognition. One should bear in mind that such a right is only useful in the event that the representative does not apply for recognition. Usually the representative will have more information than creditors regarding both the financial position of the debtor and the costs of recognition. If the representative does not see any reason to apply for recognition, why should a creditor do so? The interest of creditors is best served when they file their own claims.

The second paragraph defines the documents to be submitted. A lengthy discussion took place during the sessions of the Working Group and the Commission regarding whether the court is entitled to require other formalities, such as an authentication or a legalization. In this respect, it is noted that an authentication is given by the court that opened the insolvency proceeding. Authentication can take the form of seal or signature stating that the decision to commence a proceeding is indeed a decision rendered by the court. Legalization is satisfied by a diplomatic or consular agent of the State where recognition is sought in the form of certification that, for example, a document or the signature on a document is authentic. Many in the Working Group were concerned about the time required to satisfy legalization. For this reason, the text prepared by the Working Group contained a prohibition against legalization. However, the Commission found that there may be cases where the court may find legalization useful. The compromise is expressed in article 16 § 2, which allows the court to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized. This means that the court retains discretion over whether to rely on the presumption of authenticity, or to conclude that evidence to the contrary prevails.

Subparagraph (c) provides courts with additional flexibility. It states that, in the absence of a certified copy or certificate, the court is to review additional evidence at its discretion.

The third paragraph requires that an application for recognition be accompanied by a statement identifying all foreign proceedings that involve the debtor that are known to the foreign representative. The court does not need this kind of information to determine whether it can recognize the foreign proceeding, rather it needs the information to determine what relief shall be granted upon recognition. As we shall see, articles 29 and 30 provide rules for coordinating domestic and foreign proceedings and for the coordination of more than one foreign proceedings. The court is able to coordinate only if it is aware that there is more than one proceeding.

At this point, a remark about article 17 § 4 should be made. This provision empowers the court to modify or terminate recognition if it is shown that the grounds for granting recognition are fully or partially lacking, or have ceased to exist. In my view, article 17 § 4 does not refer to article 15 § 3, in so far as it enables the court to terminate the recognition. In other words, article 15 § 3 does not contain a requirement with respect to the recognition itself; a court cannot terminate recognition if it turns out that the foreign representative did not inform the court about other foreign proceedings that were known to him. One can imagine that a foreign representative would want the proceeding in which he is involved to be recognized as a foreign main proceeding and not as foreign non-main proceeding. Even if, for that reason, he does not inform the court of the opening of a concurrent foreign proceeding that is susceptible to recognition as a main proceeding, such an action would not lead to termination of the recognition. The court can modify the recognition or recognize the existing proceeding as a foreign non-main proceeding.

Article 15 says nothing about whether the affected parties should be heard before the court can decide upon the application for recognition. In some States, the right to be heard prevails. In others, the requirement of expeditious treatment prevails over the right to be heard to prevent the dissipation of assets. In the latter case, imposing the requirement of hearing all affected parties would cause undue delay. In some States, the parties involved are heard as soon as the application for recognition has been decided. The absence of a reference to the right of affected parties to be heard does not preclude legislators from requiring the court to put that principle into practice. It is clear, however, that from the representative's or creditor's point of view, and to facilitate international trade, every delay caused by hearing affected parties is undesirable.

3. Presumptions Concerning Recognition

Article 16 states:

> (1) If the decision or certificate referred to in of article 15(2) indicates that the foreign proceeding is a proceeding within the meaning of article 2(a) and that the foreign representative is a person or body within the meaning of article 2(a), the court is entitled to so presume.
> (2) The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.
> (3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

The Model Law contains three presumptions. In some jurisdictions, it would be more common to insert a presumption in the article to which the presumption relates. The Working Group and the Commission chose to put all presumptions in one article. This is a matter of technique and does not have any influence on the substance of the presumptions.

For some jurisdictions, paragraphs 1 and 2 may seem less useful, since the Model Law states that the court is entitled, but not compelled, to presume. However, in other legislation, these paragraphs are useful since they enable the court to start from a presumption. If these paragraphs were not inserted, the court in those jurisdictions would not be required to start from a presumption. However, it is remarkable that the third paragraph contains the words "is presumed," which leaves no room for a *discretionary* presumption to start from a presumption.

Article 16 § 3 contains the terminology "In the absence of proof to the contrary . . . ." One could argue that these words are not necessary. The purpose of these words seems to be to express that the presumption is rebuttable, but the essence of a presumption is that it is rebuttable. One might argue that if the "presumption" is not rebuttable, then one should not use the word "presumed," but rather a word such as "deemed." The third paragraph is virtually copied from the EU Convention. The drafters of the Model Law may not have recognized the differences between the third paragraph and the other two. A possible view is that we need the words "in the absence of proof of the contrary" because in § 3 the court is compelled to presume. If there is proof to the contrary, the court is not compelled to presume (and not entitled to do so either).

However, the difference in wording should not lead to any difference in interpretation, though it may have been better to formulate the three paragraphs along the same lines.

The presumption contained in the first paragraph relates to the decision or certificate referred to in article 15 § 1. If this document indicates that the foreign proceeding is a proceeding within the meaning of article 2(a) and that the foreign representative is a person or body within the meaning of article 2(d), the court is entitled to so presume. The purpose of this presumption is to avoid lengthy discussions during which the foreign representative must prove that the proceeding for which he requests recognition is a proceeding within the meaning of the Model Law. The word "indicates" is not entirely precise. Does "indicate" require that the document state explicitly that the proceeding is one within the meaning of the Model Law and that it should state the elements of the proceeding, so that the court can conclude whether it is such a proceeding?

As we have seen above (see article 15 § 2), the presumption contained in the second paragraph is a compromise between States that did and States that did not want the option of asking for an authentication of legalization.

The purpose of the presumption contained in the third paragraph is to avoid lengthy discussions about the location of the main interest. As far as legal persons are concerned, this paragraph was copied from article 1 of the EU Convention. The Model Law adds to this presumption a presumption concerning individuals.

4. Decision to Recognize a Foreign Proceeding

Article 17 states:

> (1) Subject to article 6, a foreign proceeding shall be recognized if:
> (a) the foreign proceeding is a proceeding within the meaning of article 2(a);
> (b) the foreign representative applying for recognition is a person or body within the meaning of article 2(d);
> (c) the application meets the requirements of article 15(2); and
> (d) the application has been submitted to the court referred to in article 4.
> (2) The foreign proceeding shall be recognized:
> (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
> (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.
> (3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
> (4) The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

This article expresses the core philosophy of the Model Law. There is no time to waste, as the recognition must take place as expeditiously as possible. If the requirements of article 17 are met, the foreign proceeding must be recognized. The Model Law does not leave any room for the court to evaluate the merits of the foreign court's decision.

An alternative to the recognition set out in article 17(1) would have been a more restrictive list of grounds on which recognition could be refused. The prevailing view was that such a technique would still not obligate the court to recognize a decision when the requirements were met. For this reason, such an option was rejected. It is clear that foreign proceedings must be recognized if the requirements are met and that there is no possibility for evaluating the application on other grounds. Once the

technique of article 17 § 1 is used, I hope many jurisdictions will follow it. Following the procedures laid out in article 17 § 1 will lead to greater uniformity among jurisdictions throughout the world.

The second paragraph states that a foreign proceeding shall be recognized as the predominate foreign proceeding if it takes place in the State where the debtor maintains the centre of its main interests. A similar interpretation should be applied to the provisions in the remainder of article 2(b), that a foreign proceeding shall be recognized as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State. One could ask why article 2(b) was not worded along the same lines as 2(a); the wording would then be that a foreign proceeding shall be recognized as a foreign non-main proceeding if it takes place in the State where the debtor maintains an establishment within the meaning of article 2(f).

The remarks about the wording represent more hairsplitting. It is important to see that the court must recognize the foreign proceeding, whether as a main proceeding or as a non-main proceeding when the requirements set forth in the Model Law are met. The text suggests implicitly that the court must indicate whether it recognizes the foreign proceeding as a main proceeding or as a non-main proceeding. One should bear in mind that the opinion of the foreign court that opened the proceeding does not matter. Even if the foreign court indicates its preference that the debtor maintain the centre of its main interests in that foreign State, the court of the enacting State may decide otherwise and recognize the foreign proceeding as a non-main proceeding. The basis of these provisions is that a court can recognize only one foreign proceeding as a foreign main proceeding.

Suppose that a court in Singapore opens a proceeding against a debtor, and finds that the debtor maintains the centre of its main interests in Singapore. Subsequently, a court in Malaysia opens a proceeding against the same debtor and finds that the debtor maintains the centre of its main interests in Malaysia. Both representatives thereafter address themselves to the court in Australia, and each pretends that he is the "main representative." The views of the representative, the Malaysian court, and the Singapore court are irrelevant to the Australian court. The Australian court decides for itself where the centre of the main interests is located. The Australian court may even find that the centre of main interests is in none of the States mentioned, except, for example, Thailand. The advantage of this rule is that two representatives having the powers of a "main representative" cannot exist within one country. A disadvantage may be that, in the given example, the Australian court may find that the centre of main interests is in Singapore, while another court,

for example the Indonesian court, may find that the centre of main interests is in Malaysia. However, this disadvantage is outweighed by the advantages. Competing claims from foreign proceedings for recognition as the main proceeding should be avoided. Moreover, to empower a foreign court that opens the proceeding to determine whether its proceeding should be labeled as a "main" proceeding would interfere with the sovereignty of the enacting State.

The third paragraph of article 17 reflects the urgent need for expeditious recognitions ("an application for recognition shall be decided upon at the earliest time").

The fourth paragraph leaves the question of whether the court of the enacting State can terminate or modify the recognition to other provisions of the laws of the enacting State. The recognition may be modified when the court learns of new information indicating that a proceeding that was recognized as main proceeding should have been recognized as a non-main proceeding, or vice-versa.

5. Subsequent Information

Article 18 states:

> From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:
>
> (a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
>
> (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

It is possible that, after the application for recognition, changes occur in the foreign proceeding that may later affect the court's decision. The purpose of this article is to compel the foreign representative to inform the court of substantial changes. Insolvency practitioners were afraid that they would have to inform the court about even insignificant filings. For this reason, the word "substantial" was inserted. The provision does not state when the obligation to inform the court terminates. I presume that this obligation continues to exist after recognition. It is not clear when the obligation comes to an end once the court recognizes the foreign proceeding. I do not think this will lead to any practical problems. When the court refuses to recognize the foreign proceeding, the obligation ends.

6. Relief That May Be Granted Upon Application for Recognition of a Foreign Proceeding

Article 19 states:

> (1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:
>
> (a) staying execution against the debtor's assets;
>
> (b) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
>
> (c) any relief mentioned in article 21(1)(c), (d) and (g).
>
> (2) [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice.*]
>
> (3) Unless extended under article 21(1)(f), the relief granted under this article terminates when the application for recognition is decided upon.
>
> (4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

a. Introduction

Article 19 grants the court the discretion to order relief, when it is urgently needed, from the moment of the application for recognition. The Working Group and the Commission had lengthy discussions about the issue of provisional relief. In this respect, it should be noted that there are two kinds of provisional relief. The first is "collective provisional" relief. This may include, for instance, a general stay of execution against the debtor's assets, a general stay of commencement or continuation of individual actions concerning the assets, and a general suspension of the debtor's right to dispose of the assets. The second kind of provisional relief is "individual" relief. These measures cover specific assets identified by a creditor. This kind of provisional relief does not prevent a creditor from commencing or continuing an individual action against the debtor's assets.

In some countries, provisional relief of a collective nature is unknown. If, in these countries, provisional relief is needed prior to an insolvency proceeding, one has recourse to general provisional relief that is not of a collective nature. The Netherlands, for example, maintains a provision especially for insolvency proceedings; however, this measure is

rarely used. The lack of such a collective provisional relief provision can be justified by the short lapse of time between application for recognition and recognition itself, thus minimizing the need for the provision. The more fundamental reason why some countries do not allow provisional relief of a collective nature is that these jurisdictions view such severe relief as the loss of the right to dispose of the assets that cannot be ordered before the debtor's insolvency is proved. Another argument is that the more easily so-called "Paulian" actions can be brought against the debtor, the less urgent is the need for collective provisional relief. In other words, what has been done by the debtor in bad faith can be undone with a Paulian action.

On the other hand, some jurisdictions feel that the possibility of provisional relief of a collective nature is sorely needed. Those countries believe that the assets must be protected and, therefore, that the debtor must not be able to remove, sell, or otherwise encumber assets. This view presumes that a debtor against whom collective provisional relief is ordered is, in practice, always subjected, subsequently, to an insolvency proceeding. The requirement that severe provisional relief against a debtor can only be ordered once his insolvency is proved is, in this view, only of theoretical significance. Countries adhering to this view are not convinced that the dissipation of assets can be undone by bringing a Paulian action against the debtor. The representative is in a better position if he can prevent the debtor from disposing of the assets, as opposed to having to reverse the debtor's actions.

The discussions of the Working Group and the Commission did not focus on the question of whether countries maintaining only individual provisional relief should introduce the option of collective provisional relief, or whether countries maintaining the possibility of collective provisional relief should abolish it. Discussion focused on whether those countries that do not recognize collective provisional relief can nevertheless order such relief in the context of the recognition of a foreign proceeding. The compromise reached provided that provisional relief of a collective nature can be ordered by the court of the enacting State in the context of the recognition of a foreign proceeding, even if the enacting State does not provide for the possibility of such relief in its own laws. At the same time, the option of ordering such relief with respect to entrusting the administration or realization of the assets to a representative is restricted, although this restriction is, in my view, not significant.

It is important to note that the foreign representative can only ask for such relief if he has already filed an application for recognition of the foreign proceeding. In practice, this will mean that he can ask for such relief at the same moment he requests recognition of the foreign

proceeding. In other words, he cannot ask for collective provisional relief before he has requested recognition of the proceeding. A foreign proceeding must already have been opened. The more fundamental argument against collective provisional relief, that such severe measures should not be ordered before a debtor's insolvency is proved, does not apply in the context of recognition of a foreign proceeding. The debtor's insolvency is proved by the existence of a foreign proceeding. This is the reason why countries that do not provide the option of collective provisional relief prior to the *opening* of an insolvency proceeding can accept such relief prior to *recognition*.

b. Article 19 § 1

Under the Model Law, creditors cannot ask for collective provisional relief for the same reasons that they cannot ask for recognition (see § 7.2). Of course, they can ask for individual provisional relief in the enacting State, as long as the foreign representative has not requested collective provisional relief.

It does not make a difference whether the provisional relief is requested prior to the recognition of a foreign proceeding as a foreign main proceeding, or prior to the recognition of a foreign proceeding as a foreign non-main proceeding. The drafters of the Model Law felt that granting the court discretion in this respect was important. Moreover, it may not be clear whether a proceeding will be recognized as a foreign main proceeding or as a foreign non-main proceeding at the time the foreign representative requests provisional relief. A rule that provides provisional relief prior to the recognition of a foreign main proceeding would prove unworkable.

Article 19 § 1 states that provisional relief can only be ordered if there is an urgent need to protect either the assets of the debtor or the interests of the creditors. One can imagine that the interpretation of these words will differ from one jurisdiction to another. However, the court has discretion; the court may order provisional relief, but is not compelled to do so.

According to article 19 § 1, the court can grant every kind of provisional relief. While the examples provided in paragraphs (a), (b), and (c) are not conclusive, they are provided as suggestions to those countries that do recognize collective provisional relief in their laws.

These provisions include, but are not limited to:

(1) *Stay of execution against the debtor's assets*. The stay of the commencement or continuation of individual actions or individual proceedings is not mentioned in subparagraph (a) because the drafters of

> the Model Law felt that explicitly mentioning such relief would go too far. However, because § 1 does not contain restrictions, such a stay of individual actions is an option.
> (2) *Entrusting the administration or realization of all or part of the debtor's assets located in the enacting State to the foreign representative or another person.* Until the foreign proceeding is recognized, the court may feel it is risky to entrust the administration or realization of the assets to the foreign representative. For this reason, the Model Law provides that the court can entrust another person with the assets' administration or realization. The drafters of the Model Law found the provisional relief mentioned in subparagraph (b) justified, but far-reaching as well. For this reason, they restricted the cases in which such relief could be granted. The court can entrust the administration or realization of the assets only if doing so is necessary to protect and preserve the value of assets that, by their nature, or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy. In my view, administration and realization of the assets should be entrusted to someone other than the foreign representative only if it is necessary to protect the assets. However, since this restriction is mentioned only in an example, the restriction is not a requirement. Even if the preservation of the value of the assets does not require that the administration or realization be entrusted to somebody else, such relief can, nevertheless, be granted on the basis of § 1. The requirement that the relief is urgently needed to protect the assets of the debtor (without reference to the value of the assets) is always applicable on the basis of § 1.
> (3) *Any relief mentioned in paragraph 1(c), (d), and (g) of article 21*. The types of relief referred to in these subsections include:
> - suspending the right to transfer, encumber, or otherwise dispose of any assets;
> - providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities;
> - granting any additional relief. Since the list in article 19 § 1 is meant to provide for exceptions, the reference to article 21, paragraph 1(g) appears superfluous.

Subparagraph 1(a) of article 21 addresses the stay of the commencement or continuation of individual actions. As previously mentioned, the drafters felt that this kind of relief would go too far when granted as provisional relief. Subparagraph 1(b) of article 21 deals with the stay of the execution against the debtor's assets. This kind of relief is already mentioned in article 19, so a reference to subparagraph 1(b) of article 21 appears superfluous.

It is not quite clear why article 19 § 1(a) mentions the stay of execution instead of referring to article 21 § 1(b). The reason cannot be in

subparagraph 1(b) of article 21, which includes the language "to the extent it [the execution against the assets] has not been stayed under paragraph 1(b) of article 20." These words would not make much sense in an "article 19 situation," where no decision upon the application for recognition has been reached. This could be the reason why article 19 § 1(c) does not refer to article 21 § 1(b). However, this does not explain the reason why article 19 § 1(c) refers to article 21 § 1(c). Subparagraph 1(c) of article 21 states "to the extent this right [to transfer, etc.] has not been suspended under paragraph 1(c) of article 20." I see no reason why the technique employed with respect to the stay of the execution is not employed with respect to the suspension of the right to transfer. As far as I can see, this is only a matter of legislative preference and not substance. It, therefore, appears unimportant.

Subparagraph 1(e) of article 21 provides for the option of entrusting the assets' administration or realization to someone other than the foreign representative. The reason article 19 § 1(c) does not refer to article 21 § 1(e) is that the latter does not require this relief in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy. As we have just seen, this reference in article 19 § 1(b) is of minimal importance.

Subparagraph 1(f) of article 21 provides for the possibility of extending the relief granted under article 19 § 1; it is self-evident that article 19 § 1 should not make reference to this subparagraph of article 21.

c. Article 19 § 2

Many jurisdictions require notice to facilitate collective provisional relief. Paragraph 2 invites legislators to insert such a requirement, but leaves the decision to do so to the legislature of the enacting State. However, the question of *to whom* notice must be given—debtor, creditor, or both—is not addressed.

d. Article 19 § 3

Article 19 § 3 states that collective provisional relief terminates when the application for recognition is determined, unless it is extended under article 21 § 1(f). Some drafters felt that the Model Law should not provide any rule concerning the termination of provisional relief; rather, such determinations should be included in the legislation of the enacting State. According to this view, there is the risk that the provisional relief will terminate before it is replaced by definitive relief contained in the Model Law. It is obvious that such a hiatus is undesirable. Others felt

that the Model Law should define when provisional relief terminates because such provisional relief could be incompatible with the automatic relief provided in article 20. These two views were reconciled by language stating that, at the moment provisional relief terminates, the court is empowered to extend additional relief under article 21 § 1(f). Moreover, article 22 § 3 empowers the court, at the request of the foreign representative or a person affected by the relief, or at its own motion to modify or terminate the relief.

e. Article 19 § 4

Article 19 § 4 states that the court may refuse to grant collective provisional relief if such relief would interfere with the administration of a foreign main proceeding. Since the power of the court to grant collective provisional relief is discretionary, this paragraph is, in my view, superfluous. Irrespective of that remark, the wording of this paragraph can be improved, since it refers to every main proceeding. Strictly speaking, the court can refuse to grant collective provisional relief even if such relief would interfere with the administration of a foreign proceeding that is not recognized. Moreover, if such relief would not interfere with the administration itself but would, on the other hand, interfere with the realization of the assets, this paragraph does not apply. However, it is obvious that if the relief interferes with realization, there is even more reason to refuse provisional relief. One might object that it is unlikely relief would interfere with the realization and, at the same time, not interfere with the administration. To this I would respond that the distinction between administration and realization is made in other provisions of the Model Law. After all, while this paragraph is not the most outstanding of the Model Law, it is not harmful either.

7. Effects of Recognition of a Foreign Main Proceeding

Article 20 states:

> (1) Upon recognition of a foreign proceeding that is a foreign main proceeding,
>
> (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities are stayed;
>
> (b) execution against the debtor's assets is stayed; and
>
> (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
>
> (2) The scope, and the modification or termination, of the stay and suspension referred to in paragraph (1) of this article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply*

> *to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph (1) of this article*].
> (3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.
> (4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] or the right to file claims in such a proceeding.

a. Introduction

A distinction can be made between three types of effects of recognition:

> (1) the "automatic" effects after the recognition of a foreign proceeding as a foreign main proceeding;
> (2) the effects that can be granted after the recognition of a foreign proceeding as a foreign non-main proceeding and the effects of a recognition of a foreign proceeding as a foreign main proceeding in the event that a local proceeding has been opened prior to that recognition;
> (3) the effects that can be granted after the recognition of a foreign proceeding as a foreign main proceeding, or as a foreign non-main proceeding.

The substance of the first two categories is the same. They differ only in that the first group of effects take place "automatically," while the effects of the second category take place only upon a court order. Another difference is that the first category relates to the recognition of a foreign proceeding as a main proceeding, while the second category contains effects that can take place only after the recognition of a foreign non-main proceeding.

During the discussions of the Working Group, some delegations tried to avoid the term "automatic effects." The reason for this is that, in some jurisdictions, an appropriate court order is needed for the effects defined in article 20. In these jurisdictions, the court is compelled to grant the relief mentioned in article 20 after recognizing the foreign proceeding as a foreign main proceeding. In other jurisdictions, the relief is automatic upon recognition of the foreign proceeding. For the purposes of this Article, I will describe this provision as if it were enacted in a State where a separate court order is not required. I will, therefore, use the term "automatic effects."

The automatic effects envisaged in article 20 are necessary to organize an ordered and fair cross-border insolvency proceeding. I reiterate that speed is of paramount importance in cross-border insolvency proceedings. Therefore, no time should be wasted between the moment

of recognition and the moment the automatic effects take place. The court should not spend too much time contemplating the various forms of relief provided in article 20 once it recognizes a foreign main proceeding. For this reason, the effects mentioned in article 20 § 1 flow automatically from the recognition. It is worth noting that these effects are, in principle, temporary until the court modifies or terminates them.

Recognition brings with it any effects contained in the laws of the enacting State, not just those that have been incorporated from the Model Law. This is a main difference between the Model Law and the EU Convention. Under the EU Convention, the law of the State where the proceeding is opened governs the proceeding, including the ranking of claims. Such a solution is not possible on a global level at this point. Legal traditions differ too much to achieve such a result. Moreover, many countries would only accept such a rule on the basis of reciprocity or, in other words, on the basis of a treaty, not a model law.

b. Article 20 § 1

The first type of automatic relief mentioned in article 20 § 1 concerns a general stay of individual actions. The text mentions "individual actions" and "individual proceedings." The difference will not be clear in every enactment of the Model Law; however, the general idea is clear: whatever can be undertaken by a creditor individually, is stayed. As a consequence, the only way for a creditor to secure partial or full payment is to file his claim in an insolvency proceeding.

Actions before an arbitral tribunal are also covered by this subparagraph. The individual actors of individual proceedings must address the debtor's assets, rights, obligations, or liabilities. The law of the enacting State defines the scope of the notion of "assets, rights, obligations or liabilities." Therefore, the actions that are stayed may differ from one legislature to another. It is clear that, for instance, a proceeding concerning a divorce between the debtor and his or her spouse would not be affected by the insolvency proceeding. However, a financial claim in such a divorce can be affected by the stay. In jurisdictions where the concept of an "estate" in insolvency proceedings is recognized, legislatures will probably use the words "concerning the estate."

Subparagraph (b) makes it abundantly clear that the executions against the debtor's assets are stayed as well. It is obvious that "individual execution" is intended by the use of the term "execution." A collective execution would be an execution in the context of an insolvency proceeding.

Nevertheless, the word "individual" is not inserted in subparagraph (b). If it is agreed that subparagraph (b) concerns individual executions, one could argue that these executions fall within the meaning of "individual actions" and "individual proceedings" as used in subparagraph (a). However, the automatic stay of executions against the debtor's assets is such a crucial effect of recognition that one could argue it is better to provide for it one time too many than not at all. Here again, I can imagine that those legislatures familiar with the concept of an "estate" in an insolvency proceeding will include language that provides for a stay of executions against the estate. One may say that subparagraph (a) includes the *commencement* of individual actions, whereas similar language is absent from subparagraph (b). It would be absurd to conclude from this difference in wording that individual executions may be commenced after recognition of a main proceeding. The continuation and the commencement are both stayed after recognition of the main proceeding.

Subparagraph (c) states that the debtor's right to transfer, encumber, or otherwise dispose of any assets of the debtor is suspended. Here too, I would say that those countries familiar with the concept of an "estate" in an insolvency proceeding will provide for a suspension of the debtor's right to dispose of the estate. For example, in jurisdictions where natural persons can be submitted to insolvency proceedings, the law can provide that the most basic and essential belongings, such as clothes and furniture, do not belong to the estate and, therefore, are not covered by the insolvency proceeding. In such jurisdictions, the general suspension of the right to dispose of the "assets" will not prevent the debtor from disposing of these essential goods.

One drafter suggested including the language, "The *debtor's* right to transfer . . ." to make clear that creditors having a secured claim, such as a mortgage, can still act as if there were no recognition. The suggestion was rejected on the ground that § 2 provides that the scope of the stay is subject to the other provisions of the law of the enacting State. In other words, the fact that § 1 does not mention the position of the secured creditors does not mean that those creditors' entitlement to realize their secured right is affected by the recognition. If the other provisions of the laws of the enacting State provide that a secured creditor can act as if there were no recognition, or no insolvency proceeding, this rule remains unchanged.

The wording of § 1 is not restricted to the territory of the enacting State. However, it is clear that if, for instance, Chile implements the rule that the debtor's right to dispose of the assets is stayed upon recognition,

recognition by the Chilean court does not have an effect on the right to dispose of the assets located in Brazil.

The subparagraph does not address sanctions that might apply to acts performed in defiance of the suspension of the right to dispose of the assets. These sanctions vary considerably from one State to another. It is impossible to draft sanctions in the Model Law that would be compatible with all jurisdictions.

One should note that it is possible that the automatic effects prescribed in § 1 are more far-reaching than the effects of an insolvency proceeding in the State where it was opened. This is not an undesirable consequence. The alternative is that the court that recognizes a foreign proceeding must examine the law of the foreign State to find out what relief it can grant—an impractical solution.

c. Article 20 § 2

Paragraph 2 of article 20 states that other provisions contained in the laws of the enacting State should determine the scope, modification, and termination of the stay and suspension referred to in § 1. Some States' legislatures, for example, empower courts to make individual exceptions upon request by an individual party, if certain conditions set out by the law are met. Such competence of the court remains unchanged by the Model Law. Generally, persons who are affected by the stay or the suspension have an opportunity to be heard. This can lead to a modification or even a termination of the stay or the suspension.

Some delegates at the session of the Commission considered the stigma attached to insolvency proceedings. Because of this stigma, which is present even with foreign insolvency proceedings, those delegates felt that stringent conditions should be met before an insolvency proceeding can be opened. In this view, these stringent conditions should also be observed in the context of recognition of a foreign proceeding. Therefore, one delegate suggested that the *requirements* of the stay and suspension should be subject to local law, but not the *scope* of the stay and suspension. This suggestion was rejected, for the better, I believe. Replacing the word "scope" with "requirement" would hamper an orderly, coordinated, and fair cross-border insolvency proceeding. If a debtor fears the consequences of the insolvency law of a foreign State, because, for example, the consequences are harsher than in his own country, he should not transact business in that foreign State. Being subject to the insolvency legislation in a foreign State is one of the normal risks of global trade. Therefore, a rule requiring that the *scope* of the stay and suspension be governed by local law is maintained.

d. Article 20 § 3

Some States observe the rule that an individual claim can only be preserved if an individual action is commenced, even in the case of an insolvency proceeding. Section 3 is included for these countries. Not all States, however, observe this rule, and, therefore, they need not implement article 20 § 3.

e. Article 20 § 4

Article 20 § 4 states that the automatic stay and suspension do not prevent anyone from requesting an insolvency proceeding in the enacting State, or from filing claims in such a proceeding. Once such a proceeding is opened in the enacting State, coordination of the foreign proceeding and the local proceeding is administered under article 29. Since article 20 deals with the recognition of a foreign proceeding as a foreign main proceeding, the local proceeding in the enacting State can only be a non-main proceeding.

8. Relief That May Be Granted upon Recognition of Foreign Proceeding

Article 21 states:

> (1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:
>
> (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 20(1)(a);
>
> (b) staying the execution against the debtor's assets to the extent it has not been stayed under article 20(1)(b);
>
> (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under article 20(1)(c);
>
> (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
>
> (e) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
>
> (f) extending relief granted under article 19(1);

> (g) granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.
>
> (2) Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.
>
> (3) In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

a. Introduction

Under article 21, there are three categories of relief:

> (1) the so-called "automatic" effects after the recognition of a foreign proceeding as a foreign main proceeding;
>
> (2) the effects that can be granted after the recognition of a foreign proceeding as a foreign non-main proceeding, and the effects of a recognition of a foreign proceeding as a foreign main proceeding in the event a local proceeding has been opened prior to that recognition;
>
> (3) the effects than can be granted after the recognition of foreign proceeding as a foreign main proceeding or as a foreign non-main proceeding.

Article 21(1)(a)-(c) prescribes the effects of the second category. This relief is discretionary. Article 21(1)(d)-(g) contains the effects of the third category.

b. Article 21 § 1: Types of Relief That May Be Granted

The substance of the relief that can be granted under article 21 § 1(a)-(c) is the same as the substance of the relief that takes place automatically after recognition of a foreign proceeding as a foreign main proceeding. The differences between these two categories is that the relief under article 20 is mandatory, whereas the relief under article 21 is discretionary. In subparagraphs (a) to (c) the words "to the extent they have not been stayed under paragraph 1 of article 20" are added. That language is repeated three times because the relief referred to in article 20 is not automatically granted when a local proceeding is opened in the enacting State before the recognition of the foreign proceeding (see article 29(a)(ii)). In that case, the effects of staying the individual actions,

executions, and suspensions of the right to dispose of the assets can only occur if ordered by the court. From the point of view of legislative drafting, it is not desirable to repeat this three times. An alternative would have been to insert a separate article in the Model Law that deals with the relief that can be granted upon recognition of a foreign non-main proceeding. Another possibility would be to mention these three kinds of relief all in one article, followed by a provision stating that these types of relief come into effect automatically upon recognition of a foreign proceeding as a foreign main proceeding and that they come into effect only if granted upon recognition of a foreign non-main proceeding.

Subparagraphs (d) to (g) deal with relief that can be granted upon recognition of a foreign proceeding as either a foreign main proceeding or a foreign non-main proceeding.

In addition, subparagraph (d) discusses the examination of witnesses and the taking or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities.

It should be noted that subparagraph (e) also provides an important variety of relief. The effect of suspension of the debtor's right to dispose of the assets is that the situation is "frozen." The debtor cannot transfer or encumber the assets anymore; but this does not necessarily mean that somebody else can dispose of the assets. It is important to note that even after the recognition of a foreign proceeding as a foreign main proceeding, the foreign representative does not automatically have the power to administer or to realize the value of the assets. A court order is still needed to empower the foreign representative to administer or realize the assets. Contrary to the pre-recognition relief as a provisional measure under article 19, article 21 does not provide that this measure is necessary to protect and preserve the value of assets that, by their nature, or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy. One should bear in mind that under article 21(2) just because the foreign representative is empowered to administer and realize the assets does not mean that he is empowered to distribute the assets.

Subparagraph (f) hinges on the extension of provisional relief. As we have seen, the provisional relief granted under article 19 terminates when the application for recognition is decided upon. In practice, however, the court will not apply this subparagraph often. The relief that can be granted under article 21(1)(a)-(d) and (g) is, in substance, the same as the relief that can be granted as provisional relief. Therefore, the court will prefer to grant these types of relief under article 21 instead of granting them as an extension of provisional relief. As a result, the court

will apply this subparagraph only when provisional relief is the sole relief available, and definitive relief is not an option.

Subparagraph (g) needs no explanation.

c. Article 21 § 2: "Turnover" of the Assets

Article 21 § 2 is another significant type of relief for petitioners. Under this provision, the court may empower the foreign representative to administer and realize the assets. This, however, does not mean that the assets are "turned over" to him. A separate court order is necessary to empower him to distribute the assets. The court can only grant this relief if it is satisfied that the interests of creditors in the enacting State are adequately protected.

Earlier drafts of the Model Law contained a provision that allowed courts to grant the relief of a "turnover" to the foreign representative once a lapse of time occurred. The rationale behind such a provision was to give local creditors a chance to request the opening of a local proceeding. The Working Group and the Commission finally held, however, that such an opportunity is not necessarily sufficient to protect their interests. Their interests are better served when they are duly informed about the opening of the proceeding. Moreover, once a local proceeding is opened upon their request, each creditor, whether local or foreign, has the right to file a claim in that proceeding. The most convincing argument against such a provision is that it is not consistent with the philosophy of nondiscrimination, the underlying principle of the Model Law. However, if the court should hold that the interests of the creditors are not adequately protected because they are not afforded the opportunity to request a local proceeding, article 21 § 2 will not be met. In other words, § 2 empowers the court to grant local creditors a time period in which they can request the opening of a local proceeding.

d. Article 21 § 3: Assets of the Non-Main Proceeding

Article 21 § 3 provides that the interests and authority of a representative of a foreign non-main proceeding are considerably more narrow than the interests and authority of a foreign representative of a foreign main proceeding. In other words, the relief granted to a foreign representative of a foreign non-main proceeding is limited to assets administered in that proceeding. The authority of a foreign "non-main representative" should not cover assets that have no "relationship" with the foreign non-main proceeding in which he is appointed. The question is, therefore, which assets have a "relationship" with the foreign non-main proceeding? One fact is clear—the relief must relate to assets that are in

the State where the insolvency proceeding is opened at the time of the opening. However, if the debtor removes assets from that State to another State only because he foresaw the opening of an insolvency proceeding, the relief granted to a foreign non-main representative should also relate to those assets. That is why § 3 states that the relief must relate to assets that *should be* administered in the foreign non-main proceeding. There can be assets that should de jure be administered by the foreign representative, but that de facto are not simply because the assets are in another State. In many cases, the recognition of a foreign non-main proceeding will be sought solely because the foreign representative wants to obtain relief with respect to those assets.

The EU Convention contains a similar provision. Article 3 § 2 of the EU Convention states that the effects of a territorial proceeding are restricted to the assets of the debtor situated in the territory of the State where the territorial proceeding was opened. In my view, this wording is not sufficiently precise, since it does not cover assets that are wrongfully removed to another State.

Strictly speaking, the words in the Model Law "should be administered" are a little imprecise. The words "*should be*" suggest that the relief only relates to assets that should be administered in that proceeding, but which *are* in fact not administered in that proceeding. The words suggest that the relief does not relate to assets administered in that proceeding. As soon as relief is granted pursuant to recognition of a foreign proceeding as a foreign non-main proceeding with respect to assets in the enacting State, one could argue that the words "should be administered" do not apply anymore because those assets are administered in that foreign proceeding.

Although the comments on wording may seem like hairsplitting, it is clear that the relief granted after recognition as a foreign proceeding must relate to those assets that were in the State where the proceeding was opened at the time of opening, or that should have been there if the debtor or someone else had not performed an act that was detrimental or otherwise wrongful to all creditors.

The legislation of the enacting State determines the proceeding in which an asset should be administered. For example, country B recognizes a proceeding opened in country A as a foreign non-main proceeding. The debtor removes an asset from country A to country B, despite the fact that he lost de jure his right to dispose of the assets. According to the law of country A, the asset should be administered in the proceeding. According to the law of country B, however, the asset should not be administered in country A. In that case, the relief granted after the recognition of the foreign proceeding cannot relate to that asset.

One can wonder what the situation would be in the alternative. For example, according to the law of country B, the asset should be administered in the foreign proceeding opened in country A, but the law of country A provides that the asset should not be administered in that proceeding. In such an instance, it would be of no use for the foreign representative to bring the asset to his own country, assuming the court of country B empowered him to do so. If, instead, the foreign representative brought the asset to country A, he would not have the right to administer that asset anymore. While he can distribute the asset among the creditors in country B, whether he can do so in country A will depend on the law of country A.

There are several reasons why such an asset should be administered under the law of country A and not under the law of country B. For example, the law of country B may consider the asset essential to someone's life, whereas the law of country A holds a different view. Another reason for choosing one country's law over another's is that the notion of an act detrimental to all creditors differs from one country to the next. Even if this notion is the same in two countries, there may be a difference in the time-limits after the expiration of which the representative could not reverse the act.

The phrase "under the law of the enacting State" reflects the principle underlying the Model Law that recognition of a foreign proceeding does not mean the effects of the foreign proceeding, as they may be attached to that proceeding by the law of the foreign State, are "imported" into the enacting State.

The Model Law does not provide the same principle for the situation in which a foreign proceeding is recognized as a foreign main proceeding. One can only wonder what the situation would be if, in the case of recognition of a foreign proceeding as a foreign main proceeding, an asset is not administered in that proceeding under the law of the enacting State. On the one hand, an underlying principle of the Model Law is that the effects attached to a proceeding that takes place in one State are not to be extended to foreign States. On the other hand, however, the relief should not relate to an asset that, under the law of the enacting State, should not be administered in the foreign proceeding recognized as a foreign main proceeding. Only if it is manifestly contrary to the public policy of the enacting State, would the automatic relief that takes place after recognition of a proceeding as a foreign main proceeding not relate to such an asset.

The third paragraph of article 21 also provides that the court, in granting relief to a representative of a foreign non-main proceeding, must be satisfied so that the relief concerns information required in that

proceeding. It is not clear whether that addition is really necessary. The relief granted under article 21 includes the delivery of information (see article 21 § 1(d)). The drafters' intention is clear, however. A foreign representative appointed in a foreign proceeding that is recognized as foreign non-main proceeding does not have access to information having no relationship to that proceeding. This is a safeguard to prevent the representative from accessing sensitive information that has nothing to do with the assets in that proceeding.

9. Protection of Creditors and Other Interested Persons

Article 22 states:

> (1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph (3) of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.
> (2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.
> (3) The court may, at the request of the foreign representative or a person affected by relief under article 19 or 21, or at its own motion, modify or terminate such relief.

a. Introduction

Article 22 provides three rules that attempt to guarantee a balance between relief that may be granted and the interests of persons who may be affected by such relief. Only the first rule deals explicitly with protection. The second rule provides that the court may subject relief to conditions, and the third rule empowers the court to modify or terminate the relief.

b. Article 22 § 1: Protection of Interests

Some may fear the possibility of abuse of the Model Law. When a debtor is subjected to an insolvency proceeding in a country plagued with corruption, or where one must fear that the court is not independent from the government, concerns may arise over fairness. The fact that the debtor or other parties were not heard, or at least not afforded the opportunity to be heard, upon the request for opening the insolvency proceeding may cast some doubts upon the proceeding's fairness. Since the Model Law is not based on reciprocity, the drafters included the following safeguards: some types of relief can only come into being when granted by the court, the request for recognition must meet specific conditions, and, last but not least, there must be a public policy clause.

Additionally, the drafters thought it was useful to insert a general provision requiring the court to be satisfied that the interests of all interested persons are adequately protected. This is the cornerstone of a balance between all the interests involved and will serve to convince legislators that the Model Law provides a satisfactory equilibrium.

It is important to note that article 22 § 1 does not deal with recognition itself. Recognition can be refused if the conditions set out in article 17 are not met, or if recognition would be contrary to the public policy of the enacting State. It is not difficult to imagine a court finding that, even though the conditions set out in article 17 are met, automatic relief should not be provided. If, however, the court believes that invoking the public policy clause would be going too far, and therefore recognizes the foreign proceeding, article 22 does not empower the court to undo the automatic effects. However, in such a situation, the court can invoke article 20 § 2 to modify or terminate the automatic relief, provided article 20 § 2 empowers the court to do so.

The suggestion was made to introduce an article dealing with the interests of local creditors. The proposal was rejected because it is difficult to define the notion of "local creditors." Moreover, it is contrary to the philosophy of the Model Law to place local creditors in a better position than other creditors just because they are local. Local creditors can be individuals or big multinationals with branches all over the world. Large, corporate, local creditors have the opportunity to hire legal expertise in many countries. If it is easier for them to request the opening of a proceeding in another country, they shall do so. The bakery shop around the corner is no longer the "model local creditor." Those who want to protect the interests of local creditors should realize that they are really helping big creditors.

Moreover, so-called local creditors do not always deserve special treatment. Suppose that a company maintains the centre of its main interests in Norway. Yet, it has two establishments that employ a number of people, one in Switzerland and one in Hungary. The company also has a considerable bank account in Switzerland that has nothing to do with the Swiss establishment, but is located in Switzerland for other reasons. In Norway, an insolvency proceeding is opened against the company. If both Hungary and Switzerland protect their own local creditors, the Swiss employees would get paid more than their Hungarian colleagues. What is the justification for that? There is no basis for favoring certain creditors just because they are termed "local."

c. Article 22 § 2: Relief Subject to Conditions

The second paragraph of article 22 empowers the court to subject the relief granted under articles 19 and 21 to conditions it considers appropriate. The Model Law does not give examples of such conditions. One can think of demanding a security or guarantee in case a certain kind of relief turns out to be granted unjustly. Another example is that the court may have doubts with respect to the authenticity of some documents, but not sufficient doubt to refuse recognition. As a result, the court may condition the relief on authentication of such documents within a certain time period.

Article 22 § 2 does not provide the court with authority to make recognition itself conditional. Although one should note that the court can subject the relief granted under articles 19 and 21 to conditions, it cannot do so under article 20 since that relief is automatic. The reason that the recognition itself cannot be submitted to conditions is that it would lead to undesirable delay. On the basis of article 17 § 3, the court must decide upon the application for recognition as soon as possible. States adopting the Model Law may add a rule to this provision stating that the court can recognize on a provisional basis and, if it does so, must fix a date when the recognition becomes definitive. During the period of the "previous recognition" and "definitive recognition," all the automatic effects mentioned in article 20 would take place. In practice, the present text of the Model Law will lead to a similar result. The court can terminate or modify the automatic effects, provided there are provisions in the laws of the enacting State that allow the court to modify or terminate the automatic stay by its own motion. If there are such provisions, the court can replace the automatic stay with the relief granted under article 21, which can be subjected to conditions.

While this may seem a somewhat roundabout method, it is not. On the contrary, it meshes with the philosophy of the Model Law: "Act first, think later." Once the court has the time to analyze the case on its merits, it can make the definitive decisions. Until that time, action must be undertaken in order to avoid dissipation of assets.

10. Article 22 § 3: Modification or Termination of Granted Relief

Article 22 § 3 empowers the court, at the request of the foreign representative, a person affected by either the granted provisional relief or the relief granted after recognition, or at its own motion, to modify or terminate granted relief. The debtor is included in the category of persons affected by the granted relief. Other provisions of the legislation of the enacting State must provide the grounds on which the granted relief can

be modified or terminated. During the sessions of the Working Group and the Commission, there were lengthy discussions about whether the court can modify or terminate the automatic relief mentioned in article 20. A view was expressed that a court cannot modify or terminate effects that flow automatically from the law. In other words, effects called into being by the law can only be modified or terminated by the law. This view did not attract much support because such theoretical arguments do not serve the needs of practice. The law creates many effects or rights that can be modified or terminated by a court order. For instance, the law grants everyone the right to vote, but if someone commits a crime and is detained in prison, the court may take that right away from him.

Based on article 20 § 2, the court can modify or terminate the automatic relief. The fact that the automatic relief is not mentioned in article 22 § 3 does not mean that this relief cannot be modified or terminated.

11. Actions to Avoid Acts Detrimental to Creditors

Article 23 states:

> (1) Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [*refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation*].
> (2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

Article 23 refers to actions that are sometimes called "Paulian actions." The aim of such an action is to make void or render ineffective acts otherwise detrimental to all creditors. The debtor may sell assets to a specific creditor or other person he wants to advantage just before the opening of an insolvency proceeding. If he does so while there is no obligation, contractual or by law, the representative and, in some jurisdictions, the creditors can initiate a Paulian action.

In the context of cross-border insolvency, the Paulian action is a difficult subject to address. On the one hand, it is beyond doubt that in certain cases a Paulian action is essential to protect the integrity of the assets. The absence of the right to initiate a Paulian action would give the malicious debtor the opportunity to weaken the position of the creditors. On the other hand, a Paulian action diminishes the certainty of concluded or performed transactions. This disadvantage is not serious if the insolvency proceeding has no cross-border aspects. The counterparty of the detrimental transaction knows, or can know, in advance which law is

applicable and what the consequences will be in concluding a transaction with someone who will be subjected to an insolvency proceeding. However, the disadvantage of uncertainty becomes more serious in a situation of cross-border insolvency. The counterparty is less aware of which law is applicable, and even if he knows in advance which law is applicable, it may be very difficult for him to discover what consequences attach to the transaction if the law is that of a foreign State.

Under many national laws, there is a so-called "suspect period," a prescribed time period just before the opening of the insolvency proceeding. If a transaction is concluded or performed during this period without any legal obligation, the counterparty of the debtor is presumed to be aware that the transaction was detrimental to other creditors or that an insolvency proceeding would be opened. Suppose that this suspect period is six months in country A. The debtor and his counterparty conclude a transaction, and seven months later an insolvency proceeding is opened in country B. Under the law of country B, the suspect period is twelve months. If the representative of country B has the right to initiate a Paulian action against the counterparty of the debtor, the transaction is rendered void. However, the counterparty may not be aware that he could be subjected to the law of country B. Even if he was aware of that fact, it might be too complicated for him to find out the rules under that law.

The drafters had the dilemma of deciding whether to include a rule that would increase uncertainty or omit a rule essential to the protection of the integrity of the assets. The Model Law ensures that the right to initiate a Paulian action will not be denied to a foreign representative on the sole ground that he has not been locally appointed. Article 23 does not create any substantive right regarding such actions nor does it provide for a rule concerning conflict of laws. The conclusion that can be made is that article 23 is very narrowly drafted.

The second paragraph of article 23 is similar to article 21 § 3 (see above).

### 12. Intervention by a Foreign Representative in Proceedings in This State

Article 24 states: "Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party." The purpose of this article is to avoid the denial of "standing" to the foreign representative attempting to "intervene" in proceedings on the sole ground that there is not an explicit provision in the legislation of the enacting State empowering him to "intervene." In some jurisdictions,

such as the Netherlands, the word "intervene" has a precise, technical meaning. It can mean one of two things under Dutch law. On one hand, there is an intervention if a third party, such as the foreign representative, takes part in a proceeding at the side of one of the parties. On the other hand, an intervention exists if the foreign representative takes part in a proceeding, but does not take sides and remains opposed to both parties. Either way, both types of intervention fall within the scope of article 24.

The article does not distinguish between a representative of a proceeding recognized as a foreign main proceeding and a representative of a proceeding recognized as a foreign non-main proceeding. As opposed to article 12, this article refers to individual proceedings. Therefore, it would have been more clear if the word "individual" was added.

The practical significance of this article is de minimus since it can only apply to a proceeding that has not been stayed under article 20 § 1(a) or 21 § 1(a). Nevertheless, it may be helpful because proceedings that do not concern the debtor's assets, rights, obligations, or liabilities are not stayed under article 20 § 1(a). Therefore, as far as a foreign proceeding recognized as a foreign main proceeding is concerned, the foreign representative can only request to intervene in the "other" proceedings that are not stayed under the Model Law. Because the enacting State may not want the representative to have standing in proceedings where such intervention is undesirable, the words "provided the requirements of the law of this State are met" are inserted.

### *H. Cooperation with Foreign Courts and Foreign Representatives*

#### 1. Introduction

Most provisions of the Model Law involve "inbound traffic" (see above). Chapter IV of the Model Law, on the contrary, deals with "outbound traffic." Courts and representatives are mandated to cooperate with other courts and representatives. Under this framework, article 25 addresses cooperation of courts of the enacting State with foreign courts and foreign representatives. Article 26 concerns the cooperation of domestic representatives with foreign courts and foreign representatives, and article 27 covers the means through which cooperation can be implemented. Such cooperation can be an important way, if not the only way, to prevent dissipation of assets, to maximize the value of assets, and to find the best solution for reorganization of the enterprise. Today, there are not many legislative systems that provide legal bases for cooperation. The aim of Chapter IV is to fill this gap.

2. Cooperation and Direct Communication between a Court of the Enacting State and Foreign Courts or Foreign Representatives

Article 25 states:

> (1) In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*].
> (2) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

The judicial colloquium organized by UNCITRAL and Insol in Toronto emphasized the importance of granting courts flexibility and discretion in cooperating with foreign courts. Today, courts in common law countries appear to have more opportunities to cooperate with foreign courts than do courts in civil law countries. Some common law judges have even stated that they are able to "just pick up the phone" to contact foreign courts. As for civil law systems, it appears that judges are more hesitant to contact foreign courts. At the end of the spectrum, a court from a civil law country, such as the Netherlands, can only act if it is explicitly empowered to do so by law; all activities must be expressly authorized before a court can become involved with the courts of a foreign jurisdiction. As a consequence, a civil law court cannot just "pick up the phone" to make arrangements with foreign courts. This is an undesirable result, expressly addressed by article 25. The aim of article 25 is to promote cooperation. The article must be read in connection with article 27, such that the court is mandated to cooperate with foreign courts and foreign representatives. Because common law courts are presently more equipped to cooperate with foreign courts, the impact of this article will likely be greater for civil law countries.

The Working Group discussed the question of whether article 25 should state that the court "*may* cooperate" or that the court "*shall* cooperate." An argument in favor of the word "may" is that the word "shall" might have the unintended effect of making cooperation mandatory, without regard to other relevant factors. The word "shall" might be, in this view, insufficiently flexible. By means of solution, "shall" has been implemented, and the words "to the maximum extent possible" have been added. These words provide a sufficient degree of flexibility. Therefore, in my opinion, article 25, particularly the words "to the maximum extent possible," does not compel the court to strain to cooperate without regard to other provisions. Rather, it mandates the

court to cooperate to the maximum extent possible under the law of the enacting State. In this respect, it must be noted that the cooperation will not be without any restrictions. Other provisions of the law of the enacting State might provide that communication between courts must be undertaken carefully and with appropriate safeguards in order to protect the rights of every party involved. The law of the enacting State may provide that parties must be informed about the court's plan of action and that parties must be heard. The law of the enacting State may contain provisions concerning data protection and privacy of the debtor, such that some information cannot be exchanged. The words "to the maximum extent possible," therefore, have two purposes. The first purpose is to abide by the legislation of the enacting State, as described above. The second purpose is to compel the court, within these limits, to perform as it is empowered by law.

It should be noted that article 25 does not require that the foreign proceeding be recognized. In other words, the court shall cooperate, even if the foreign proceeding has not been recognized, regardless of whether recognition has been requested, or whether an application for recognition has not yet been decided upon.

The second paragraph states that the court is entitled to communicate *directly* with foreign courts. This is a crucial clause pertaining to urgent situations. Time-consuming procedures, such as communicating by letter or through diplomatic channels, must be avoided. This article does not only apply when a court of the enacting State takes the initiative to contact a foreign court, but also when a foreign court contacts a court of the enacting State. However, when the court of an enacting state takes the initiative to contact a foreign court, a domestic court is allowed to forgo the use of formalities. When a foreign court contacts a court of the enacting State, the domestic court is forbidden from requiring the use of such formalities.

3. Cooperation and Direct Communication between the Domestic Representative and Foreign Courts or Foreign Representatives

Article 26 states:

> (1) In matters referred to in article 1, a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.
> (2) The [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] is entitled, in the exercise of its functions and subject to the supervision of the

> court, to communicate directly with foreign courts or other foreign representatives.

The idea behind article 26 is similar to the idea behind article 25: the representative should not be precluded from partaking in insolvency proceedings in foreign States. Therefore, the representative must cooperate with foreign courts and foreign representatives. The representative acts under the overall supervision of the court, as reflected by the words "subject to supervision of the court." This article does not, however, modify the rules already existing in the enacting State with respect to the supervision. Ad hoc authorization for each act of cooperation that the representative seeks to undertake is not advisable. Such a requirement would hamper the speed that is required in an insolvency proceeding. Furthermore, in article 26, the words "to the maximum extent possible" do not mean that the representative must make every effort to cooperate without regard to the other provisions of the Model Law, but rather that the representative must obey the other provisions of his legislation. This is the case, for example, for legislation concerning data-protection, whereby the representative must do what the law empowers him to do. This article also must be read in conjunction with article 27.

4. Forms of Cooperation

Article 27 states:

> Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:
>
> (a) appointment of a person or body to act at the direction of the court;
>
> (b) communication of information by any means considered appropriate by the court;
>
> (c) coordination of the administration and supervision of the debtor's assets and affairs;
>
> (d) approval or implementation by courts of agreements concerning the coordination of proceedings;
>
> (e) coordination of concurrent proceedings regarding the same debtor;
>
> (f) [*the enacting State may wish to list additional forms or examples of cooperation*].

Article 27 contains a list of the types of cooperation that are authorized by articles 25 and 26. Any conceivable cooperative means not mentioned within the article are not necessarily excluded.

Subparagraph (a) describes, as an example of cooperation, a situation in which the court appoints a person or a body to act at the direction of the court.

Subparagraph (b) describes the communication of information. It is conceivable that the drafters of the Model Law would have included the notion that such cooperation is subject to rules concerning protection of privacy. However, a clause to this effect is not necessary. As stated above, one of the purposes of the words "to the maximum extent possible" in articles 25 and 26 is to ensure that information contrary to the enacting state's laws need not be communicated. Here again, the Model Law does not aim to change those other provisions; rather, it will be embedded in the law of the enacting State, in the sense that other provisions remain as they are.

Subparagraph (c) concerns the coordination of the administration and supervision of the debtor's assets and affairs. Here, the Model Law requires the court to achieve a result on its own, rather than giving the court the means to achieve that result. In this sense, subparagraph (c) is of a different nature than subparagraphs (a) and (b). It is not always clear how courts can coordinate administration and supervision, and, for civil law countries, it will be less clear than for common law countries. It is obvious that not every arrangement between courts to achieve coordination is authorized. Subparagraph (c) appears to be very useful, as long as agreements are made within the bounds of the law, such that they may contribute to an effective administration. Practice will prove the significance of this subparagraph.

Subparagraph (d) contains the possibility of approval or implementation by courts of agreements concerning the coordination of proceedings. The same remarks with respect to subparagraph (c), concerning the possibility of agreements with respect to the coordination of proceedings, apply here as well.

Subparagraph (e) concerns the coordination of concurrent proceedings. Articles 29 and 30 deal with the issue of concurrent proceedings. Subparagraphs (c) and (d) concern the coordination of effects of one proceeding in several States rather than the coordination of several proceedings. The same remarks with respect to subparagraph (c), addressing the possibility of agreements with respect to coordination of proceedings, apply here as well.

Subparagraph (f) contains space within which the enacting State may include additional forms of possible coordination. It is, so to speak, an invitation to legislators to add other means.

5. Commencement of a Local Proceeding after Recognition of a Foreign Main Proceeding

Article 28 states:

> After recognition of a foreign main proceeding, a proceeding under [*identify laws of the enacting State relating to insolvency*] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

The underlying principle of article 28 is that the recognition of a foreign proceeding does not prevent the opening of a local proceeding. If a foreign proceeding is recognized as a foreign non-main proceeding, then there is no restriction whatsoever for the court of the enacting State to open a proceeding that is considered a main proceeding. Article 28 does not deal with such a circumstance, nor does any other article. On the other hand, if a foreign proceeding is recognized as foreign main proceeding, then the aim of article 28 is to restrict the court of the enacting State from opening a local proceeding, which is necessarily a non-main proceeding. The purpose of the restriction is to avoid a multitude of non-main proceedings. As a consequence, article 28 states that after recognition of a foreign proceeding as a foreign main proceeding, a local proceeding may only commence if the debtor has assets in the enacting State.

One should bear in mind that article 28 does not deal with the situation in which the court of the enacting State wishes to open a local proceeding *before* the recognition of a foreign proceeding. In this scenario, there is no restriction at all; even the presence of assets is not required.

The EU Convention takes another position. Under the EU Convention, the mere presence of assets is an insufficient basis for the opening of a local proceeding. The court has jurisdiction to open a local proceeding only if the debtor maintains an establishment in the enacting State. I am in favor of the solution selected in the EU Convention. The purpose of article 28 is to restrict the possibility for opening a local proceeding, but I cannot see that article 28 does so in practice. Why should a creditor wish to request the opening of a local proceeding in a State where there are no assets? What is there to liquidate or to administer?

It appears that, in practice, the opening of a proceeding will never be sought in a State in which there are no assets. This article, regrettably,

creates the legal basis for the opening of a proceeding even in States where the debtor has merely a bank account consisting of one Dutch guilder (approximately US$0.50).[41] Such a legal basis may prove costly, as representatives and courts must cooperate and coordinate the insolvency proceeding as they would other proceedings. Creditors must be notified so that they can file their claims.

I wholeheartedly support the Model Law, except for this article. On the other hand, I can understand that it would be, from a political point of view, undesirable to draft the Model Law in a manner that would greatly restrict the sovereignty of enacting States. Nevertheless, I hope that legislators will choose a more restrictive solution, in the sense that a local proceeding only can be opened if the debtor has an establishment in the enacting State, irrespective of whether a foreign proceeding has already been recognized as a foreign main proceeding. If there are only assets in a State but not an establishment, then the opening of a local proceeding is, in my view, not the most efficient way to protect foreign, and even local, creditors; on the contrary, this will be, in many cases, detrimental to their interests. One should bear in mind that the enacting State is not bound to recognize a foreign proceeding that was opened in a country where the debtor has no establishment.

The second part of Article 28 provides the same kind of rule as article 21 § 3, which is that the effects of a non-main proceeding shall be restricted to the assets located in the State where the proceeding is opened. However, this rule does not have the same impact in article 28 as it does in article 21 § 3. The latter deals with the situation where a proceeding is opened in a foreign State, while the former concerns the situation where a proceeding is opened in the enacting State. Article 28 states that assets that ought to be located in the enacting State but that are de facto in a foreign State, should nevertheless be administered de jure by the representative of the enacting State. In other words, article 28 exports a rule from the enacting State to a foreign State, while article 21 § 3 imports a rule from a foreign State to the enacting State.

This makes the second part of article 28 more strange in the midst of the Model Law. Of course, for a foreign State the law of the enacting State is not decisive with respect to the question of whether an asset should be administered in that proceeding. Whether or not an asset located in a foreign State can be transferred to the enacting State is a question governed by the law of the foreign State.

41. *See UNCITRAL Thirtieth Session Report*, *supra* note 1, ¶ 42.

## *I. Concurrent Proceedings*

### 1. Introduction

Concurrent proceedings can have many forms. First of all, the court of the enacting State decides whether it will recognize a foreign proceeding as a foreign main proceeding or as a foreign non-main proceeding. Second, at the time provisional measures are requested, it may not yet be clear whether this provisional relief is prior to a foreign main proceeding or a foreign non-main proceeding. The following list is an inventory of the various types of concurrent proceedings.

(1) First a local main proceeding is opened, then the recognition of a foreign non-main proceeding is requested.
(2) First a local main proceeding is opened, then provisional relief prior to the recognition of a foreign non-main proceeding is requested.
(3) First a foreign main proceeding is recognized, then the opening of a local non-main proceeding is requested.
(4) First a foreign main proceeding is recognized, then the recognition of a foreign non-main proceeding is requested.
(5) First a foreign main proceeding is recognized, then provisional relief prior to the opening of a local non-main proceeding is requested.
(6) First a foreign main proceeding is recognized, then provisional relief prior to the recognition of a foreign non-main proceeding is requested.
(7) First a local non-main proceeding is opened, then the recognition of a foreign main proceeding is requested.
(8) First a local non-main proceeding is opened, then the recognition of a foreign non-main proceeding is requested.
(9) First a local non-main proceeding is opened, then provisional relief prior to the recognition of a local main proceeding is requested.
(10) First a local non-main proceeding is opened, then provisional relief prior to the recognition of a foreign non-main proceeding is requested.
(11) First a foreign non-main proceeding is recognized, then the opening of a local main proceeding is requested.
(12) First a foreign non-main proceeding is recognized, then a foreign main proceeding is recognized.
(13) First a foreign non-main proceeding is recognized, then the opening of a local non-main proceeding is requested.
(14) First a foreign non-main proceeding is recognized, then the recognition of another foreign non-main proceeding is requested.
(15) First a foreign non-main proceeding is recognized, then provisional relief prior to the opening of a local main proceeding is requested.
(16) First a foreign non-main proceeding is recognized, then provisional relief prior to the recognition of a foreign main proceeding is requested.

(17) First a foreign non-main proceeding is recognized, then provisional relief prior to the opening of a local non-main proceeding is requested.
(18) First a foreign non-main proceeding is recognized, then provisional relief prior to the recognition of a foreign non-main proceeding is requested.
(19) First provisional relief prior to the opening of a local main proceeding is granted, then the recognition of a foreign non-main proceeding is requested.
(20) First provisional relief prior to the opening of a local main proceeding is granted, then provisional relief prior to the recognition of a foreign non-main proceeding is requested.
(21) First provisional relief prior to the recognition of a foreign main proceeding is granted, then the opening of a local non-main proceeding is requested.
(22) First provisional relief prior to the recognition of a foreign main proceeding is granted, then the recognition of a foreign non-main proceeding is requested.
(23) First provisional relief prior to the recognition of a foreign main proceeding is granted, then provisional relief prior to the opening of a local non-main proceeding is requested.
(24) First provisional relief prior to the recognition of a foreign main proceeding is granted, then provisional relief prior to the recognition of a foreign non-main proceeding is requested.
(25) First provisional relief prior to the opening of a local non-main proceeding is granted, then the recognition of a foreign main proceeding is requested.
(26) First provisional relief prior to the opening of a local non-main proceeding is granted, then the recognition of a foreign non-main proceeding is requested.
(27) First provisional relief prior to the opening of a local non-main proceeding is granted, then provisional relief prior to the recognition of a foreign main proceeding is requested.
(28) First provisional relief prior to the opening of a local non-main proceeding is granted, then provisional relief prior to recognition of a foreign non-main proceeding is requested.
(29) First provisional relief prior to the recognition of a foreign non-main proceeding is granted, then the opening of a local main proceeding is requested.
(30) First provisional relief prior to the recognition of a foreign non-main proceeding is granted, then the recognition of a foreign main proceeding is requested.
(31) First provisional relief prior to the recognition of a foreign non-main proceeding is granted, then the opening of a local non-main proceeding is requested.

(32) First provisional relief prior to the recognition of a foreign non-main proceeding is granted, then the recognition of another foreign non-main proceeding is requested.
(33) First provisional relief prior to the recognition of a foreign non-main proceeding is granted, then provisional relief prior to the opening of a local main proceeding is requested.
(34) First provisional relief prior to the recognition of a foreign non-main proceeding is granted, then provisional relief prior to the recognition of a foreign main proceeding is requested.
(35) First provisional relief prior to the recognition of a foreign non-main proceeding is granted, then provisional relief prior to the opening of a local non-main proceeding is requested.
(36) First provisional relief prior to the recognition of a foreign non-main proceeding is granted, then provisional relief prior to the recognition of another non-main proceeding is requested.

All of these types of concurrent proceedings may seem somewhat complicated at first sight. However, all of these possibilities are "governed" by three simple rules:

(1) Effects of a foreign proceeding must always be adjusted to the effects of a local proceeding.
(2) Effects of a foreign non-main proceeding must always be adjusted to the effects of a foreign main proceeding.
(3) Effects of more than one non-main proceeding must be adjusted to each other.

## 2. Coordination of a Local Proceeding and a Foreign Proceeding

Article 29 states:

Where a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] are taking place concurrently regarding the same debtor, the court shall seek cooperation under articles 25, 26 and 27, and the following shall apply:
(a) when the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,
  (i) any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and
  (ii) if the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;
(b) when the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,
  (i) any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and

> (ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in article 20(1) shall be modified or terminated pursuant to article 20(2) if inconsistent with the proceeding in this State;
>
> (c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

The underlying principle of article 29, in conjunction with article 28, is that commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. Conversely, the effects of the recognition of a foreign proceeding on a local proceeding are addressed in article 20 § 4. Article 20 § 4 contains the rule that the automatic effects of the recognition of a foreign proceeding as a foreign main proceeding do not affect the right to request the opening of a local proceeding. The result is that the effects of a foreign proceeding and the effects of a local proceeding coexist in the enacting State. Therefore, the Model Law must contain rules concerning cooperation. While the Working Group did not reach the issue of coordination of proceedings, the Commission drafted article 29. The court of the enacting State is compelled by the *chapeau* of article 29 to seek cooperation under articles 25, 26, and 27.

The basic rule of article 29 is that there is a pre-eminence of the local proceeding over the foreign proceeding. Therefore, it does not matter which of the two proceedings is the first to have an effect in the enacting State. Similarly, it does not matter whether the local proceeding is a main proceeding or a non-main proceeding, or whether the foreign proceeding is a main proceeding or a non-main proceeding. Further, it is of no import whether the proceedings are liquidation proceedings or restructuring proceedings. Finally, it is not significant whether the effects of the local proceeding are provisional or definitive.

Paragraph (a) deals with the situation in which a local proceeding has been initiated and recognition is subsequently sought of a foreign proceeding. If the court recognized the foreign proceeding as a foreign non-main proceeding, then it can grant any appropriate relief on the basis of article 21, as we have already seen. Article 29(a)(i) states that this relief must be consistent with the proceeding that has already been opened in the enacting State. If the court recognizes this proceeding as a foreign main proceeding, the recognition does not have any automatic effect; subparagraph (a)(ii) states that article 20 does not apply. If the court wants the foreign proceeding that is or that will be recognized as a main proceeding to have effects in the enacting State, then it can grant relief on

the basis of article 21. This is why the words "to the extent that it has not been stayed under paragraph 1 . . . of article 20" are inserted in article 21 § 1. This kind of relief, granted after the recognition of a foreign main proceeding on the basis of article 21, must be consistent with the proceeding in the enacting State; article 29(a)(i) therefore applies again.

Provisional relief must also be consistent with the proceeding in the enacting State when initiated and when provisional relief is requested in the context of the application for recognition of a foreign proceeding. At the time of the application for recognition of a foreign proceeding, it may be too early to determine whether the foreign proceeding will be recognized as a foreign main proceeding or a foreign non-main proceeding. However, the distinction between foreign main and foreign non-main proceedings is irrelevant here. Whatever provisional relief is granted, it must be consistent with the local proceeding. This situation also falls within the scope of subparagraph (a)(i).

Paragraph (b) deals with the situations in which a foreign proceeding is recognized and the opening of a local proceeding is subsequently requested. Generally, the effects of the foreign proceeding, already present at the time of the opening of a local proceeding, must be modified or terminated if they are inconsistent with the local proceeding. Subparagraph (b)(i) states that any relief in effect under article 21 shall be reviewed by the court and shall be modified or terminated if that relief is not consistent with the local proceeding. This subparagraph concerns the situation where a foreign proceeding is recognized as a non-main proceeding; if it had been recognized as a foreign main proceeding, there would have been automatic effects under article 21. In such cases, subparagraph (b)(ii) applies, and the automatic effects shall be modified or terminated. One could argue that the pre-eminence of the local proceeding is manifest in this case: even if a local proceeding is a non-main proceeding, and even when it is opened after the recognition of the foreign proceeding as a foreign main proceeding, it still influences the foreign main proceeding and not the other way around.

The same solution applies in the situation where a local proceeding is opened at a moment when provisional relief is already in effect under article 19. This provisional relief must be reviewed and modified, or terminated, if inconsistent with the local proceeding.

The automatic stay and suspension must be modified or terminated pursuant to article 20 § 2. Article 20 § 2 states that, inter alia, modification and termination of the stay and suspension are subject to other provisions in the legislation of the enacting State. It appears that the modification and termination under article 29(b)(ii) would also be subject to the other provisions of the legislation of the enacting State if there were

no reference made to article 20 § 2. In other words, the statement "pursuant to paragraph 2 of article 20" is not superfluous. It is noteworthy that none of the effects, whether they are automatic under article 19 or 21, or granted under article 21, terminate automatically. In the Guide to Enactment this point is made with respect to the automatic effects only,[42] but in my view the granted relief under article 19 or 21 also does not terminate automatically as a result of the opening of a local proceeding.

This article was drafted with much debate at the session of the Commission. That may be the reason why some minor, unimportant inaccuracies occur in this article. Since I contributed to the realization of this article, I am to blame for it too. The first point is that, very strictly speaking, article 29 does not deal with the situation where the court of the enacting State opens a proceeding between the filing of the application for recognition and the recognition itself, and where there is no provisional relief. Under such circumstances, paragraph (a) does not apply because at the time of the application for recognition, the local proceeding has not yet been opened. Paragraph (b) does not apply either. While this paragraph states, "When the proceeding in this State commences after recognition *or after the filing of the application for recognition . . .*," only relief "in effect under article 19 or 21 shall be reviewed." When there is no provisional relief, there is no relief under article 19 in effect. Because the foreign proceeding has not yet been recognized, there is no relief in effect under article 21 either. However, it is clear that the relief to be granted under article 21 must be consistent with the local proceeding that has been initiated. If the foreign proceeding will be recognized as a foreign main proceeding, then such a result flows from the underlying principle that article 20 does not apply, and that the court has to apply article 19 if it wants to grant relief.

It should be noted that subparagraph (b)(i) states that the court *shall review* the relief in effect under article 19 or 21, but subparagraph (b)(ii) does not indicate that the automatic relief in effect under article 20 must be reviewed. However, in order to determine whether automatic relief is inconsistent with the local proceeding, the court must also review the automatic effect. Therefore, the words "shall be reviewed" must either occur in both subparagraphs or be absent from both subparagraphs.

It should also be noted that the words "in this State" occur in subparagraph (a)(ii), but do not occur in subparagraph (b)(ii). This may be a result of the fact that subparagraph (b)(ii) states that the foreign

42. *See Guide to Enactment*, *supra* note 30, ¶ 190.

proceeding *is* recognized as a foreign main proceeding, instead of stating that the foreign proceeding is recognized as a foreign main proceeding.

Subparagraph (c) provides the same rule as article 28 and article 21 § 3.

3. Coordination of More Than One Foreign Proceeding

Article 30 states:

> In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:
>
> (a) any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
>
> (b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;
>
> (c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

This article deals with the situation in which the debtor is subject to more than one foreign proceeding and the foreign representatives seek recognition or relief in the enacting State. This provision applies whether or not a local proceeding has been opened in the enacting State. If there is a local proceeding, and recognition and relief are sought in more than one foreign proceeding, both articles 29 and 30 must be applied.

The underlying principle of article 30, that a foreign proceeding is recognized in the enacting State, does not prevent the court of the enacting State from recognizing another foreign proceeding. As we have seen before, however, the court can recognize only one foreign proceeding as a foreign main proceeding.

The basic rule of article 30 is that there is a pre-eminence of the foreign main proceeding over the foreign non-main proceeding. If there is more than one foreign non-main proceeding, then one foreign non-main proceeding cannot receive priority over the other foreign non-main proceeding.

As under article 29, the court of the enacting State is compelled by article 30 to seek cooperation under articles 25, 26, and 27.

Subparagraph (a) addresses the situation in which the court of the enacting State has already recognized a foreign proceeding as a foreign

main proceeding. If the court subsequently recognizes another foreign proceeding, necessarily as a foreign non-main proceeding, then the relief granted under article 21 must be consistent with the foreign main proceeding. The relief granted must also be consistent where the court has already recognized a foreign proceeding as a foreign main proceeding, and the foreign representative of another foreign proceeding applies for provisional relief; if such provisional relief is granted, it must be consistent with the foreign main proceeding.

Subparagraph (b) addresses the situation where the court of the enacting State has already recognized a foreign proceeding as a foreign non-main proceeding. If the court subsequently recognizes another foreign proceeding as a foreign main proceeding, then any relief in effect under article 21 must be reviewed and modified, or terminated, if inconsistent with the proceeding that is recognized as a foreign main proceeding. This also occurs in situations where the court has granted provisional relief under article 19 in the context of an application for recognition of a foreign proceeding, and has subsequently recognized another foreign proceeding as a foreign main proceeding. Under such circumstances, the provisional relief in effect under article 19 must be reviewed and modified or terminated if inconsistent with the foreign proceeding that is recognized as a foreign main proceeding.

Subparagraph (c) addresses the situation where the court of the enacting State has already recognized a foreign proceeding as a foreign non-main proceeding and subsequently recognizes another foreign proceeding as a foreign non-main proceeding. In that case, the court shall grant relief in the latter proceeding for the purpose of facilitating coordination of the proceedings, or modifying or terminating the relief granted in the first proceeding for that same purpose.

The article does not deal with the situation in which the court has granted provisional relief in the context of an application for recognition of a foreign proceeding and subsequently grants provisional relief in the context of an application for recognition of another foreign proceeding. At that stage, it may not yet be clear which of those two proceedings, if any, will be recognized as a foreign main proceeding. If the court has already determined how it will recognize the proceeding, it can choose to apply subparagraphs (a), (b), or (c) by analogy.

4. Presumption of Insolvency Based on Recognition of a Foreign Main Proceeding

Article 31 states: "In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of

commencing a proceeding under [*identify laws of the enacting State relating to insolvency*], proof that the debtor is insolvent." Some jurisdictions limit insolvency proceedings to situations in which the debtor's insolvency is proved. Article 31 contains the rebuttable presumption of insolvency of the debtor upon recognition of a proceeding as a foreign main proceeding.

If proving insolvency is a time-consuming exercise, this article may be helpful, especially when one bears in mind that proof of insolvency is of little additional benefit, since there is already an insolvency proceeding initiated against the debtor in a foreign State. For jurisdictions that do not require that the debtor be insolvent, but where an insolvency proceeding can be opened under specified circumstances, it is doubtful whether this provision is useful. For example, under Dutch law, article 1, DIA, a debtor can be subjected to an insolvency proceeding if he is "in the cessation of payments situation," which means that at least two debts remain unpaid. Because the aim of article 31 of the Model Law is to avoid time-consuming procedures, one can ask whether this article should not be interpreted in a broad sense. This would mean that the recognition of a foreign proceeding as a foreign main proceeding is, for the purpose of a local proceeding, proof that the conditions for the initiation of such a proceeding are met. I would favor such a broad interpretation, but the Guide to Enactment suggests this was not the intention of this article; the Guide states that where proof of the debtor's insolvency is not required by national law for the commencement of insolvency proceedings, the presumption established in article 31 may be of little practical significance.[43] I doubt whether such a narrow interpretation is justified; one could argue that even in States where other conditions must be met in addition to "insolvency" as such, insolvency proceedings remain.

It is noteworthy that this article also applies when foreign proceedings are opened in countries where the laws do not require insolvency as a condition for the commencement of insolvency proceedings. Thus, for example, if the court of an enacting State requires insolvency as a condition for the commencement of an insolvency proceeding and recognizes a foreign proceeding that was opened in the Netherlands as a foreign main proceeding, then recognition is presumed to be proof that the debtor is insolvent, even if cessation of payments, not insolvency, is the criterion under Dutch law.

Although the Model Law introduces a presumption in article 31, this presumption is not inserted in article 16. Article 16 establishes, as we have seen, three presumptions. The presumption of insolvency is inserted

43. *See id.* ¶ 196.

into a separate article because this presumption does not concern recognition. It would have been preferable, however, to formulate all presumptions along the same lines. The word "presume" does not occur in article 31, although this article contains a rebuttable presumption similar to the presumptions in article 16. Moreover, article 16 § 2 states "in the absence of the *proof* to the contrary," while article 31 states "in the absence of *evidence* to the contrary." The court of the enacting State is not bound by the decision of the court of the foreign State that opened the proceeding. It follows from the words "in the absence of evidence to the contrary" that the criteria in the laws of the enacting State for initiating an insolvency proceeding remain operative.

Here again, it is not quite correct to state "the recognition of a foreign main proceeding;" it would have been better to state "recognition of a foreign proceeding as a foreign main proceeding." More important, the presumption does not apply if the foreign proceeding is recognized as a foreign non-main proceeding; such a presumption, established upon recognition of a foreign proceeding that was opened in a State where the debtor does not have the centre of its main interests, would go too far.

5. "Hotchpot Rule"

Article 32 states:

> Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [*identify laws of the enacting State relating to insolvency*] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

Under the Model Law, more than one proceeding can be opened against the debtor in several countries, and every creditor can file his claim in each proceeding (see article 13). A creditor is allowed to keep what he has received as a dividend in proceeding A, but he can only obtain a percentage of his claim in proceeding B if the other creditors of the same class have received the same percentage as he did in proceeding A. This rule is stated in article 32 and is sometimes referred to as the "hotchpot rule."

It should be noted that article 32 does not affect the ranking of claims as established by the law of the enacting State. The representative in proceeding B must calculate the amount the creditor can receive if he has already obtained an amount in another proceeding. The Model Law and the Guide to Enactment do not provide rules for this calculation. The

Explanatory Report to the EU Convention describes a method for calculation.[44] This method comprises four rules:

> (1) Nobody may obtain more than 100% of his claims.
> (2) The original amount of the claim, or 100% of its initial value, shall be taken into account, and not the remaining amount. In other words, satisfaction obtained in other proceedings is not deducted. There is only one exception to this rule: secured claims and rights in rem, the secured parts of which are not affected by the insolvency proceedings. Under the Model Law, the question as to whether the amount of the original claim or the remaining claim shall be taken into account is left to other provisions of the laws of the enacting State. Under the EU Convention, this question is left to the rules of the State of opening.
> (3) A claim is not taken into account in the distribution until such time as the creditors with the same ranking have obtained an equal percentage of satisfaction in the proceedings as that obtained by the holder of the claim in the first proceeding.
> (4) The fourth rule mentioned in the Explanatory Report to the EU Convention will not be applied under the Model Law. The rule is that the ranking or category of each claim is determined for each of the proceedings by the law of the State of opening. Under the Model Law, there will be no export of the consequences of the law of the State of opening. Therefore, it appears that this rule cannot apply under the Model Law and must be replaced by the rule that the ranking or category of each claim is determined by the law of the enacting State.

Two examples may serve to clarify. There are two proceedings against the same debtor: proceeding A and proceeding B. A creditor files his claim in both proceedings. In proceeding A he obtains six percent of his claim. Subsequently, he also wants to get his share in the distribution in proceedings B. The creditors of the same ranking in proceeding B get ten percent of their claims. The creditor gets four percent of his initial claim in proceeding B (the difference between ten percent and six percent). The six percent that he obtained in proceeding A is not deducted from the initial claim.

The second example illustrates the opposite situation. The creditor obtains ten percent in proceeding A. Subsequently, he wants to get his share in the distribution in proceeding B. The creditors of the same ranking in proceeding get six percent. The creditor will not obtain anything in proceeding B, since he got a higher percentage in proceeding B. The model law does not provide an answer to the question whether the creditor must pay four percent to the liquidator in proceeding B. This will be left to the law of the enacting State. In my view, it will be useless for

44. *See supra* note 20.

the enacting State to provide that the creditor must pay four percent to the liquidator in the enacting State. If the enacting State provides for that, no creditor would, in this example, file his claim in proceeding B.

Article 32 states that creditors may be precluded, as described above, "without prejudice to secured claims or rights in rem." These are technical terms and may be difficult to apply to every jurisdiction. The enacting State may wish to use different wording to address these concepts. The Guide to Enactment observes, generally, that a secured claim is a claim that is guaranteed by particular assets, while the words "rights in rem" are intended to indicate rights relating to a particular property that are enforceable also against third parties.[45]

It appears that secured claims and rights in rem are not necessarily two different types of claims because a claim can be secured by a right in rem. On the other hand, the question of whether a right is a right in rem or not may be irrelevant in the context of the distribution of assets. In the context of the hotchpot rule, the words "without prejudice to a right in rem" may seem somewhat odd when applied to the notion of the right of way. It is true that rights in rem can be enforced against third parties and that secured claims do not have this characteristic; however, it appears that the percentage obtained by a creditor, who has a rightfully secured claim that is not a right in rem, should be taken into account in the context of the hotchpot rule.

The hotchpot rule should be applied without prejudice to rights in rem because rights in rem are enforceable against third parties, as the Guide to Enactment observes quite correctly.[46] But it is precisely this characteristic that is absent as far as "simple" secured rights are concerned. Therefore, it would have been preferable if the words "secured claims or" did not occur in the text.

In addition, within certain legal systems, the hotchpot rule must be applied without prejudice to claims that are secured through a set-off; this is, for instance, the case under the EU Convention according to its Explanatory Memorandum. Therefore, if the hotchpot rule should be applied without prejudice to secured rights that are not rights in rem, the article should be worded along the following lines: "Without prejudice to rights that are secured through a set-off or rights in rem, a creditor . . . ." However, the question as to whether the relationship between the hotchpot rule and claims that are secured through a set-off should be left to the other provisions of the law of the enacting State.

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45. *Guide to Enactment*, *supra* note 30, ¶ 200.
46. *See id.*

### *J. Appreciation*

In examining the Model Law, I find it to be a well-balanced set of rules.

On one hand, the Model Law meets the requirements of a modern international trading world. The foreign representative is given the powers he needs to act expeditiously. Malicious debtors must not be able to hide assets such that the foreign representatives cannot locate them. In an increasingly open world market, courts, representatives, and legislatures should not be as closed to foreign proceedings as they once were. Cooperation and coordination of proceedings are needed, and the door should not be closed to bona fide foreign representatives.

On the other hand, the Model Law does not step into the pitfall of creating a system without restrictions. It does not provide a legal basis for the recognition of any proceeding whatsoever, and, if a proceeding is recognized, it does not attach to it every imaginable effect. Some relief is automatic, and some relief is only available if it is expressly granted. Even relief that is automatic can be modified and terminated by the court, upon request or on the courts own motion. The effects of the law of the foreign State where the proceeding was opened are not imported. Protection of every party involved, including the debtor, is the first matter of importance.

## III. THE MODEL LAW IN THE DUTCH CONTEXT

In this chapter, I shall dedicate a few words to the present state of Dutch cross-border insolvency law, so that one can see what changes adoption of the Model Law would bring about in the Netherlands.

### *A. Effects of a Foreign Proceeding in the Netherlands*

The Dutch Insolvency Act does not contain any provisions concerning the effects of a foreign proceeding in the Netherlands. In Dutch case law, there are two key Supreme Court decisions. In the first case, the Supreme Court ruled that, under Dutch law, a foreign insolvency proceeding does not cover assets located in the Netherlands unless a treaty contains other rules to that effect.[47] The foreign representative has standing to act in the Netherlands, but a foreign proceeding does not prevent attachment of assets in the Netherlands. This implies that the debtor can dispose of assets located in the Netherlands. The Supreme Court ruled that this was the case "unless a convention contains other

47. Chiotakis/Société Anonyme Etablissements Abend Fourrures Pelleteries, HR 2 June 1968, NJ 16 (ann. HB).

rules." At present, the only relevant convention in force is the one between Belgium and the Netherlands.[48] In my view, the Supreme Court did not consider the possibility of a model law.

In 1996, the Supreme Court had the opportunity to open the door to broader recognition in the Netherlands of the effects of a foreign proceeding, but it confirmed the decision of 1967.[49] One could argue that the Supreme Court went even further than in 1967 in ruling explicitly that a foreign proceeding has territorial effects only. The court held both that the foreign proceeding did not cover assets located in the Netherlands and that the legal consequences attached by the law of the foreign State to the insolvency proceeding cannot be invoked in the Netherlands. In that case, the debtor had been subjected to a French proceeding that had been terminated. Under French law, creditors could no longer ask for payment, because of the particular kind of termination of the proceeding in this case. The Dutch Supreme Court ruled that this consequence could not be invoked by the debtor in the Netherlands.

The territorial approach adopted by the Dutch Supreme Court was somewhat mitigated by the lower courts of the Netherlands, albeit not very much. Some decisions held that the foreign representative can dispose of assets that he himself transfers to the Netherlands.[50]

The question as to whether the foreign representative can dispose of assets located in the Netherlands at the moment of the opening of the foreign proceeding has not yet been decided. Since, according to Dutch jurisprudence, a foreign proceeding does not cover assets located in the Netherlands, one should conclude that the foreign representative does not have the right to transfer assets to a foreign State. I must admit that I regret this consequence, but from a logical point of view, I cannot draw another conclusion.

### *B. Effects of a Dutch Proceeding in a Foreign State*

The Dutch Insolvency Act does not contain explicit provisions that deal with the effects of a Dutch proceeding in a foreign State. In short,

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48. Verdrag, betreffende de territoriale rechterlijke bevoegdheid, betreffende het faillissement en betreffende het gezag en de tenuitvoerlegging van rechterlijke beslissingen, van scheidsrechterlijke uitspraken en van authentieke akten {Convention Concerning the Territorial Jurisdiction of Courts, Bankruptcy, and Authority and Enforcement of Judicial Decisions, Arbitral Awards, and Authentic Acts], Mar. 25, 1925, Neth.-Belg., Stb. 405.

49. *See* O./De Vleeschmeesters, HR 31 May 1996, 1998 NJ 108 (ann. ThMdB); *see also* Titia M. Bos, *Discharging a Bankruptcy in France and the Recovery of an Undischarged Claim Against a Debtor in the Netherlands*, NETH. INT'L L. REV. 390-96 (1996).

50. *See* Kramer/Fränkische Plastikwaren GMbH, Pres. Rb. The Hague 14 Sept. 1967, NJ 356; Nya Nika Pa Oland Aktiebolag/Strümpel, Pres. Rb. Breda 30 Mar. 1983, NJ 798; Gustafsen Baltic Shipping Baltic Seaways, Pres. Rb. The Hague 20 Oct. 192, NIPR 177.

articles 203 to 205 only state that, in a Dutch insolvency proceeding, a creditor who receives part or total payment of his claim in a foreign State, irrespective of whether in a collective proceeding or as the result of an individual action, must pay the received amount to the Dutch representative.

In 1955, the Dutch Supreme Court rendered its seminal decision on this issue. It ruled that the Dutch legislator cannot give effect to a Dutch proceeding in a foreign State because only the foreign legislature can make such a decision. However, the Dutch Insolvency Act does not prevent a Dutch proceeding from having effects in a foreign State. The court ruled that a basic principle of the Dutch Insolvency Act is that a Dutch insolvency proceeding includes all assets, wherever they are located. Whether the effects of a Dutch proceeding can be invoked depends on the law of the foreign State.

### *C. Consequences of the Implementation of the Model Law into Dutch Legislation*

In conclusion, Dutch law is territorialistic concerning the effects in the Netherlands of a foreign proceeding, and universalistic concerning the effects of a Dutch proceeding in a foreign State. From a purely dogmatic point of view, this approach is correct, but in practice it assumes a double standard. Implementation of the Model Law into Dutch legislation would put an end to this undesirable situation.

## IV. EPILOGUE

A developed cross-border insolvency law applies, to a large extent, the same rules for inbound traffic as for outbound traffic. The UNCITRAL Model Law successfully operates in this manner. A company should not get into financial trouble simply because it has debtors in a foreign State. A modern cross-border insolvency law is not focused on its own proceedings, but rather it provides for possibilities of cooperation and coordination, as does the Model Law. A modern cross-border insolvency law should open the door to the recognition of foreign proceedings that are bona fide, as does the Model Law. Therefore, I would be pleased to see many States enact this Model Law, as doing so would facilitate international trade. After all, one of the basic rules of justice is that debts should be paid. If many States enact the Model Law, creditors will realize a higher percentage of their claims. This will lead to more confidence among investors, traders, and banks, which will benefit all.