



COMPANY LAW REVIEW GROUP

UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

Contents

Page

Chairperson’s Letter to the Minister	6
Executive Summary	7
Chapter 1. Introduction	8
1.1 The Company Law Review Group	8
1.2 CLRG Work Programme 2018-2020	8
1.3 Cross-border Insolvency.....	8
1.4 The UNCITRAL Model Law.....	9
1.5 Context for the potential adoption of UNCITRAL Model Law on Cross Border Insolvency in Ireland	11
1.6 The Scope and Application of the Model Law in an Irish Context	11
1.7 General Approach	12
Chapter 2. Cross-border Corporate Insolvency Law in Ireland	13
2.1 Introduction	13
2.2 Section 1417, Companies Act 2014.....	13
2.3 Applicable EU Insolvency Law	13
2.4 The Position at Common law	16
2.4.1. The ongoing Development of the Common Law in Ireland	16
2.5 Interplay between Irish, EU and UNCITRAL Law	19
Chapter 3. Examination of the Model Law	21
3.1 Introduction	21
3.2. Preamble	21
3.3 Chapter I. General Provisions.....	24
Chapter 4. Conclusions and Recommendation of the Group.....	49
4.1 The case for adoption	49
4.2 The case against adoption.....	492
4.3 Conclusions as to the merits of adoption	52
4.4 Considerations arising should the Model Law be adopted.....	52
4.5 Debt Adjustment and Schemes.....	54
Appendices	56
Appendix 1: Membership of the CLRG Corporate Insolvency Subcommittee..	56

Appendix 2: Modified Universalism	58
Appendix 3: The Treatment of Groups	60
Appendix 4: The Status of Enactment of the UNCITRAL Model Law	63
Appendix 5: Entities for potential exclusion from the ambit of the Model Law	65
Appendix 6: Analysis of the common law position	66
Legislation Referenced	68
Glossary of Terms	70

Chairperson's Letter to the Minister

Dear Minister,

I am pleased to submit for your consideration the Company Law Review Group's *Report on UNCITRAL Model Law on Cross-Border Insolvency*. The recommendations contained within the report intend to make a clear case as to why the Model Law should be adopted in Ireland. The report was conducted as part of the Review Group's 2018-2020 work programme and was formally adopted by the Review Group on 10th December 2018.

In preparation for this report, an extensive review of cross-border corporate insolvency law in Ireland and the position in other common law jurisdictions was undertaken. Each article of the Model Law was analysed from a practical standpoint, with a view to establishing the ways in which its adoption may impact our company law framework along with the various stakeholders involved, from insolvency practitioners to unsecured creditors, with the Review Group making a recommendation on each of its 32 articles.

The deliberations which led to the conclusions of this report, were conducted over the past 18 months, during which there were 7 meetings of a working committee¹ chaired by Mr. Barry Cahir. I would like to thank Barry not only for his systematic approach to the task, but also for sharing his technical expertise. I thank the committee members who worked diligently to provide a clear and comprehensive report. I must also acknowledge the work of the secretariat and legal researchers who provided essential support to the committee and Review Group.

Adoption of the Model Law will provide business with an increased level of certainty when operating in Ireland. I believe that by providing an internationally recognised framework for cross-border insolvency we can further improve conditions for continued foreign direct investment. Equally, within the context of Brexit, and given the hugely significant trading relationship we have with our immediate neighbour, it is of vital importance that we have a cross-border insolvency procedure that is functional and adaptable.

Finally, I would like to take this opportunity on behalf of the newly convened Review Group to say that we look forward to working with you and your officials in the Department of Business, Enterprise and Innovation in continuing to update and improve company law.

Yours sincerely,

Paul Egan
Chairperson

¹ The current members of the Insolvency sub-committee are set out at Appendix 1

Executive Summary

The purpose of this report is to examine and make recommendations on whether it is necessary or desirable to adopt, in Irish company law, the UNCITRAL Model Law on Cross-Border Insolvency (“the Model Law”).

The Model Law offers a procedural structure within which a diversity of national laws can exist with an emphasis on recognition of foreign insolvency proceedings and co-operation between stakeholders in affected jurisdictions. It does not provide for any substantive choice-of-law rules. Instead it utilises ancillary proceedings to assist foreign insolvency proceedings.

The question of whether this State should adopt the Model Law has assumed a more pronounced impetus following the Brexit referendum in the United Kingdom. Post Brexit, companies in the United Kingdom may no longer be subject to Regulation (EU) 2015/848 of the European Parliament and of the Council (“the EU Regulation”). Ireland’s significant trading relationship with its immediate neighbour implies a need for a system of cross-border insolvency administration which is usable, functional and adaptable. Moreover, Ireland has other significant trading partners such as the United States, who would welcome the certainty of a familiar construct within which to administer cross-border insolvencies. The benefit of an enhanced system of cross-border insolvency could further improve conditions for continued foreign direct investment.

The main focus of the UNCITRAL Model Law relates to situations where parties in insolvency proceedings in other countries seek assistance from the Irish courts. For the most part insolvency proceedings relating to Irish incorporated and registered companies will continue to be governed by the provisions of the Companies Act 2014.

It is submitted that the adoption of the Model Law in Ireland would provide companies to which the EU Regulation does not apply, and their creditors, greater certainty and predictability as to how cross-border insolvencies are treated in this jurisdiction.²

The Model Law is designed to apply to corporate and personal insolvencies. It is noted that in this jurisdiction (like many common law jurisdictions) that personal insolvency comes under the remit of the Department of Justice and Equality. While the Group is satisfied that the Model Law could be applied only to corporate insolvencies it is desirable to achieve a coherence between personal and corporate insolvency in terms of the Model Law.

² See also Appendix 2 for an outline on the principles of modified universalism.

Chapter 1. Introduction

1.1 The Company Law Review Group

The Company Law Review Group (the “Review Group” or the “CLRG”) was established by section 67 of the Company Law Enforcement Act 2001 to advise the Minister for Business, Enterprise and Innovation (the “Minister”) on changes required in companies’ legislation with specific regard to promoting enterprise, facilitating commerce, simplifying legislation, enhancing corporate governance and encouraging commercial probity. In the period since its establishment, the Review Group has been involved in advising the Minister, culminating in a major transformation in the Irish company law regime.

Most significantly, the Companies Act 2014 was signed into law on 23 December 2014 and commenced on 1st June 2015. This Act, which is the largest substantive Act in the history of the State, modernises the Irish company law code and consolidates 17 Acts and 15 Statutory Instruments, dating from 1963 to 2013, into a single coherent piece of legislation.

The drive to modernise Irish company law is part of a long-standing commitment by the State to policies which seek to open up the economy to the opportunities afforded by free trade, international capital mobility, EU membership and globalisation. The pursuit of these policies has helped transform Ireland’s economy from one grounded in a small, protected and domestic industrial base to one which now consists of a highly productive and innovative industrial sector, together with a sophisticated and internationally-traded services sector.³ A transparent and effective company law code forms part of the foundation of a modern, commercially-focused economy.

1.2 CLRG Work Programme 2018-2020

The Minister, following consultation with the CLRG, determines the programme of work to be undertaken by the Review Group, on a two-year cycle. This document will address item 5 of the Work Programme, which requests that the CLRG:

“Examine and make recommendations on whether it is necessary or desirable to adopt, in Irish company law, the Model Law on Cross-border Insolvency”.

1.3 Cross-border Insolvency

Cross-border insolvency law assists in determining:

- (a) which court has jurisdiction over a cross-border insolvency case,
- (b) which substantive insolvency law applies to the case, and
- (c) whether the judgment opening an insolvency proceeding rendered by a foreign court should be recognised and, if so, whether the effects of this proceeding under foreign law should be extended to the assets located in the jurisdiction recognising the foreign judgment.

³ Department of Finance, *Economic Impact of the Foreign-Owned Sector in Ireland* (October 2014), p.5.

There are two broad approaches that countries have adopted in designing laws and mechanisms to guide cross-border insolvency administrations: the universal approach and the territorial approach.

The universal approach assumes that one insolvency proceeding will be universally recognised by the jurisdictions in which the entity has assets or carries on business. All the assets of the insolvent company will be administered by the court or the administrator of, the lead insolvency process, which is typically determined by the place of incorporation. All creditors seeking to claim in the winding up submit claims to that court or administrator. When assets of the insolvent company are located in foreign countries, the court has the power to apply for assistance from the courts of those countries.

The territorial approach assumes that each country will have exclusive jurisdiction over the insolvency of a particular debtor in that jurisdiction and that separate proceedings for each country under that country's laws will be undertaken. No recognition is given to proceedings in course or completed in other jurisdictions.

A major disadvantage of the territorial approach to cross-border insolvency is that separate insolvency proceedings are undertaken in each jurisdiction where the debtor's assets are located with the cost of such proceedings being borne ultimately by creditors. The cost and time involved in numerous proceedings encourages inefficiencies and duplication of work.

1.4 The UNCITRAL Model Law

In 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted the text of a model law on cross-border insolvency ("the Model Law") designed to assist States 'to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency'.⁴

The Model Law offers a framework for domestic legislation, open for adoption by States individually, enabling insolvency proceedings in respect of corporate or natural legal persons having cross-border aspects (principally, where the insolvent entity has assets in more than one State or where that entity is indebted to a creditor from another State) to be administered more efficiently, effectively and fairly.

The purpose of the Model Law, as stated in its Preamble, is expressed as being "to promote the objectives of:

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

⁴ UNCITRAL 30th Session, May 12–30 1997: Official Records of the General Assembly of The United Nations, 52nd Session, Supplement no 17 (A152/17), Part II, paras 12–225 and Annex 1.

(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.”⁵

The Model Law is supplemented by a Guide to the Enactment and Interpretation of the Model Law on Cross-Border Insolvency⁶ (“the Enactment Guide”) which also acts as an aid to interpretation of the Model Law's provisions. In the Enactment Guide, UNCITRAL notes the increasing number of cross-border insolvencies resulting from global expansion of trade and investment and points to several factors necessitating greater conformity between individual jurisdictions in their approach to administration of such insolvencies. It suggests that individual national insolvency regimes “have by and large not kept pace with the trend, and ... are often ill-equipped to deal with cases of a cross-border nature”, resulting in “inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment.”⁷

UNCITRAL identifies cross-border fraud by insolvent debtors (e.g. concealment of assets or their transfer to foreign jurisdictions) as a problem which is increasing both in frequency and magnitude. It notes that a limited number of countries have laws governing cross-border insolvency which are well suited to the needs of international trade and investment and asserts that existing principles and remedies such as; the doctrine of comity by courts in common law jurisdictions, orders recognising and assisting foreign insolvency administrators and proceedings (*exequatur*), and reliance on legislation for enforcement of foreign judgements and requests by foreign courts to a national court for judicial assistance (letters rogatory) “do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as the one contained in the Model Law, on judicial co-operation, recognition of foreign insolvency proceedings and access for foreign representatives to courts”.⁸

The lack of communication and coordination among courts and administrators from the jurisdictions affected renders it more likely that assets could potentially be dissipated, fraudulently concealed, or possibly liquidated without reference to other more advantageous solutions, which reduces the ability of creditors to receive payment and the possibility of rescuing financially viable undertakings and securing jobs.⁹

The Model Law can be adapted to deal with corporate insolvencies within a group context and this is considered further at Appendix 3, however, group insolvencies are not the focus of the current Model Law and therefore this topic is beyond the scope of consideration for adoption at this time.

⁵ UNCITRAL Model Law on Cross-Border Insolvency, Preamble at page 3.

⁶ 1997 - UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment.

⁷ The Enactment Guide at para 5, pp 20-21.

⁸ Par. 16 of the Guide.

⁹ Par. 17 of the Guide.

1.5 Context for the potential adoption of UNCITRAL Model Law on Cross-Border Insolvency in Ireland

Trade and commerce have become increasingly international and the number of debtors with assets held in or transitioning through several different jurisdictions has increased. When an insolvency situation arises in such companies, the lead insolvency representative may wish to collect those overseas assets in order to distribute the proceeds among the creditors in accordance with the discernible relevant principles. Accordingly, international insolvencies can give rise to unique challenges and issues surrounding jurisdiction and choice of law.

The Model Law is purely procedural, it does not create any new rights. It simply provides courts which are dealing with applicable cross-border insolvencies with an agreed court procedure for the recognition of a foreign main proceeding, an automatic stay consequent upon recognition, and the discretion for the court to grant additional reliefs.

The question of whether this State should adopt the Model Law has assumed a more pronounced impetus following the Brexit referendum in the United Kingdom. Post Brexit, companies in the United Kingdom will no longer be subject to EU Regulation. Ireland's significant trading relationship with its immediate neighbour implies a need for a system of cross-border insolvency administration which is usable, functional and adaptable. Moreover, Ireland has other significant trading partners such as the United States, who would likely welcome the certainty of a familiar construct within which to administer cross-border (non-EU) insolvencies.¹⁰

1.6 The Scope and Application of the Model Law in an Irish Context

Ireland, like most common law countries, maintains a clear separation between its corporate insolvency and personal insolvency frameworks,¹¹ with the former being governed by the 2014 Act, while the provisions in respect of the latter are contained in the Bankruptcy Act 1988¹² and, more recently, the Personal Insolvency Act 2012.¹³

Given that the notion of what constitutes insolvency varies from jurisdiction to jurisdiction, the Model Law does not prescribe a definition for "insolvency", reference is made instead to the different types of collective proceedings commenced with respect to debtors who are in severe financial distress or insolvent. The Model Law is designed to deal with proceedings aimed at liquidating or reorganising the debtor.

¹⁰ A list of those countries which have enacted the model law are at Appendix 4.

¹¹ This dichotomy can be traced back to the development of insolvency law in England and Wales whereby the provisions governing personal insolvency law and corporate insolvency were, prior to the Insolvency Act 1986, retained in separate legislation with bankruptcy and windings up being administered by separate courts pursuant to different procedures rules. See generally Keay, *Insolvency Law: Corporate and Personal* (3rd Ed., Lexis Nexis, 2012) at p. 10.

¹² Bankruptcy can be defined as a process in which the property of an individual who is unable or unwilling to pay his or her debts (a "debtor") is transferred to a trustee to be sold and, after payment of costs, expenses, fees and certain debts given priority, distributed among those to whom he/she owes money (the "creditors").

¹³ A further distinction lies in the fact that the Minister for Justice has responsibility for personal insolvency, whereas the Minister for Business, Enterprise and Innovation is competent in the area of corporate insolvency.

While the Model Law is designed to apply to corporate and personal insolvencies, we believe it is possible, should it be necessary, to introduce it solely in respect of corporate insolvency. The EU Insolvency Regulation is equally applicable to personal and corporate debtors. While it would be desirable that the Model Law would mirror the EU insolvency regime in its scope and application, the responsibility for personal insolvency resides with the Minister for Justice and as such is outside the remit of the Company Law Review Group.¹⁴ It is the remit of the Company Law Review Group to review matters solely as they pertain to Company Law. Accordingly, for the purposes of this report, any recommendation on the application of the Model Law will relate to entities governed by the Companies Act 2014.

In addition, certain entities should be excluded from the scope of the Model Law. Those entities which should be excluded include credit institutions and insurance undertakings, both of which are subject to special insolvency regimes. These entities and their potential grounds for exclusion have been considered further in Appendix 5 of this report. Special insolvency rules have traditionally been applied to such entities both to protect the interests of deposit holders and insurance claimants, and in recognition of the importance of such entities to the functioning of the economy. The Group has identified those entities which have been excluded from the EU insolvency regime¹⁵ and notes that there could be merit in echoing these exclusions in the Model Law, should it be adopted. Ultimately, the decision in respect of which entities could be excluded would require consultation with the Minister for Finance and other relevant regulatory authorities.

1.7 General Approach

Chapter 2 of this report will outline the various statutory insolvency mechanisms in use in Ireland along with the operation of the EU Regulation. It also deals with the current common law position in relation to the provision of assistance to foreign courts. Chapter 3 will address each of the 32 Articles contained in the Model Law in turn, considering the implications for Irish law of their adoption. Chapter 4 contains the conclusions and recommendations of the CLRG, including the cases for and against the adoption of the Model Law, the treatment of local preferential creditors and practical considerations in the event of adoption.

This report is informed by and includes input from a series of papers prepared and revised by Noel Rubotham (an officer of the Courts Service and former CLRG member) in the initial deliberations by the CLRG on the potential adoption of the Model Law in the Irish context. The CLRG wishes to acknowledge and thank Noel Rubotham for his dedication and research on this matter.

¹⁴ The following jurisdictions have implemented the Model Law either with an implicit, or explicit incorporation of personal insolvency or no explicit disapplication of the Model Law to personal insolvency: Australia, the British Virgin Islands, Canada, the Cayman Islands, Colombia, Great Britain, Greece, Japan, Mauritius, Mexico, New Zealand, Poland, Romania, Serbia, South Africa, South Korea, the United States of America. Part XIII of the Canadian Bankruptcy and Insolvency Act 1983 (Cross Border Insolvencies) applied explicitly to both.

¹⁵ See para 3.3 in respect of Article 1.

Chapter 2. Cross-border Corporate Insolvency Law in Ireland

2.1 Introduction

The main purpose of this report is to assess the merits of incorporation of the Model Law into Irish law and to address the issues which would arise in the event that the Group was disposed to recommending such incorporation. Currently, insolvency law in Ireland is governed by several sources of law. The primary source of corporate insolvency law is the Companies Act 2014. The 2014 Act provides that the High Court has jurisdiction to wind up any company formed and registered under Irish law¹⁶ and any unregistered company¹⁷, which latter category includes a company incorporated outside the State which has been carrying on business in the State and ceases to carry on business in the State.¹⁸

2.2 Section 1417, Companies Act 2014

Section 1417 of the Companies Act 2014¹⁹ states that orders “made for or in the course of winding up” of a company incorporated outside the State²⁰ by the courts of a country recognised by an order of the Minister under that section, may be enforced by the High Court “in the same manner in all respects as if the order had been made by the High Court”.²¹ An order under section 1417 may not be made in respect of other EU Member States save Denmark - the only Member State which has not subscribed to the EU Regulation. Only one Ministerial order was made in respect of the predecessor to section 1417, section 250 of the Companies Act 1963, which recognised Northern Ireland and Great Britain for the purposes of the section.²² That recognition was subsequently revoked by the 2002 Regulations²³ given that the EU Regulation applies to the United Kingdom.

2.3 Applicable EU Insolvency Law

The proper functioning of the internal market requires (1) that cross-border insolvency proceedings should operate efficiently and effectively and (2) the avoidance of incentives for parties to transfer assets or judicial proceedings from one Member State to another in an attempt to obtain a more favourable legal position. This practice is also known as forum shopping. Regulation (EC) No 1346/2000 (“the EC Insolvency Regulation”) was adopted in order

¹⁶ Section 564(1), Companies Act 2014 and definition of “company” in section 2 of that Act.

¹⁷ For the meaning of “unregistered company” see section 1326, Companies Act 2014.

¹⁸ Section 1328(6) Companies Act 2014: a winding up order may be made in such a case even though the company has been dissolved or otherwise ceased to exist as a company under the laws of the country under which it was incorporated.

¹⁹ Which substantially re-enacts section 250 of the Companies Act 1963 as amended by the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333/2002), Regulation 3(d) of which inserted a new subsection (4) in that section providing that section 250 does not apply in relation to an order made by a court of a member state of the European Communities other than the State and Denmark.”.

²⁰ Section 1417(1) – please note that this section does not include Examinership.

²¹ Section 1417(1).

²² Companies (Recognition of Countries) Order 1964 (S.I. No. 42 of 1964). That Order also prescribes those jurisdictions for the purposes of prescribed for the purposes of sections 388 (Proof of incorporation of companies incorporated outside the State) and 389 (Proof of certificates as to incorporation) of the Companies Act, 1963.

²³ Regulation 13 of the 2002 Regulations.

to achieve this objective and comes within the scope of judicial co-operation in civil matters within the meaning of Article 81 of the Treaty on European Union and the Treaty on the Functioning of the European Union.²⁴

In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it was deemed necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in an EU law measure which is binding and directly applicable in Member States.²⁵

2.3.1 Regulation (EU) 2015/848 of the European Parliament and of the Council

Where the applicable insolvency proceedings were opened after the 26th June 2017, the recognition of and co-operation with insolvency proceedings²⁶ originating in other Member States of the EU (apart from Denmark), is governed by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (“the EU Insolvency Regulation”). Acts committed by a debtor before that date shall continue to be governed by the EC Insolvency Regulation.

The formerly applicable European Communities (Corporate Insolvency) Regulations 2002 (S.I. 333 of 2002) (“the 2002 Regulations”) were revoked by the 2014 Act, which now reflects their contents in Part 11.

Scope

The EU Insolvency Regulation applies to proceedings where the centre of the debtor's main interests is located in the European Union²⁷ and governs collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.²⁸ In the context of Irish corporate insolvency law this includes: compulsory winding up by the court; creditors' voluntary winding up (with confirmation of a court) and examinership.²⁹ Members' voluntary windings-up, schemes of arrangement and receiverships are not included.³⁰

The EU Insolvency Regulation does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.³¹ Separate EU legislation in the form of Council Directives governs the effects within the EU of the reorganisation and winding up of credit institutions³² and insurance undertakings,³³ and extends to all EU Member States and EEA countries. Other directives ensure legal enforceability of

²⁴ Consolidated Versions of the Treaty of the European Union and the Treaty of the Functioning of the European Union.

²⁵ Preamble to Regulation (EU) 2015/848.

²⁶ Whether proceedings in respect of corporations or natural legal persons.

²⁷ Recital 25 of the EU Insolvency Regulation.

²⁸ Article 1(1).

²⁹ Annex A of the EU Insolvency Regulation.

³⁰ Section 437(1) of the Companies Act 2014 gives a receiver of the property of a company power to do, in the State and elsewhere, all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the objectives for which s(he) was appointed; however, this is not applicable to the operation of the Model Law which is insolvency-based.

³¹ Article 1(2).

³² Council Directive 2001/24/EC.

³³ Council Directive 2001/17/EC.

transfer orders, netting agreements and related collateral securities³⁴ and of financial collateral arrangements³⁵ and protect these from the effects of a local insolvency. This principle is reflected in the exceptions to the choice of law rules of the EU Insolvency Regulation mentioned below.

Jurisdictional rules

The EU Insolvency Regulation introduces uniform rules as to jurisdiction for the opening of insolvency proceedings affected in the Member States concerned which displace their national jurisdictional rules.³⁶ These rules rest on the concepts of “the centre of a debtor’s main interests” (COMI), “main” insolvency proceedings, “territorial” insolvency proceedings “secondary” insolvency proceedings.³⁷

Recital 28 of the EU Insolvency Regulation states that “when determining whether the centre of the debtor’s main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests.”

Main insolvency proceedings may be opened in the Member State where COMI is located. These proceedings have universal scope and aim at encompassing all the debtor’s assets,³⁸ and any insolvency proceedings opened subsequently in another Member State are called secondary proceedings.³⁹ Secondary proceedings may be opened in a Member State other than where COMI is located only if the debtor has an establishment⁴⁰ within the territory of that Member State, in which event the effects of those proceedings are restricted to the assets of the debtor situated in that Member State’s territory.⁴¹

Choice of law rules

The EU Insolvency Regulation also establishes uniform choice of law rules determining which Member State’s law shall govern the various aspects of insolvency proceedings within the Regulation’s scope.⁴² In general, the law applicable to insolvency proceedings and their effects is that of the Member State where proceedings are opened, and this covers matters such as who may be the subject of insolvency proceedings, what assets are captured by the proceedings and how they are to be treated, the respective powers of the debtor and liquidator, the effects of the proceedings on transactions, claims admissible and the manner of their proof.⁴³

There are various exceptions to this general rule and they concern such matters as rights in rem⁴⁴ of third parties to assets located in a Member State other than that in which the proceedings

³⁴ Council Directive 98/26/EC on settlement finality in payment and securities settlement systems.

³⁵ Council Directive 2002/47/EC on financial collateral arrangements.

³⁶ Article 3.

³⁷ Article 3.

³⁸ Recital 23.

³⁹ In *Eurofood*, the European Court of Justice held that any challenge to the jurisdiction of a court opening proceedings as main proceedings must be made to that court (par. 44 of the judgment).

⁴⁰ Viz. “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods”: Article 2(h).

⁴¹ Article 3(2).

⁴² Articles 4 to 15.

⁴³ Article 7.

⁴⁴ Rights in rem refer to rights over specific things, usually real property.

were opened,⁴⁵ rights based on reservation of title to assets located in such a Member State,⁴⁶ contracts affecting immovable property,⁴⁷ rights and obligations of the parties to a payment or settlement system or to a financial market (the applicable law being the law of the Member State applicable to that system or market)⁴⁸ and employment contracts.⁴⁹

Recognition and enforcement of insolvency proceedings

Orders opening insolvency proceedings made by a court in the Member State where COMI is located and orders made by that court in the course of or in terminating such proceedings⁵⁰ must be recognised in all the other Member States from the time they come into effect.⁵¹ Generally, such orders will, without further formalities, produce the same effects in any other Member State as in the Member State of COMI as long as no secondary proceedings are opened in the other Member State.⁵²

A Member State may refuse to recognise insolvency proceedings opened in another Member State or enforce orders made in such proceedings where the effects of recognition or enforcement “would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.”⁵³

A temporary administrator, such as a provisional liquidator, appointed in the Member State where COMI is located may request any measures in another Member State to secure and preserve assets in that State pending opening of the main proceedings.⁵⁴

Co-Operation and Communication

Where main and secondary proceedings are being conducted concurrently, the liquidators in each proceeding are obliged to communicate information to each other - immediately, in the case of information relevant to the other proceedings - and cooperate with each other.⁵⁵ They, as well as individual creditors,⁵⁶ may lodge claims in the other proceedings on behalf of the creditors in their proceedings⁵⁷ and may participate in the other proceedings as a creditor might do.⁵⁸

The EU Insolvency Regulation makes provision to ensure that creditors in other Member States are informed of the opening of insolvency proceedings and are facilitated in lodging claims.⁵⁹

⁴⁵ Article 8.

⁴⁶ Article 10.

⁴⁷ Article 8.

⁴⁸ Article 12.

⁴⁹ Article 13.

⁵⁰ Article 19.

⁵¹ Article 19.

⁵² Article 20.

⁵³ Article 33.

⁵⁴ Article 52.

⁵⁵ Article 43.

⁵⁶ Article 45(1).

⁵⁷ Article 45(2).

⁵⁸ Article 45(3).

⁵⁹ Articles 53 to 55.

Chapter V – Insolvency Proceedings of Members of a Group of Companies

Chapter V of the EU Insolvency Regulation addresses insolvency proceedings of members of a group of companies. Group coordination proceedings may be requested of any court having jurisdiction over the insolvency proceedings of a group member, by an insolvency practitioner appointed in insolvency proceedings opened in relation to a group member and in accordance with the conditions provided for by the law applicable to the proceedings in which the insolvency practitioner has been appointed.⁶⁰

2.4 The Position at Common law

Ireland has a common law legal system which has evolved from court judgments over centuries. Precedent as a source of law is the main characteristic feature of a common law system. It involves the citing of a judgment or decision of a court of law as an authority to justify a decision in a case involving a similar set of facts. Currently Ireland and the United Kingdom, (and Cyprus and Malta to an extent) are the only EU countries operating under a common law legal system.

The recognition and assistance of foreign insolvency proceedings not subject to the EU Insolvency Regulation or section 1417 of the Companies Act 2014 (those originating in Denmark and all non-EU States) remains governed by the common law rules of private international law in this area.

2.4.1. The ongoing Development of the Common Law in Ireland

For many years, there was a scarcity of relevant modern Irish case law. However, a number of recent cases have shed light on the common law entitlement of a court to recognise insolvency proceedings in another jurisdiction.

The first of these cases was the decision of the Supreme Court on the 23rd February 2012 in *Re Flightlease (Ireland) Limited (In Voluntary Liquidation)*,⁶¹ where the company's liquidators had asked the court to determine whether an order made by a Swiss court in a Swiss liquidation would be enforceable against the Irish company. The order would require the return of moneys paid to the Irish company at a disadvantage to creditors. The nature of that order was that it was an order *in personam*. Applying the common law rules, the court held that such an order would only be enforceable if the Irish company was present or carrying on business in Switzerland when the proceedings were instituted and had submitted to the jurisdiction of the Swiss courts. As neither of these factors were present the court ruled it would be inappropriate for the Irish court to recognise any judgment on the relevant matter in the Swiss liquidation proceedings.

In coming to its determination, Finnegan J stated.

“In the area of conflicts of law it is desirable to await development of a broad consensus before developing the common law and it has not been suggested that such a consensus exists among common law jurisdictions. It is in any event desirable that such a significant change in the common law should be by legislation as appears to be the case in the

⁶⁰ Article 61(1), (2).

⁶¹ *Re Flightlease (Ireland) Limited (In Voluntary Liquidation)* [2012] 1 IR 722.

United Kingdom. It is suggested by commentators that the common law in the United Kingdom is developing so that it will approximate with Council Regulation (E.C.) No. 1346/2000. For such a change to occur in this jurisdiction it is desirable that it should occur by way of legislation rather than by judicial development having regard to the significant changes which would be wrought in the common law”.

However, delivering a separate judgment in which he concurred with Finnegan J, O’Donnell J noted that in the absence of an international agreement and domestic legislation, the courts should seek to retain a prospect of further development of the common law in this area.⁶²

In *Fairfield Sentry Limited (in liquidation) & Anor. v Citco Bank Nederland and Ors*,⁶³ a judgment of the High Court delivered some days after *Flightlease*,⁶⁴ and wherein *Flightlease* is not referenced, Finlay-Geoghegan J was satisfied, notwithstanding the paucity of authority, that, at common law, inherent jurisdiction to recognise orders of foreign courts existed. She stated:

“...pursuant to common law in Ireland, the court has an inherent jurisdiction to recognise orders of foreign courts (in the sense of non-EU courts) for the winding up of companies and the appointment of liquidators.”⁶⁵

The Court noted however that ‘the common law is undeveloped in relation to any further assistance to be given to foreign liquidators.’⁶⁶

In *Re Mount Capital Fund Limited (in liquidation) & Ors*,⁶⁷ Laffoy J noted the Court had to consider whether the decision in *Fairfield* was reconcilable with the Supreme court’s decision in *Flightlease*.

At issue was an application by joint liquidators for recognition of the liquidation of two companies based in the British Virgin Islands. The joint liquidators also sought orders that the High Court and its officers act in aid of the Eastern Caribbean Supreme Court in the High Court of Justice in the British Virgin Islands in granting the liquidators liberty to apply for an order under section 245 of the Companies Act 1963 to obtain books and records of the companies from certain entities in Ireland. The liquidators argued that there was equivalence between the provisions of the Act of 1963 and the Insolvency Act 2003 of the British Virgin Islands, and that the court had inherent jurisdiction pursuant to common law to grant the orders sought. Laffoy J considered that both judgments were reconcilable:

“I am satisfied that the ratio decidendi⁶⁸ of [Flightlease]...is limited to the situation in which it is sought to enforce at common law "liability to pay a sum" on foot of a judgment made by a foreign court in liquidation proceedings being conducted in this jurisdiction in

⁶² At para. 82.

⁶³ [2012] 1 IEHC 81.

⁶⁴ on the 28th February 2012.

⁶⁵ *Fairfield Sentry Limited (in liquidation) & Anor. v. Citco Bank Nederland and Ors*. [2012] 1 IEHC 81, para.23.

⁶⁶ At para. 111.

⁶⁷ [2012] 2 I.R. 486.

⁶⁸ Lit. “the reason for the decision”.

accordance with Irish law. I am of the view that it does not preclude this court from giving recognition to orders of the type made by the High Court of Justice of the British Virgin Islands in relation to the companies.”

In *Re Sean Dunne, (a Bankrupt)*,⁶⁹ it was claimed that the Official Assignee in Ireland had no jurisdiction to deal with the assets of the bankrupt where there had been a prior foreign bankruptcy order. In the Supreme Court, Laffoy J commented⁷⁰ that:

“... there have been a number of recent decisions of the High Court in this jurisdiction which recognise that at common law an inherent jurisdiction exists, deriving from the underlying principle of universality of insolvency proceedings, by virtue of which the courts in this jurisdiction can give recognition to insolvency proceedings in a foreign jurisdiction and act in aid of the court in that jurisdiction: In Re Drumm (a bankrupt) [2010] IEHC 546; Fairfield Sentry Limited (in liquidation) & Anor. v. Citco Bank Nederland and Ors. [2012] 1 IEHC 81; and In Re Mount Capital Fund Limited (in liquidation) & Ors. [2012] 2 I.R. 486. However, if the High Court had jurisdiction to adjudge the Appellant a bankrupt on the petition of the Petitioner, and assuming the Petitioner established compliance with the criteria necessary to give it entitlement to such an order, there is absolutely no basis in law on which the High Court could abstain from exercising its jurisdiction on the ground that, instead of exercising its entitlement, the Petitioner should have attempted to persuade the Chapter 7 Trustee to pursue the order in aid route.”

The Supreme Court cited with approval the statement of the Privy Council in *Singularis*⁷¹ in support of the view that “this Court can only act within the limits of its own statutory and common law powers.”

In *A.A.-v-B.A.*,⁷² Charleton J in the Supreme Court cited the *Sean Dunne* case with approval and noted that:

*“In this jurisdiction we have an official trustee tasked with the independent and fair discharge of the collection and distribution of all of the estate of a bankrupt. He fulfils that task in exemplary fashion. His authority, exercised under that of the High Court, is not to be automatically ceded merely because a foreign power has been persuaded to take up a jurisdiction where it may be virtually all of the relevant assets in reality lie outside the boundaries of that court system. Were such an alienation of authority possible, the clear risk would be that some systems might be more favourable to debtors than others or even that there might be a system enabling the return of assets to a bankrupt notwithstanding that the estate in bankruptcy is insufficient to meet liabilities. Such possibilities would caution against unthinkingly adopting such a principle.”*⁷³

⁶⁹ [2015] IESC 42.

⁷⁰ At para. 63, Denham CJ & Charleton J concurring.

⁷¹ This decision is considered further in Appendix 6.

⁷² [2015] IESC 102.

⁷³ *Ibid* at page 13.

It is, as yet, unclear what the long-term effect of the *Sean Dunne* decision will be in the context of the development of the common law power of recognition and assistance. The particular facts of the *Sean Dunne* case involved an individual whose primary assets and creditors were in Ireland and who held very few assets in the United States.

The emphasis placed by the Supreme Court on the constraints on development of a cross-border assistance facility for insolvency proceedings at common law, and the lack of clarity as to the parameters of the assistance available to foreign liquidators, serve to underline the uncertainty and lack of predictability which reliance on the common law for a solution in this area would entail. Some elements of the position at common law in Australia and the United Kingdom are set out further in Appendix 6.

2.5 Interplay between Irish, EU and UNCITRAL Law⁷⁴

The EU Insolvency Regulation will prevail in relation to insolvencies within the EU. The Model Law would only apply to the extent the Regulation does not apply. If adopted the hierarchical order would be:

- 1) The EU Insolvency Regulation;
- 2) Relevant Irish statutes governing the insolvency of companies e.g. Companies Act 2014;
- 3) The common law conflict of law rules relating to the recognition of foreign judgements in insolvency proceedings insofar as it is not displaced by the Model Law legislation.

In the event of the adoption of the Model Law, it would fit into the second of the above three categories.

A practical view

What implications would the adoption of the Model Law have for the commencement of insolvency proceedings in multiple jurisdictions involving a company which has an activity based in Ireland?

By way of example, a fictitious United States registered company, 'U.S. Inc.' makes an application for recognition in the Irish courts of the American Chapter 11 bankruptcy⁷⁵ proceedings. The present approach of the Irish courts to the recognition of the insolvency processes is determined on a case-by-case basis in accordance with conflict-of-law rules. So, whereas the common law dictates that Irish courts have an inherent jurisdiction to recognise orders of foreign courts (in the sense of non-EU Courts) for the winding up of companies and the appointment of liquidators, the decision would still be subject to the interpretation of a court, as opposed to being determined by the process set out in the Model Law. On the other hand, were Ireland to adopt the Model Law, the Chapter 11 bankruptcy proceedings would be recognised subject to the fulfilment of the necessary conditions under the Model Law.

⁷⁴ In the event of adoption of the Model Law.

⁷⁵ This chapter of the United States Bankruptcy Code generally provides for reorganisation, usually involving a corporation or partnership. A chapter 11 debtor usually proposes a plan of reorganisation to keep its business alive and pay creditors over time. People in business or individuals can also seek relief in chapter 11.

Jurisdiction and choice of law

The Model Law, unlike the EU Insolvency Regulation, does not seek to displace existing national rules or to displace existing choice of law rules (i.e. which law should apply to the insolvency process or issues ancillary thereto). These remain the prerogative of the enacting State.

The Model Law yields to an enacting state's obligations under any multi-lateral or bilateral treaties or agreements.⁷⁶ Thus, enactment of the Model Law would not lead to conflict with the application of the EU Insolvency Regulation under Irish law.

The Model Law is suitable for incorporation into the existing laws of any country. A key principle of the Model Law is that it is not based upon reciprocity between states. Rather, it provides a mechanism which, when incorporated into the domestic law of the enacting State, enables recognition to be given to foreign insolvencies and relief and assistance to foreign officeholders. Enacting States are free to adopt the Model Law in its entirety, or to expand, adapt, or modify it.

⁷⁶ Article 3, which provides: "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."

Chapter 3. Examination of the Model Law

3.1 Introduction

The Model Law is designed to assist States to supplement their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency. It focuses on authorizing and encouraging co-operation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws.

For the purposes of the Model Law, a cross-border insolvency is one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

The Model Law is stated to apply in cases where:

- (a) assistance is sought in the enacting State by a foreign court or a foreign representative in connection with a foreign proceeding;
- (b) assistance is sought in a foreign State in connection with a domestic insolvency proceeding (i.e. one under the insolvency law of the enacting State);
- (c) a foreign proceeding and a domestic insolvency proceeding concerning the same debtor are taking place concurrently; or
- (d) creditors or other interested persons in a foreign State have an interest in initiating or participating in a domestic insolvency proceeding.⁷⁷

This report seeks to outline the likely effect of the Model Law, if adopted, on the status of foreign insolvency proceedings and representatives under Irish law. However, as (b) indicates, the Model Law also seeks to facilitate local insolvency representatives requiring assistance abroad. Article 5 permits local insolvency representatives designated under the law of the enacting State to act in a foreign State on behalf of an insolvency proceeding originating in the enacting State.

This chapter will review each of the 32 articles contained in the Model Law, and consider the implications for Irish law of the adoption of each of them. While many of the articles would not require significant or any alteration in terms of their potential incorporation into Irish law, certain of them, particularly those which relate to the comparative treatment of statutorily protected creditors in Ireland and abroad, will bear more in-depth analysis. (articles 13, 21 & 22).

To assist with the potential drafting process should the Minister choose to adopt the Model Law, under each individual article, a recommendation has been made to adopt the article as it is drafted or to adopt with certain modifications so as to tailor the text for its inclusion into Irish law.

3.2. Preamble

Preamble

⁷⁷ Article 1(1).

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:

- (a) Co-operation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Insolvency

Given that the notion of what constitutes insolvency varies from jurisdiction to jurisdiction, the Model Law does not prescribe a definition for "insolvency". The Model Law deals with proceedings aimed at liquidating or reorganizing the financially distressed debtor as a commercial entity

The definition of insolvency in the context of the Companies Act, 2014 is generally accepted as being that a company is unable to pay its debts⁷⁸ as they fall due.

The definition of 'insolvent' pursuant to the Personal Insolvency Act, 2012, in relation to a debtor, shall be construed as meaning that the debtor is unable to pay his or her debts in full as they fall due.⁷⁹

In relation to the definition of "insolvency proceedings" it is noteworthy that the Enactment Guide states as follows at paragraph 50: -

50. It should be noted that in some jurisdictions the expression "insolvency proceedings" has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person or only to collective proceedings against a natural person. No such distinction is intended to be drawn by the use of the term "insolvency" in the Model Law, since the Model Law is designed to be applicable to proceedings regardless of whether they involve a natural or a legal person as the debtor. If, in the enacting State, the word "insolvency" may be misunderstood as referring to one particular type of collective proceeding, another term should be used to refer to the proceedings covered by the Law.⁸⁰

Irish 'Insolvency proceedings' from the perspective of the EU Insolvency Regulation means the following types of proceedings in the Irish context: -

- (i) Compulsory winding-up by the court,

⁷⁸ cf. CA '14 s 569(1)(d).

⁷⁹ Personal Insolvency Act, 2012 at s 2(1).

⁸⁰ The Guide at para 50, p33.

- (ii) Bankruptcy,
- (iii) The administration in bankruptcy of the estate of persons dying insolvent,
- (iv) Winding-up in bankruptcy of partnerships,
- (v) Creditors' voluntary winding-up (with confirmation of a court),
- (vi) Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution,
- (vii) Examinership,
- (viii) Debt Relief Notice,
- (ix) Debt Settlement Arrangement,
- (x) Personal Insolvency Arrangement.

At section 2(1), the Companies Act 2014 defines “insolvency proceedings” as meaning *insolvency proceedings opened under Article 3 of the EU Insolvency Regulation in a Member State, other than the State and Denmark, where the proceedings relate to a body corporate.*

Recommendation

As the term ‘insolvency proceedings’ has a wide meaning and not a ‘narrow technical meaning’ it is the view of the Group that this preamble, in so far as it applies to company law, could be reflected, in the heads of a Bill or explanatory memorandum. However, it is not typical for an Irish legislative instrument to have a preamble.

3.3 Chapter I. General Provisions

Article 1

Article 1. Scope of application

1. This Law applies where:

(a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) Assistance is sought in a foreign State in connection with a proceeding under [*identify laws of the enacting State relating to insolvency*]⁸¹;

or

(c) A foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] in respect of the same debtor are taking place concurrently; or

(d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [*identify laws of the enacting State relating to insolvency*].

2. This Law does not apply to a proceeding concerning [*designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

Article 1 of the Model Law outlines the types of issue that may arise in cases of cross-border insolvency and for which the Model Law provides solutions: -

- (a) inward-bound requests for recognition of a foreign proceeding;
- (b) outward-bound requests from a court or insolvency representative in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State;
- (c) coordination of proceedings taking place concurrently in two or more States; and
- (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State.⁸²

For the purposes of this report, the Model Law has been limited in its application to corporate bodies and, accordingly, Article 1 is only to be applied in respect of proceedings under the Companies Act 2014.

Article 1(2): The exclusion at Article 1(2) is similar to that which exists in Article 1.2 of the EU Insolvency Regulation, which states as follows: -

...

2. *This Regulation shall not apply to proceedings referred to in paragraph 1 that concern:*

⁸¹ Define 'Irish Insolvency Laws' throughout as Part 9, Chapter 1; Part 10; Part 11; Part 22, Chapter 3; and Part 25, Chapter 5 of the Companies Act 2014.

⁸² Paragraph 53 of the Guide to Enactment and Interpretation at page 35.

- (a) *insurance undertakings;*
- (b) *credit institutions;*
- (c) *investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or*
- (d) *collective investment undertakings.*

The enacting State may exclude enterprises (e.g. banks or insurance companies) which under its law are subject to a special insolvency regime.⁸³

By way of comparison, as mentioned above⁸⁴ the EU Insolvency Regulation has no application to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.⁸⁵

Recommendation

It is the view of the Group that article 1(1) should be adopted and modified to allow for the inclusion of Irish Insolvency Law as defined (see footnote to Article 1(1)).

It is the view of the Group that section 1(2) should be adopted. The Group suggests that the exclusion of certain undertakings from the scope of the Model Law would mirror the exclusions provided for in the Insolvency Regulation subject to consultation with the Minister of Finance and the Central Bank.

Article 2

Article 2. Definitions

For the purposes of this Law:

- (a) “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 supervision by a foreign court, for the purpose of reorganization or liquidation;
- (b) “Foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) “Foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;
- (d) “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;
- (e) “Foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding;

⁸³ Article 2(2).

⁸⁴ At para 2.3.1.

⁸⁵ Sections 1419 to 1428 of the Companies Act 2014.

(f) “Establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Article 2 of the Model Law defines the terms specific to cross-border scenarios. The Enactment Guide gives the following guidance in relation to definitions: -

“Since the Model Law will be embedded in the national law, Article 2 only needs to define the terms specific to cross-border scenarios. [T]o the extent that it would be useful to define in the national statute the term used for such a person or body (rather than just using the term commonly employed to refer to such persons), this may be added to the definitions in the enacting law.”⁸⁶

The centre of main Interests

The following excerpt from the Enactment Guide outlines the circumstances in which foreign proceedings will be considered “main proceedings”. The formulation is almost identical to that contained in the EU Insolvency Regulation.

81. A foreign proceeding is deemed to be the “main proceeding” if it has been commenced in the State where “the debtor has the centre of its main interests”. This corresponds to the formulation in Article 3 of the EC Regulation thus building on the emerging harmonization as regards the notion of a “main proceeding”. The determination that a foreign proceeding is a “main” proceeding may affect the nature of the relief accorded to the foreign representative under articles 20 and 21 and coordination of the foreign proceeding with proceedings that may be commenced in the enacting State under chapter IV and with other concurrent proceedings under chapter V.⁸⁷

Where is the centre of main interests?

The phrase centre of main interests is not defined in this section of the model law but see Article 16(3). The concept is very familiar in Irish Law, being derived from the EU Regulation and the EU Insolvency Regulations.

The term “collective” is well known in Irish Law and distinguishes a formal insolvency regime (under which the debtor’s assets are realised for the benefit of all creditors) from private proceedings against a debtor, in which a single creditor acts for its own benefit, such as receivership.⁸⁸

The EU Insolvency Regulation defines ‘establishment’ at recital (10) as meaning

‘any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets’;

⁸⁶ The Enactment Guide at para 62, p38.

⁸⁷ The Enactment Guide, para 81 at p43.

⁸⁸ *Williams v Simpson (No 5)* [2010] NZHC 1786 at [5].

The principal difference therefore between the treatment of the ‘Establishment’ definition by the EU Insolvency Regulation as compared with the Model Law definition is the time delimitation element contained in the former.

The definitions of “foreign main proceeding” and “foreign non-main proceeding” correspond substantially to the concepts of main and territorial/secondary proceedings in the EU Insolvency Regulation.

Recommendation

It is the view of the Group that this article should be adopted as drafted.

Article 3

Article 3. International obligations of this State

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.

Article 3 expresses the principle of supremacy of international obligations of the enacting State over internal law.⁸⁹

This is a reference to the status of the Model Law as such, which would be subordinate to the terms and provisions of the EU Insolvency Regulation, for example.

Ireland’s implementation of Article 3 should confirm the supremacy of EU law – namely, the EU Insolvency Regulation but it is suggested that EU Insolvency Regulation is specified.

Recommendation

Adopt Article 3 with the following modification: -

“To the extent that this Law conflicts with the European Insolvency Regulation or 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 European Insolvency Regulation, treaty or agreement prevail.”

Article 4

Article 4. [Competent court or authority]⁹⁰

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

⁸⁹ The Enactment Guide, paragraph 91, page 48.

⁹⁰ A state where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials of 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 the State governing the authority of *[insert the title of the government-appointed person or body]*.

Article 4 specifies the relevant courts and/or authorities who would carry out the functions of the Model Law in the areas of recognition of foreign proceedings and co-operation with foreign courts.

It is recommended that the High Court should, in view of its current jurisdiction in relation to insolvency, be designated as the competent court for the purpose of discharging the relevant functions under the Model Law, such as the recognition of foreign proceedings and co-operation with foreign courts.

Recommendation

It is the view of the Group that this article should be adopted, specifying the inclusion of ‘the High Court’ as the competent court.

Article 5

Article 5. Authorization of [insert title of person/body administering reorganization or liquidation per law of enacting State] to act in a foreign State

A [insert the 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.

The person or body administering a reorganisation or liquidation under the law of the enacting State could be separately defined (for example as “Irish Insolvency Officeholder”) and will include liquidators, provisional liquidators and examiners. Liquidators to include court appointed liquidators and liquidators appointed through creditors’ voluntary liquidation.⁹¹

Recommendation

It is the view of the Group that this article should be adopted and modified to include references to newly defined Irish Insolvency Officeholder.

Article 6

Article 6. Public policy exception

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.

In relation to Article 6 the following commentary of André J. Berends in his work on the Model Law, discusses the usefulness of Article 6: -

⁹¹ From an Irish perspective, the fact that both the United Kingdom and the United States have already adopted the Model Law means that an Irish representative will be able to gain assistance in these jurisdictions.

“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”.⁹²

Recommendation

Adopt as drafted.

Article 7

Article 7. Additional assistance under other laws

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.

The approach adopted by Article 7 ensures that the Model Law of the enacting State, the EU Insolvency Regulation, and the common law operate in parallel. Common law assistance is necessarily subordinate to legislative policy such as that evinced in the Model Law. The common law may supplement the Model Law, but not trump it.⁹³

Recommendation

It is the view of the Group that this article should be adopted as amended in the following terms:

Nothing in this Law limits the power of a court or an Irish Insolvency Officeholder to provide additional assistance to a foreign representative under other laws (to include constitutional law, statute law and common law) of this State.

Article 8

Article 8. Interpretation

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.

As the Model Law is not a treaty and does not create binding international obligations, its operation depends exclusively on how it is enacted and interpreted locally. The common thread uniting all national enactments is Article 8 of the Model Law. In *Rubin v Eurofinance*, the UK High Court attached importance to Article 8 when interpreting the British Model Law: “[A]rticle 8

⁹² *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview* – Berends, André J., (1998) 6 Tulane J Int Law 309

⁹³ Adapted from Chan Ho, *Ibid* at p183; *Re Stanford International Bank* [2009] EWHC 1441 (Ch); [2009] BPIR 1157 at [104]-[105]. But see *Schmitt v. Deichmann* [2012] EWHC 62 (Ch).

provides that in interpreting the [British Model] Law, regard is to be had to its international origin and to the need to promote uniformity in its application. Both these considerations would be disregarded if the court were to adopt a parochial interpretation of ‘debtor’ and as a result refuse to provide any assistance in relation to a bona fide insolvency proceeding taking place in a foreign jurisdiction.”⁹⁴

Recommendation

It is the view of the Group that this article should be adopted as drafted.

Article 9

Article 9. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

Article 9 is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, intending to thus free the representative from having to meet formal requirements such as licenses or consular action.⁹⁵

It should be noted that direct access in practice means an application to court using a barrister, instructed by a solicitor who in turn is instructed by the foreign representative.

Recommendation

It is the view of the Group that this article should be adopted as drafted.

Article 10

Article 10. Limited jurisdiction

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.

Article 10 makes clear that the mere making of an application under the aegis of the Model Law would not submit the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the Irish courts for any purpose other than the application.

Recommendation

It is the view of the Group that this article should be adopted as drafted.

Article 11

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

⁹⁴ [2009] EWHC 2129 (Ch); [2010] 1 All ER (Comm) 81 at [40]; *ibid* at p186.

⁹⁵ The Enactment Guide at para 108, p55.

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.

Article 11 ensures that a foreign representative can file an application for the opening of an Irish Insolvency Proceeding, as outlined in the following quote from Berends work on the Model Law:-

“The UNCITRAL 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 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 proceeding in the enacting State.”⁹⁶

Recommendation

It is the view of the Group that this article should be adopted to include the definition of ‘Irish Insolvency Law’.

Article 12

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

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 intent in this article is reflected in all jurisdictions that have adopted the Model Law.⁹⁷

The term ‘participate’ above is not defined in order not to restrict its breadth and flexibility. Commentators observe that the foreign representative’s right to participate in British insolvency proceedings is not limited to intervention in court proceedings, but includes the entire insolvency process: [T]he drafters [of the Model Law] intended ‘participate’ to mean the making of petitions, requests or submissions concerning issues such as protection, realisation or distribution of assets, or co-operation and coordination with the foreign proceeding⁹⁸.

⁹⁶ Berends, Ibid at page 340.

⁹⁷ Chan Ho, Ibid at page 9.

⁹⁸ Ibid at p188; Andre J Berends “The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview” (1998) 6 Tul J Int’l & Comp L 309, 342.

Recommendation

It is the view of the Group that this article should be adopted and modified to include the definition of Irish Insolvency Law.

Article 13

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

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 the laws of the enacting State in relation 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].⁹⁹

Article 13(1) embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such a proceeding, should not be treated less favourably than local creditors.¹⁰⁰

Article 13 Paragraph 2 clarifies that the principle of non-discrimination enshrined in paragraph 1 does not disturb the provisions on the ranking of claims in insolvency proceedings. We do not currently have legislative provisions assigning special ranking to foreign creditors. As such, it is the view of the Group that this article should be adopted to include definition of Irish Insolvency Law and without the exception in paragraph 2.

Recommendation

It is the view of the Group that this article should be adopted to include definition of Irish Insolvency Law and without the exception in paragraph 2.

Article 14

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

⁹⁹ The enacting State may wish to consider the following alternative wording to replace paragraph 2 of 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].”

¹⁰⁰ The Enactment Guide at para 118, p60.

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 a 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.

Recommendation

It is the view of the Group that this article should be adopted as drafted inserting the definition of the Irish Insolvency Law.

Article 15

Article 15. Application for recognition of a foreign proceeding

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.

Article 15 defines the core procedural requirements for an application by a foreign representative for recognition. In incorporating the provision into national law, we believe it is desirable not to encumber the process with additional procedural requirements beyond those referred to. With article 15, in conjunction with article 16, the Model Law provides a simple,

expeditious structure to be used by a foreign representative to obtain recognition.¹⁰¹ In implementing the Model Law in Ireland Article 15.3 could be extended to include all proceedings in being and not just foreign proceedings.

Recommendation

It is the view of the Group that this article should be adopted with the inclusion in 15(3) of the phrase “and proceedings under Irish Insolvency Law” after the phrase ‘foreign proceedings’.

Article 16

Article 16. Presumptions concerning recognition

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, 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.

Article 16 establishes presumptions that facilitate swift action. These presumptions allow the court to expedite the evidentiary process. At the same time, they do not prevent the court, in accordance with the applicable procedural law, from calling for or assessing other evidence if the conclusion suggested by the presumption is called into question.¹⁰²

The third paragraph seeks to avoid lengthy discussions about what constitutes the debtor’s centre of main interests and in this regard closely resembles the EC Regulation.¹⁰³

Recommendation

It is the view of the Group that this article should be adopted as drafted in so far as it applies to company law.

Article 17

Article 17. Decision to recognise a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognised if:
 - (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
 - (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
 - (c) The application meets the requirements of paragraph 2 of article 15; and
 - (d) The application has been submitted to the court referred to in article 4.

¹⁰¹ The Enactment Guide at paragraph 127.

¹⁰² The Enactment Guide, para 137 at page 68.

¹⁰³ Berends, *ibid* at pp353-4.

2. The foreign proceeding shall be recognised:
 - (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 subparagraph (f) of article 2 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.

Article 17 mandates that, once the necessary criteria have been satisfied, a foreign proceeding shall be recognised as a foreign main proceeding or non-main proceeding. The local court is obliged to determine the recognition application promptly. Article 17 has been implemented in all jurisdictions.¹⁰⁴

The provisions of article 17.1(c) were considered by the Group. While the requirements for an application for recognition set out in Article 15 are all compulsory, the highlighting of only paragraph 2 of article 15 in article 17.1(c) may give rise to confusion. The United Kingdom have provided in its equivalent article that “the application meets the requirements of paragraphs 2 and 3 of article 15”.

Recommendation

It is the view of the Group that this article should be adopted with a minor amendment to Article 17.1(c) deleting the words ‘paragraph 2 of’ so that it would simply read: “The application meets the requirements of article 15; and”.

Article 18

Article 18. Subsequent information

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 recognised 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.

In the event that a substantive change in the status of either the recognised foreign proceeding or the foreign representative should occur after the application for recognition of the foreign proceeding, the foreign representative is obliged to inform the court of that change.

Recommendation

It is the view of the Group that this article should be adopted as drafted.

¹⁰⁴ Look Chan Ho, *Ibid* at page 10.

Article 19

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

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 paragraph 1 (c), (d) and (g) of article 21.

2. *[Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]*

3. Unless extended under paragraph 1 (f) of article 21, 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.

Interim relief pending recognition

Pending the determination of an application for recognition of a foreign representative, Article 19(1) gives the court discretion where "urgently needed to protect the assets of the debtor or the interests of the creditors," to grant interim relief. The court may decline to grant such relief where to do so would interfere with the conduct of a foreign main proceeding.¹⁰⁵

Relief referred to under the preceding two paragraph headings may only be granted or denied where the court is satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.¹⁰⁶ Such relief may also be granted on terms,¹⁰⁷ and may be modified or discharged by the court at the request of the foreign representative or a person affected (e.g. a local claimant) or on its own initiative.¹⁰⁸

Recommendation

It is the view of the Group that this article should be adopted as drafted with an insertion that the court may direct that notice of the application be given to any relevant parties and the mode of notice to be given.

Article 20

Article 20. Effects of recognition of a foreign main proceeding

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 is stayed;

¹⁰⁵ Article 19(4).

¹⁰⁶ Article 22(1).

¹⁰⁷ Article 22(2).

¹⁰⁸ Article 22(3).

- (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.

Whereas the relief provided for by Articles 19 and 21 is discretionary, the effects provided for by Article 20 are not because they flow directly from the recognition of the foreign main proceeding. Another difference between discretionary relief under Articles 19 and 21 and the effects under Article 20 is that discretionary relief may be issued in favour of main and non-main proceedings, while the automatic effects only flow from recognition of foreign main proceedings.¹⁰⁹

It should be noted, however, that the first three effects outlined above do not automatically apply where a local insolvency proceeding has already been instituted prior to the application for recognition of the foreign main proceedings.¹¹⁰ If the application for recognition comes after the opening of the local proceeding, the three effects concerned must be modified or terminated if inconsistent with the local proceeding.¹¹¹

Article 20 provides for the automatic consequences of recognition of a foreign main proceeding. One automatic consequence of recognition is a form of moratorium (or stay) on proceedings against the debtor and execution against debtor's assets. Article 20, paragraph 2 enables the recording or mirroring of exceptions or limitations on the moratorium. It is important to note that the foreign proceedings could be reorganisation proceedings or liquidation proceedings. In order to consider whether any limitations or modifications should be recorded, the relevant provisions of other legislation which give effect to equivalent moratorium should be noted as follows:

Section 520 of the Companies Act 2014 sets out the effect of a petition to appoint an examiner on creditors and others which includes a prohibition on secured lenders realising their security, (except with the consent of the Examiner) and otherwise except by leave of the Court, on such terms as the Court may impose (see Section 520, sub-section 5).

In a liquidation, Section 606 of the Companies Act 2014 sets out a restriction on the rights of creditors to execute an attachment in the case of a company being wound up.

¹⁰⁹ The Enactment Guide at para 176, page 83.

¹¹⁰ Article 29(a)(ii).

¹¹¹ Article 29(b)(ii).

Sub-section 4 of Section 606 provides that the restriction is capable of being set aside by the Court on such terms as the Court thinks fit.

Section 678 of the Companies Act 2014 precludes any action or proceeding from being initiated or advanced against a company in liquidation, except by leave of the Court and subject to such terms as the Court may impose.

Looking beyond the Companies Act, EIR Recast (the Recast European Insolvency Regulation — Regulation EU2015/848) is concerned primarily with choice of law and jurisdiction in relation to Insolvency proceedings. As such, for the purpose of defining limitations on a moratorium, it is not directly comparable. However, it specifies certain exclusions in relation to the opening of proceedings, for example:

Article 8 - the opening of Insolvency proceedings does not affect the rights in rem of the third parties in respect of assets situated within the territory of another member state at the time of opening proceedings;

Article 9 - opening proceedings doesn't affect the rights of creditors to demand the set-off of their claim;

Article 20 - any restriction of creditor rights in particular a stay or discharge shall produce effects in the territory of another member state, only in the case of those creditors who have given their consent.

Article 46 - Obliges the court which opens secondary proceedings to stay the realisation of assets on request of the Insolvency practitioners in the main Insolvency proceedings.

In November 2016, the European Commission published a proposal for a directive of the European Parliament and of the Council on Preventative Restructuring Frameworks ("the Proposed Directive"). The Proposed Directive does propose a level of harmonisation among member states in respect of a preventative restructuring. Furthermore, it is modelled on Chapter 11 of the US Bankruptcy code and, as such, there are a large number of similarities between what is proposed and Examinership. Article 6 sets out provisions in relation to a stay, which could be summarised as follows:

- 1. Member States shall ensure that debtors can benefit from the stay;*
- 2. Member States shall ensure that a stay may be ordered in respect of all types of creditors, including secured and preferential creditors;*
- 3. The stay does not apply to workers extant claims;*
- 4. The stay shall be limited to a maximum period of not more than 4 months;*
- 5. Member States may enable judicial or administrative authorities to extend or vary the terms of the stay;*
- 6. Further extensions to the stay depend on progress being made on a restructuring plan and the continuation of the stay not unfairly prejudicing the rights of any parties;*
- 7. The total duration of the stay shall not exceed 12 months;*
- 8. Judicial or administrative authorities may lift the stay at the request of the insolvency practitioner or if it becomes clear that a critical mass of creditors do not support the continuation of negotiations.*

The stay envisioned by the Proposed Directive is similar to the stay achieved on the filing of the petition for Examinership. As such, the suggestion above (using the phrase on such terms as the Court deems fit) would appear to be consistent with the thrust of the Proposed Directive.

The approach to Article 20 of the Model law in the UK has been that the stay is stated to be given the same scope and effect as if the debtor had been made the subject of a winding-up order under the Insolvency Act. The UK legislation provides that the stay in particular does not affect any right that would be exercisable in a winding-up such as:

- (a) to take steps to enforce security;
- (b) to take steps to repossess goods under a hire purchase agreement;
- (c) rights of set off.

The UK provision also contains a general carve-out permitting the Court, on the application of the foreign representative or a person affected, to modify or terminate a stay and suspension.

Based on all of that analysis, Article 20 paragraph 2 could read as follows:

"The scope, and the modification or termination, of the stay and suspension referred to in paragraph one of this article is subject to the Court, on application of the foreign representative or any affected party, modifying or terminating such stay and suspension on such terms as the Court thinks fit."

Recommendation

It is the view of the Group that this article should be adopted as drafted with an insertion at article 20(2) to the effect that the stay is subject to such terms as the court deems fit.

Article 21

Article 21. Relief that may be granted upon recognition of a foreign proceeding

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 paragraph 1 (a) of article 20;
- (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;
- (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 paragraph 1 (c) of article 20;
- (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 paragraph 1 of article 19;

(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.

Article 21 outlines the discretionary reliefs available upon recognition of a main or non-main foreign proceeding, where necessary to protect the assets of the debtor or the interests of the creditors.

Significantly, the court, on recognising a foreign proceeding and being satisfied that “the interests of creditors in this State are adequately protected”, may entrust the distribution of all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court.¹¹²

Protection of preferential creditors

The protection provided by the Model Law for the entitlements of creditors who enjoy preferential status pursuant to Irish law, should be welcomed by creditors including the Revenue Commissioners.

Insofar as receivers and debenture holders are concerned, it may be deemed appropriate to specify here or elsewhere that secured rights and rights in rem are not affected (in a similar fashion to Article 8 of the EU Insolvency Regulation). Note also in this regard that Article 32 carves out rights in rem in relation to payment in concurrent proceedings.

A significant case arose under this article in 2014 in Australia: *Akers as joint foreign representative v. Deputy Commissioner of Taxation*, the Federal Court of Australia.¹¹³ The court took steps to protect the Australian tax authorities and held that the model law is qualified by the capacity to modify and terminate the effects of recognition granted under Article 17 of the Model Law, and qualified by the obligation under Article 21.2 to protect local creditors.

A more detailed treatment of the Akers case is contained in the Appendix 6 to this report.

In adapting the Model Law into Irish law, provision could be made for the granting of adequate protection to the interests of preferential creditors in this State, within the meaning of Article 21(2). Article 21(2) and Article 22 currently grant such protection for all creditors, however, specifying preferential creditors would strengthen the position.

¹¹² Article 12(2).

Recommendation

It is the view of the Group that this article should be adopted with specific reference in paragraph two (2) to preferential creditors.

Article 22

Article 22. Protection of creditors and other interested persons

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 granted under article 19 or 21, or at its own motion, modify or terminate such relief.

Article 22 seeks to balance the relief to be granted to a foreign representative and the interests of the persons who may be affected by that relief.¹¹⁴

At the discussion stage of the Model Law, 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 would be 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 large multinational businesses with local branches.

In many instances, the affected creditors will be local creditors. This will inevitably lead to a strategic and legislative temptation to limit and focus the protection of Article 22 on local creditors. It is suggested that to specifically define the local creditors (and establish criteria according to which they would receive special treatment) would not only demonstrate the difficulty of drafting a suitable text, but also show that there is no justification for discriminating against creditors on the basis of criteria such as place of business or nationality.¹¹⁵

Recommendation

It is the view of the Group that this article should be adopted with specific reference in paragraph 1 to preferential creditors.

Article 23

Article 23. Actions to avoid acts detrimental to creditors

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*].

¹¹⁴ The Enactment Guide, para 196 at page 90.

¹¹⁵ Adapted from the Enactment Guide, para 198 page 90.

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.

The types of actions referred to above would include proceedings to set aside unfairly preferential or fraudulent transactions pursuant to sections 602, 603, 604 and 608 of the Companies Act 2014. Potential difficulties with this article could include the inevitable differences between jurisdictions in terms of prescribed time periods referable to the opening of insolvency. It is suggested the device or formula adopted in Article 11 is reflected here, as in, ensuring that “the conditions for commencing such a proceeding are otherwise met”.

Recommendation

It is the view of the Group that this article should be adopted as drafted with appropriate insertions setting out the avoidance and antecedent transaction provisions in the 2014 Act on the proviso that “conditions for commencing such a proceeding are otherwise met”.

Article 24

Article 24. Intervention by a foreign representative in proceedings in this State

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.

Article 24 allows for the intervention by a foreign representative in proceedings in the enacting State, subject to compliance with the local law of the State. The article does not distinguish between a representative of a proceeding recognised as a foreign main proceeding and a representative of a proceeding recognised as a foreign non-main proceeding.¹¹⁶ The practical impact of the article may be limited because most proceedings should have been stayed under Article 20(1)(a) or 21(1)(a).¹¹⁷

Recommendation

It is the view of the Group that this article should be adopted as drafted.

Article 25

Article 25. Co-operation and direct communication between a court of this State and foreign courts or foreign representatives

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]*.

¹¹⁶ Berends, *Ibid* at page 378.

¹¹⁷ Look Chan Ho, *Ibid* at page 239.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 25 seeks to facilitate co-operation on the part of the court of the enacting State, with foreign courts or foreign representatives, whether directly or indirectly. It also stipulates that direct communication with foreign courts and representatives is allowed, thereby stripping out another potential layer of procedural delay in execution.

The text in square brackets at Article 25 of the Model law suggests that the insertion should be either the Examiner or the Liquidator. That would seem to be unnecessarily limited given that the Irish Courts may be dealing with an inward application for recognition and assistance and they may not necessarily be dealing with a Liquidator or Examiner appointed in this jurisdiction.

In the UK, they have inserted the phrase "British Insolvency Office Holder" which is defined and which could be a private office holder or the Official Receiver. It is noted also that Article 27 of the Model law suggests the appointment of a person to act at the direction of the Court as a means of implementing the co-operation referred to in Article 25. While the original European Insolvency Regulation ("EIR") (1346/2000) did not provide for Court-to-Court communications, EIR Recast (Regulation EU (2015/848)) does. Specifically, Article 57 provides:

"that a Court shall co-operate with any other Court before which a request to open insolvency proceedings is pending "to the extent that such co-operation is not incompatible with the rules applicable to each of the proceedings. For that purpose, the Court may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them."

It is suggested that this approach could be adopted into Article 25 and that the 'gap' could be filled with "*liquidator, examiner or such other person appointed under Article 27*".

Recommendation

It is the view of the Group that this article should be adopted as drafted subject to inserting the phrase 'liquidator, examiner or such other person appointed under Article 27' where indicated.

Article 26

Article 26. Co-operation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives

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 foreign representatives.

In a similar spirit to Article 25, Article 26 mandates co-operation between the Irish Insolvency Officeholder and foreign courts or representatives. It also facilitates direct communication, for the same reasons as Article 25.

Recommendation

It is the view of the Group that this article should be adopted as drafted with the insertion of Irish Insolvency Officeholder.

Article 27

Article 27. Forms of co-operation

Co-operation 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 co-operation].*

Article 27 gives examples of the methods of "appropriate means" of co-operation.

Recommendation

It is the view of the Group that this article should be adopted as drafted.

Article 28

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding

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 co-operation 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.

Articles 28 and 29 clarify that, notwithstanding the recognition of a foreign main proceeding, a local proceeding may be commenced in relation to the same debtor as long as the debtor retains assets within the State.

*“The position taken in article 28 is in substance the same as the position taken in a number of States. In some States, however, for the court to have jurisdiction to commence a local insolvency proceeding, the mere presence of assets in the State is not sufficient. For such jurisdiction to exist, the debtor must be engaged in an economic activity in the State (to use the terminology of the Model Law, the debtor must have an “establishment” in the State, as defined in article 2, subparagraph (f)). In article 28, the less restrictive solution was chosen in a context where the debtor is already involved in a foreign main proceeding. While the solution leaves a broad ground for commencing a local proceeding after recognition of a foreign main proceeding, it serves the purpose of indicating that, if the debtor has no assets in the State, there is no jurisdiction for commencing an insolvency proceeding”.*¹¹⁸

The enacting State may prefer to adopt a more restrictive solution, whereby local proceedings could only be initiated if the debtor had an establishment in the State. The reasoning for this might be that when assets in the enacting State are not part of an establishment, the commencement of a local proceeding would typically not be the most efficient way to protect the creditors, including the local creditors. By specifying the relief to be granted to the foreign main proceeding and cooperating with the foreign court and representative, the court in the enacting State would have ample opportunity to ensure the administration of the local assets in such a manner as would assure the protection of local interests.¹¹⁹

It would not, therefore, be contrary to the philosophy of the Model Law to enact the Article with the words “only if the debtor has assets in this State” replaced with “only if the debtor has an establishment in this State”.¹²⁰

Recommendation

It is the view of the Group that this article should be adopted as drafted subject to insertion of definition of Irish Insolvency Law.

Article 29

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

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 and coordination 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

¹¹⁸ The Enactment Guide, para 225 at page 100.

¹¹⁹ The Enactment Guide, para 226 at page 101.

¹²⁰ Ibid at para 226, page 101.

(ii) If the foreign proceeding is recognised 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 paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 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.

Article 29 regulates situations where a foreign proceeding and a local insolvency proceeding are taking place concurrently. The provisions on co-operation (which have previously been discussed) apply but a distinction is made depending on whether the application for recognition of the foreign proceeding post-dates or precedes the commencement of the local proceedings.

Where the application for recognition post-dates the local proceeding, the discretionary relief mentioned above¹²¹ as being available under Articles 19 and 21 to assist the foreign proceedings must be consistent with the local proceeding¹²² and the automatic stays on actions and suspension of rights to dispose of assets arising on recognition of foreign main proceedings¹²³ do not apply.¹²⁴

Where the application for recognition precedes the local proceeding, the discretionary relief available must be reviewed by the court and modified or terminated if inconsistent with the local proceeding¹²⁵ and the automatic stays on actions and suspension of rights to dispose of assets arising on recognition of foreign main proceedings¹²⁶ must be modified or terminated if inconsistent with the local proceeding.¹²⁷

Consideration should be given to the use of language which adopts the existing powers contained in respect of liquidation and examinership and simply extends the High Court's jurisdiction to make such orders in a manner which gives effect to the Model Law.

Recommendation

It is the view of the Group that this article should be adopted as drafted subject to insertion of definition of Irish Insolvency Law.

¹²¹ At page 16.

¹²² Article 29(a)(i).

¹²³ See page 15 above.

¹²⁴ Article 29(a)(ii).

¹²⁵ Article 29(b)(i).

¹²⁶ See page 15 above.

¹²⁷ Article 29(b)(ii).

Article 30

Article 30. Coordination of more than one foreign proceeding

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek co-operation 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 recognised 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 recognised, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Article 30 seeks to coordinate assistance between two or more concurrent foreign insolvency proceedings and ensures that any discretionary relief granted under Articles 19 and 21 on recognition of a foreign non-main proceeding must be consistent with any prior recognised foreign main proceeding and, where a foreign main proceeding is recognised subsequently, the relief granted must be modified if inconsistent therewith.

Recommendation

It is the view of the Group that this article should be adopted as drafted.

Article 31

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding

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 require proof of the insolvency of a debtor as a prerequisite to the commencement of insolvency proceedings, with Ireland included amongst those. It is suggested in the Enactment Guide that this rule may be helpful in legal systems which require proof of insolvency prior to the commencement of insolvency proceedings, because if proof were itself required as opposed to the use of the presumption, more time and resources would be consumed. The use of the word ‘proof’ in Article 31 denotes a rebuttable presumption.¹²⁸

¹²⁸ Chan Ho, *Ibid* at page 244.

Recommendation

It is the view of the Group that this article should be adopted as drafted with the insertion of 'and/or unable to pay its debts as they fall due' after 'insolvent' and the inserted definition of Irish Insolvency Law.

Article 32

Article 32. Rule of payment in concurrent proceedings

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.

Article 32 codifies the “hotchpot rule” - stated also in Article 20(2) of the EU Insolvency Regulation, which means that a creditor who has received part payment in a foreign insolvency proceeding, may not receive a payment for the same claim in a local proceeding 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.

Recommendation

It is the view of the Group that this article should be adopted as drafted subject to insertion of definition of Irish Insolvency Law.

Chapter 4. Conclusions and Recommendation of the Group

In the previous chapters of this report we have analysed the current state of the law on cross-border insolvency and considered how the Model Law could be adopted into Irish law. The following chapter sets out some matters for consideration and, in the view of the Group, some of the benefits of adopting the Model Law. In addition, the chapter takes a thematic look at some of the practical questions raised in the article by article analysis in Chapter 3.

4.1 The case for adoption

The globalising of trade and investment

The importance of adequate provision in national insolvency laws to facilitate the conduct of insolvency proceedings having cross-border incidents and enabling co-operation and coordination across jurisdictions between such proceedings originating in different jurisdictions has been recognised both at international and national levels.

The IMF drew attention to the difficulties posed by diversity of national arrangements in this area, noting that this “creates considerable uncertainty and undermines the effective application of national insolvency laws in an environment where cross-border activities are becoming a major component of the business of large enterprises.”¹²⁹ Both the IMF¹³⁰ and the World Bank have supported the Model Law as an effective regime to address the problems posed as a result.

In its “Principles and Guidelines for Effective Insolvency and Creditor Rights Systems”¹³¹, the World Bank listed the required elements of a national insolvency law and concluded: “The most effective and expeditious way to achieve these objectives is enacting the Model Law...”

The Working Group on International Financial Crises established by the G-22 group of countries in the wake of the Asian economic crisis of 1998 recommended wider use of the Model Law on Cross-Border Insolvency or similar mechanisms, having noted the capacity of such regimes to “facilitate more orderly workouts as well as allow countries to be better prepared for the increased incidence of cross-border insolvencies stemming from the expansion of global trade and investment.”¹³²

Ireland’s open, dynamic corporate environment, which features many global business groups with complex structures, would benefit significantly from the incorporation of the Model Law into its legislation.

Legal certainty

The object of co-operation between courts in the context of transnational insolvency is the minimising of risks – such as uncertainty about ability to enforce legal rights, additional complexity and enforcement costs and unfamiliarity with foreign legal process - and transaction costs, so as to reduce the burden on transnational trade and investment.¹³³

¹²⁹ “Orderly & Effective Insolvency Procedures”, Legal Department, International Monetary Fund 1999, Chapter 6.

¹³⁰ Ibid.

¹³¹ World Bank, April 2001.

¹³² Report of the Working Group on International Financial Crises, IMF, October 1998.

¹³³ Chief Justice Spigelman of New South Wales: “Cross-Border Insolvency: Co-Operation or Conflict?” Address to INSOL International Annual Regional Conference Shanghai, 16 September 2008, pages 2-4.

In evaluating the merits of adopting the Model Law, the New Zealand Law Commission noted: “Predictability of outcome on any given factual base is an important policy objective in commercial law. With predictability of outcome there is less need for legal argument and, in that way, the overall costs of litigation are reduced. At present, when cross-border insolvency issues arise, the insolvency administrator’s advisors assess both the ease with which an application for assistance may be made and the way in which courts in particular states are likely to respond to requests for aid”¹³⁴ and contended that the Model Law “enhances predictability of outcome in identifying the initial processes to be followed to seek assistance and in establishing mechanisms for recognition of judgments of overseas courts.”¹³⁵

This argument is amplified in the case of Ireland. Apart from cases under the ambit of the EU Regulation, the recognition, assistance and coordination of foreign insolvency proceedings is currently governed by common law principles which have yet to be elaborated authoritatively by the courts here. Predictability of outcome, combined with certainty, can only be beneficial to a State which depends significantly on foreign direct investment.

Fair treatment of local and foreign creditors

The securing of fairness in the administration of insolvencies for creditors and other interested parties irrespective of origin is a stated object of the Model Law, and has been cited as a key argument for its adoption by several jurisdictions.¹³⁶ In its consultation paper on adoption of the Model Law in Great Britain, the Insolvency Service noted:

“Implementation of the Model Law will be beneficial in serving the cause of fairness towards creditors worldwide and will provide an example to other States in terms of our readiness to engage in a genuinely two-way process of co-operation in international insolvency matters. Over time, when other States implement the Model Law, GB officeholders will progressively enjoy the same benefits abroad, in terms of reduced administrative costs incurred in recovering assets from overseas, thereby increasing funds available for distribution to creditors.”¹³⁷

To the extent that other countries adopt the Model Law, Ireland can legitimately expect to derive the same benefits in terms of fairness, bilateral engagement, co-operation and ultimately, savings in time and costs arising from the adoption of the Model Law.

¹³⁴ “Cross-Border Insolvency”, Report No. 52, New Zealand Law Commission, 1999, par. 101.

¹³⁵ Ibid., par. 103.

¹³⁶ See, e.g. New Zealand Law Commission, op. cit. pars. 101 – 103; Sarra, “Crossing the Finish Line: The Potential Impact on Business Rescue of Adoption of new Cross-Border Insolvency Provisions”, Office of the Superintendent of Bankruptcy, Canada, (2007), page 2.

¹³⁷ Consultation Paper “Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain” Consultation Paper, Insolvency Service, August 2005.

4.2 The case against adoption

Ceding of control to another jurisdiction

The Model Law may not establish a universalist approach to the recognition of insolvency proceedings, but it does shift the emphasis towards such an approach¹³⁸. Such an emphasis could be perceived as ceding a degree of control in a liquidation to the insolvency laws and machinery of a foreign jurisdiction. This in turn could lead to different or less favourable outcomes for domestic stakeholders, for example in the treatment of preferential debt or employee creditors. The Group notes that with the inclusion of appropriate safeguards these concerns can be resolved. In particular, the 'adequate protection' provisions contained in Article 21, 22 and 23 of the Model Law and recommends the inclusion of express provisions in respect of preferential creditors in those articles to ensure their current position in Irish law is not adversely impacted by the inclusion of the Model Law.

Reciprocity

The recognition of foreign insolvency proceedings or regimes is often conditioned by national laws upon reciprocity of treatment by the insolvency regime of the country of origin of the proceedings. In Ireland, the recognition and assistance originally available in bankruptcy matters to the courts in the United Kingdom, the Isle of Man and the Channel Islands under section 142 of the Bankruptcy Act 1988 may be extended by order of the Government to other jurisdictions only where the Government are satisfied that reciprocal facilities to that effect will be afforded by that jurisdiction.

There is no requirement of reciprocity in the UNCITRAL Model Law and the Guide to Enactment makes clear that it is not envisaged that a foreign proceeding would be denied recognition solely on the grounds that a court in the State in which the foreign proceeding was commenced would not provide equivalent relief to an insolvency representative from the enacting State.

The unwillingness of many countries to offer recognition to foreign proceedings without reciprocity and national law provisions favouring local creditors have been cited as significant limitations on general acceptance of the UNCITRAL insolvency regime, and it has been observed: "in many nations, the Model Law has no realistic chance of adoption unless the executive retains a right to specify the nations to which it applies."¹³⁹ However, certain states have chosen to enact the Model Law and made reciprocity a condition of recognition.¹⁴⁰

To date legislation based on the Model Law has been adopted in 43 States in a total of 45 jurisdictions.¹⁴¹ The clear majority of these states have not required reciprocity to be a pre-condition of recognition. These include some of the leading common law jurisdictions, such as the U.S., Great Britain, Australia and New Zealand.¹⁴²

Capacity and integrity of foreign insolvency regimes

As discussed above, the entrusting by the court of assets to a foreign insolvency representative for distribution as envisaged by the Model Law, presents risks for local creditors and other

¹³⁸ New Zealand Law Commission, op. cit. par. 105.

¹³⁹ Spigelman, op. cit., pages 8 -12.

¹⁴⁰ In its approach to incorporation, Mexico, Argentina and Romania have conditioned the operation of the Model Law on reciprocity.

¹⁴¹ For a full list of adopting countries please see Appendix 3.

interests where the capacity or integrity of the foreign insolvency machinery, or the competence or integrity of the foreign representative are open to question. While this should not be an issue in the case of developed jurisdictions, legitimate concerns may arise in the case of less developed jurisdictions.

The Model Law does offer some safeguards in such an eventuality. Reference has already been made to Articles 21(2) and 22(2) and (3) in the context of the issue of reciprocity. As the Guide to Enactment states, citing Article 6 mentioned earlier, the Model Law “preserves the possibility of excluding or limiting any action in favour of the foreign proceeding, including recognition of the proceeding, on the basis of overriding public policy considerations, although it is expected that the public policy exception will be rarely used.” Thus, concerns on matters such as the observance of the rule of law in a foreign jurisdiction, the transparency or functioning of its insolvency process, or the probity of insolvency functionaries - where justified - could, it is submitted, be invoked by an affected party in resisting, or seeking imposition of conditions on recognition of the foreign proceedings.

4.3 Conclusions as to the merits of adoption

The Group is convinced of the merits of adopting the Model Law. Adoption would equip Ireland with a cross-border insolvency regime conforming to standards approved by international institutions such as the IMF and World Bank, the major common law jurisdictions, especially those outside the EU, and leading commentators and professional bodies.¹⁴³ Any potential risks relating to recognition of the status of insolvency proceedings in specific foreign jurisdictions can be adequately mitigated by use of the safeguards contained in the Model Law and by tailoring its provisions in the enacting legislation.

4.4 Considerations arising should the Model Law be adopted

In the event that a decision is taken to incorporate the Model Law into Irish law, there are several possibilities that can be considered in relation to the manner and terms of such incorporation. The following comments address what are judged to be the most significant issues.

4.4.1. Should the Model Law replace section 1417 of the Companies Act, 2014, or be available as an alternative to that provision?

In the United Kingdom, a decision was made to retain the existing statutory regime on cross-border co-operation, using section 426 of the Insolvency Act 1986. That section is more extensive in its effect than its Irish counterpart, section 1417 of the Companies Act, 2014.

Section 426(5) provides that a request made by a court of a foreign jurisdiction designated for the purpose is

“authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court¹⁴⁴ in

¹⁴³ See “Cross-Border Insolvency: Promoting international co-operation and coordination” (2002) Australian Government Corporate Law Economic Reform Program Proposals for Reform: Paper No. 8), page 12.

¹⁴⁴ Emphasis added.

relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.”

Section 1417(1), on the other hand, provides that

“Any order made by a court of any state recognised for the purposes of this section and made for, or in the course of, winding up a company may be enforced by the High Court in the same manner in all respects as if the order has been made by the High Court.”¹⁴⁵

The retention of section 426 alongside the Model Law gives a foreign insolvency representative in a jurisdiction designated for the purposes of section 426 an option to choose whether to use the Model Law or section 426 when seeking assistance from a British court. However, it also gives rise to the possibility of concurrent applications under the two regimes from foreign representatives in different jurisdictions dealing with the same debtor. In the event, no amendment to section 426 was considered necessary to regulate such a situation.¹⁴⁶

4.4.2 Application of the Model Law to bankruptcy

The Model Law may apply both to insolvencies of corporate and natural legal persons. In considering the issues involved in applying the Model Law to natural legal persons, the Australian Government analysis noted:

“it is arguable that failure to include personal bankruptcy within the scope of the provisions is undesirable because, as Australia has experienced, there are individuals that enter personal bankruptcy in the aftermath of corporate failures and the facilities provided by the Model Law to trace assets across jurisdictions would be very useful in those circumstances.”¹⁴⁷

In light of the remit of the CLRG, the implications of adoption of the Model Law have been addressed solely as they affect company law. However, should a decision be made to include personal insolvency in the adoption of the Model Law into Irish law, it is suggested that adopting as similar an approach as possible for both corporate and individual insolvency would be beneficial. This would be in line with the uniform approach adopted by the EU Insolvency Regulation to corporate and personal insolvencies. While it would be desirable that the Model Law would mirror the EU insolvency regime in its scope and application, the responsibility for personal insolvency resides with the Minister for Justice and as such is outside the remit of the Company Law Review Group. Nevertheless, it is pertinent that many jurisdictions, including the

¹⁴⁵ Companies Act, 2014 at section 1417(1).

¹⁴⁶ In New Zealand, the Model Law replaced existing statutory provisions enabling assistance to foreign insolvencies. In Australia, it is provided¹⁴⁶ that if the Model Law as applied is inconsistent with the existing provision on co-operation between courts¹⁴⁶, “the Model Law or the provision of this Act prevails, and the provision has no effect to the extent of the inconsistency.”

¹⁴⁷ “Cross-Border Insolvency: Promoting international co-operation and coordination”, op.cit., page 25.

major common law jurisdictions, have adopted the Model Law for both corporate and personal insolvency.¹⁴⁸

4.5 Debt Adjustment and Schemes

The Model Law is already evolving and reform is inevitable. If adopted, it will be necessary to review and revise the model from time to time. UNCITRAL is already reviewing a model to apply to corporate groups and has recently published a complimentary Model Law on recognition and enforcement of insolvency related judgments.

The Model Law is also undergoing a review in several jurisdictions in terms of debt adjustment schemes as distinct from insolvency proceedings. The Group's recommendation on the Model Law adopts the standard concept that a foreign proceeding must be a proceeding under a law relating to insolvency.

In this context there are two primary types of schemes. The first are schemes ancillary to what is obviously and insolvency process, such as Examinership schemes. The second are schemes which are not considered to be ancillary to an insolvency process (although they may in fact be aimed at avoiding or preventing an insolvency) such as schemes under Part 9 Chapter 1 of the Companies Act 2014.

Chapter 15 of the US Bankruptcy Code¹⁴⁹ and Singapore's adoption of the Model Law take a broader approach that defines a 'foreign insolvency proceeding' to also include proceedings under a law relating to "the adjustment of debt".

It has been commented on positively that the inclusion of 'adjustment of debt' in the definition has been critical in providing the basis for US bankruptcy courts to apply the Model Law to recognise the use of UK schemes of arrangement to restructure New York governed debt. As against that, there is also a view emerging, albeit for slightly different reasons, to the effect that US Courts may no longer recognise a UK (or other similar) scheme of arrangement that is not ancillary to or does not arise out of an insolvency proceeding.¹⁵⁰

In the EU context, it is clear that the EU Regulations apply to Examinership proceedings because they are specifically referenced in its schedule. To the extent that there is any doubt about recognition of Examinership schemes under the EU Regulations (as opposed merely to the

¹⁴⁸ The following jurisdictions have implemented the Model Law either with an implicit incorporation of personal insolvency or no explicit disapplication of the Model Law to personal insolvency: Australia, the British Virgin Islands, Canada, the Cayman Islands, Colombia, Great Britain, Greece, Japan, Mauritius, Mexico, New Zealand, Poland, Romania, Serbia, South Africa, South Korea, the United States of America.

¹⁴⁹ [11 USC § 101\(23\)](#) The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation

¹⁵⁰ The Thing about Schemes in the Scheme of Things: Recognition of Schemes of Arrangement under Chapter 15 of the U.S. Bankruptcy Code, David L. Lawton and Shannon B. Wolf, Bracewell LLP, INSOL International Technical Series Issue No. 38.

opening of the proceeding), this is addressed directly in Article 32 which provides explicitly that “...compositions approved by that court, shall also be recognised with no further formalities”.

It is notable in this regard that in July of this year, UNCITRAL adopted a Model Law on Recognition and Enforcement of Insolvency-Related Judgments. This is intended to supplement the Model Law on Cross-Border Insolvency and is aimed specifically at judgments that arise “as a consequence of or is materially associated with an insolvency proceeding” and does not include “a judgment commencing an insolvency proceeding”. In any applicable jurisdiction, this text should remove any doubt about recognition of a court sanctioned scheme under a law relating to insolvency, as opposed merely to recognition of the opening of the insolvency proceeding.

The Group considered making a recommendation to define ‘foreign insolvency proceeding’ to also include proceedings under a law relating to “the adjustment of debt” and/or judgments that arise “as a consequence of or ... materially associated with an insolvency proceeding” and concluded that the consideration by the Group should be recorded in this report.

4.6 Recommendation on the Adoption of the Model Law

Arising from the examination and deliberations of the Group, the decision has been made to recommend the adoption of the Model Law to the Review Group. The proposed modifications to the Model Law text which can be found in Chapter 3 seek to resolve any potential concerns in respect of the treatment of local creditors and preferential creditors. In particular, the Group notes the ‘adequate protection’ provisions in Articles 21,22 and 23 which allow courts to consider how local creditors will be treated as a result of the recognition of any proceedings. In addition, the public policy provision under Article 6 of the Model Law will be of assistance to the courts in interpreting the Model law in a manner which is compatible with the domestic statutory protections which preferential creditors have under Irish law.

Appendices

Appendix 1: Membership of the CLRG Corporate Insolvency Subcommittee

Barry Cahir	Chairperson
Jonathan Buttimore	Office of the Attorney General
Helen Curley	Department of Business, Enterprise & Innovation
Gráinne Duggan	Bar Council of Ireland
Michael Halpenny	Irish Congress of Trade Unions
Rosemary Hickey	Office of the Attorney General
Irene Lynch Fannon	Ministerial nominee
John Loughlin	CCAB-I
Vincent Madigan	Ministerial nominee
Conor O'Mahony	Office of the Director of Corporate Enforcement
Kevin O'Neill	The Courts Service
Paddy Purtill	The Revenue Commissioners
Noel Rubotham	The Courts Service

Secretariat: Síona Ryan

Tara Keane

Legal Researcher: Robert A. Bourke, BL

Appendix 2: Modified Universalism

The underlying principle of modern cross-border insolvency, which (as discussed further below) has been followed in Ireland and many other common law jurisdictions, is that of universalism. This is the principle that the assets of a debtor should be collected and distributed on a worldwide basis in a single insolvency proceeding. The application of universalism is modified to permit the domestic court to evaluate foreign law before deferring to a foreign main insolvency proceeding. In so deferring, the domestic court will actively assist the foreign insolvency proceeding, by doing whatever it could have done had the liquidation been carried out domestically:

“[T]he underlying principle of universality is... given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England...”¹⁵¹

A key component of modified universalism is the recognition that the authority of a company's agents is determined by the law of the company's incorporation and that the authority of a liquidator appointed under the law of the place of incorporation to get in and distribute the company's worldwide assets should be recognised whenever possible:

“the law of the place of incorporation determines who is entitled to act on behalf of a corporation. If under that law a liquidator is appointed to act, then his authority should be recognised here”¹⁵²

Modified universalism has experienced renewed prominence in recent times because of two well-documented decisions: firstly, the decision of the Privy Council in *Cambridge Gas v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.

The limits of the assistance that can be offered by a court was clarified in the recent decision of *Singularis Holdings Ltd v Pricewaterhouse Coopers*.¹⁵³ In *Singularis* the Privy Council considered whether a Bermudian court had a common law power of assistance to apply domestic legislation to an overseas liquidation as if it were a Bermudian winding-up based on the principle of modified universalism as developed in *Cambridge Gas*. The Privy Council in *Singularis* restated the principle as a common law power to assist foreign winding-up proceedings by requiring the provision of information where assistance was:

- necessary for the performance of the office-holder's functions and
- consistent with the substantive law and public policy of the assisting court; and
- provided the examinee's costs were met.

It was not a proper use of the common law power of assistance to make good a limitation on the powers of a foreign court under its own law. In *Singularis* the Privy Council addressed how in the absence of any specific statutory provisions the courts should rely on the common law and consider whether there is an inherent power at common law grant the relief sought:

¹⁵¹ per Lord Hoffman, *Cambridge Gas Transport Corporation v Navigator Holdings plc Creditors Committee* [2007] 1 AC 508, 518).

¹⁵² Dicey, Morris & Collins (15th ed), paras 30–102.

¹⁵³ [2014] UKPC 36.

“In the Board’s opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal, the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely an order for the production of information by an entity within the personal jurisdiction of the Bermuda court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law do so.”¹⁵⁴

¹⁵⁴ *Singularis Holdings Ltd v Pricewaterhouse Coopers* [2014] UKPC 36 at para.19.

Appendix 3: The Treatment of Groups

The focus of the Model Law is on individual debtors, be they corporate or natural legal persons. An UNCITRAL Working Group is currently preparing a new Part 3 to the UNCITRAL Legislative Guide on Insolvency of 2004, which will regulate the position of both domestic and international enterprise groups¹⁵⁵ in insolvency. The UNCITRAL Legislative Guide on Insolvency is a template for domestic insolvency legislation recommended for incorporation by States in their own jurisdictions, which largely reflects the principles and procedure of the Anglo-American model of insolvency legislation that Ireland administers. At its session in November 2016, the UNCITRAL Working Group noted that the interpretation of those parts of the Model Law on coordination and co-operation might be expanded to apply to enterprise groups - which have evidenced specific problems in this area. Draft recommendations on a number of those issues have been prepared. These include: -

- a) identifying the centre of main interests (COMI) of an enterprise group;
- b) providing post commencement finance to insolvent enterprise groups;
- c) providing for a court remedy for pooling of assets of groups in cases of fraud or intermingling;
- d) co-operation between the court seised of insolvency proceedings concerning a member of an enterprise group and foreign courts or foreign representatives, to facilitate coordination of those proceedings and proceedings commenced in other States with respect to that enterprise group;
- e) co-operation between the insolvency representative and foreign courts or foreign representatives for the same purpose;
- f) direct communication between the court and foreign courts or foreign representatives.

The recommendations are not intended to substitute for adoption of the Model Law. The proposed addition to the Legislative Guide when implemented, would address how the articles of the Model Law might apply to an international enterprise group and if not, what additional provisions might be required to facilitate coordination of proceedings concerning enterprise groups.

Part three of the UNCITRAL Legislative Guide on Insolvency Law relates to the treatment of Enterprise Groups in insolvency and canvasses the various issues arising.

The lack of guidance relating to insolvency of Enterprise Groups

Much of the existing commentary in domestic law regarding the insolvency of enterprise groups concentrates on when it is appropriate to consolidate insolvency estates. What is lacking is: -

- (a) guidance on how the insolvency of enterprise groups should be addressed more comprehensively and;
- (b) whether and in what circumstances enterprise groups should be treated differently from a single corporate entity.

¹⁵⁵ “Enterprise group” means two or more enterprises that are interconnected by control or significant ownership; “Enterprise” means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law.

Integration and interdependence

How is the treatment of insolvency groups affected by the extent to which the group in question is economically and organizationally integrated? How does that level of integration affect treatment of the group in insolvency, and in particular to what extent should a highly-integrated group be treated differently from a group where individual members retain a high degree of independence?

In some cases, such as where the structure of a group is diverse and involves unrelated businesses and assets, the insolvency of one or more group members may not affect other members or the group as a whole and the insolvent members can be administered separately. In other cases, however, the insolvency of one group member may cause financial distress in other members or in the group as a whole arising from the group's integrated structure, with a high degree of interdependence and linked assets and debts between its different parts.

One group, one application

Some laws permit limited exceptions which facilitate a single application to encompass other group members where, for example: -

- (a) all interested parties consent to the inclusion of more than one group member; the insolvency of one group member has the potential to affect other group members;
- (b) the parties to the application are closely economically integrated, such as by intermingling of assets or a specified degree of control or ownership;
- (c) or consideration of the group as a single entity has special legal relevance, especially in the context of reorganisation plans.

The benefits of group applications

Legislating for joint applications for the commencement of insolvency proceedings could improve efficiency and reduce costs. These benefits would be crystallised by facilitating the coordinated consideration of group applications by the court, without affecting the separate identity of each of those group members or removing the need for each to individually satisfy the applicable commencement standard. This requirement would also enlighten the court to the existence of a group, particularly if the application was accompanied by information substantiating its existence and the relationship between the relevant group members. Where proceedings were subsequently instituted on the basis of that joint application, there may be an advantage of establishing a common commencement date for each insolvent group member. This common date could simplify compliance with deadlines and the calculation of the 'suspect period' for avoidance purposes.

Single or parallel applications

Where compliant with legislation and feasible in the circumstances, a single application covering all group members that satisfy the commencement standard or parallel applications could be made at the same time in respect of each of the group members. The latter approach may be appropriate where the group members are located in different jurisdictions or where other circumstances of the case, such as the need to coordinate multiple proceedings, suggest that a single application would not be practical. In any event, it is desirable that the insolvency law facilitate a coordinated judicial consideration of whether the commencement standards with respect to the individual group members are satisfied, taking into account the group context where relevant.

The Companies Act, 2014

The Companies Act provides for the contribution by related companies to the debts of companies being wound up (section 599) and the pooling of assets of related companies (section 600). The availability of this provision in Irish law provides a practical and applicable solution for potential cross-border insolvencies in group structures.

Appendix 4: The Status of Enactment of the UNCITRAL Model Law

Legislation based on the Model Law has been adopted in 43 States in a total of 45 jurisdictions:

Australia	2008
Benin	2015
Burkina Faso	2015
Cameroon	2015
Canada	2005
Central African Republic	2015
Chad	2015
Chile	2013
Colombia	2006
Comoros	2015
Congo	2015
Côte d'Ivoire	2015
Democratic Republic of the Congo	2015
Dominican Republic	2015
Equatorial Guinea	2015
Gabon	2015
Greece	2010
Guinea	2015
Guinea-Bissau	2015
Japan	2000
Kenya	2015
Malawi	2015
Mali	2015
Mauritius	2009
Mexico	2000
Montenegro	2002
New Zealand	2006
Niger	2015
Philippines	2010
Poland	2003
Republic of Korea	2006
Romania	2002
Senegal	2015
Serbia	2004
Seychelles	2013
Singapore	2017
Slovenia	2007
South Africa	2000
Togo	2015
Uganda	2011
United Kingdom of Great Britain and Northern Ireland	
British Virgin Islands	2003
Gibraltar	2014
Great Britain	2006
United States of America	2005
Vanuatu	2013

Appendix 5: Entities for potential exclusion from the ambit of the Model Law

- (a) Credit institutions, as referred to in Regulation 4 of the European Communities (Reorganisation and Winding-up of Credit Institutions) Regulations 2004.
- (b) Designated and formerly designated credit institutions within the meaning of the Assets Covered Securities Act 2001 insofar as they may not fall within the preceding category.
- (c) Insurance undertakings as defined in Regulation 2 of the European Communities (Reorganisation and Winding-up of Insurance Undertakings) Regulations 2003.
- (d) Investment business firms within the meaning of the Investment Intermediaries Act 1995 and investment firms within the meaning of the Investor Compensation Act 1998 insofar as they do not fall within another excluded category.
- (e) “investment firms” or “regulated markets” within the meaning of the European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. 60 of 2007) or any associated or related undertakings within the meaning of those Regulations;
- (f) A company that is an undertaking for collective investment in transferable securities within the meaning of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (S.I. No. 352 of 2011) or the management company or trustee of such an undertaking.
- (g) An investment company within the meaning of Part XIII of the Companies Act, 1990.
- (h) A company that is a management company or trustee of a unit trust scheme within the meaning of the Unit Trusts Act, 1990.
- (i) A company that is a general partner or custodian of an investment limited partnership within the meaning of the Investment Limited Partnerships Act, 1994.
- (j) A company that is a management company or custodian of a common contractual fund within the meaning of Part 2 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.
- (k) Any relief, modification or relief already granted, or providing any co-operation or coordination arising from application of the Model Law if and to the extent that such would be prohibited by (a) the Netting of Financial Contracts Act 1995 or similar domestic legislation and (b) the Irish legislation implementing the EU directives on.
- (l) settlement finality in payment and securities settlement systems and on financial collateral arrangements.
- (m) Such other categories of debtor on transaction as the Minister may by order designate.

Appendix 6: Analysis of the common law position

The approach at common law in England to recognition of foreign insolvency proceedings has been described by a leading commentator as being “in a state of arrested development for most of the [twentieth] century”.¹⁵⁶ This has been attributed to the fact that section 426 of the Insolvency Act 1986 - the more comprehensive statutory counterpart in England and Wales of section 250 of the 1963 Act - and the EU Insolvency Regulation covered most instances of cross-border insolvency arising,¹⁵⁷ a contention reinforced since the incorporation into English law of the Model Law with effect from the 4th April 2006.¹⁵⁸

The principal rule at common law on the effect of a foreign winding up order is stated:

*“The authority of a liquidator appointed under the law of the place of incorporation is recognised in England.”*¹⁵⁹

The rationale for this is based on an analogy with the approach in bankruptcy law:

*“Just as the country of an individual’s domicile has been traditionally regarded by our law as the “natural” forum for proceedings having a bearing upon that person’s civil status and capacity, including bankruptcy proceedings, so in the case of companies the importance attached to the law of the country of incorporation in determining the essential qualities concerning the company’s birth, life and also its demise ensures that the English recognition rule looks primarily to the courts of that country to supply the forum for winding up”.*¹⁶⁰

Recognition of the liquidation of a foreign company in its place of incorporation may be refused where: the foreign proceedings are not final; those proceedings are in breach of natural justice (for example, where a company has not been served with notice of the proceedings); those proceedings are contrary to public policy; or recognition would conflict with the provisions of any other provision of the law of the jurisdiction in which recognition is sought.¹⁶¹

Various other situations may require consideration of the issue of recognition of a foreign insolvency. Where the foreign liquidation originates in a jurisdiction other than that of incorporation, there is “considerable uncertainty”, and a paucity of case law, as to the basis on which recognition may be afforded.¹⁶² However, it would seem that the “place of incorporation” rule aforementioned is not exhaustive as to the circumstances in which a foreign liquidator’s authority will be recognised at common law, and it has been suggested that (a) a liquidator appointed in a country other than the place of incorporation may be recognised in England if

¹⁵⁶ Fletcher: “Insolvency in Private International Law” 1st Ed. (OUP, 1999), at p. 93.

¹⁵⁷ See comments of Lord Hoffman in *Cambridge Gas Transport Corporation v. The Official Committee of Unsecured Creditors (of Navigator Holdings PLC and Others)* at par. 18 of the Judicial Committee’s judgment.

¹⁵⁸ The Model Law was adopted into English law by the Cross-Border Insolvency Regulations 2006.

¹⁵⁹ Dicey and Morris, “The Conflict of Laws”, 13th Ed., rule 158, page 1141.

¹⁶⁰ Fletcher, op. cit., page 166.

¹⁶¹ Wood, “Principles of International Insolvency” (Sweet & Maxwell, 1995), p. 250, citing *Re Alfred Shaw & Co* (1897) 8 QW 93 and *Macauley v Guaranty Trust Co of New York* (1927) 44 TLR 99.

¹⁶² Fletcher, op. cit., page 167.

that appointment is recognised under the law of the place of incorporation¹⁶³ and “more speculatively” (b) a liquidator’s appointment under the law of the country where the company carries on business¹⁶⁴ or has its central management and control¹⁶⁵ may be recognised.

It has been further suggested¹⁶⁶ that, in view of the rule giving primacy to the law of the “place of incorporation”, recognition of a foreign liquidation in respect of a company already in liquidation in England would be confined to treatment of the foreign liquidation as ancillary to the English liquidation, and that ancillary status would likewise be afforded in England to a foreign liquidation where the latter was concurrent to another foreign liquidation originating in the place of incorporation.

The Australian Position

*Akers as joint foreign representative v. Deputy Commissioner of Taxation*¹⁶⁷

Background to the case

The dispute arose because the liquidators of Saad Investments Company Limited (in official liquidation), who had previously been recognised as foreign representatives in Australia, sought to remit Saad’s Australian assets to the Cayman Islands, which was the centre of Saad’s main interests and central location of Saad’s winding up.

The Deputy Commissioner of Taxation opposed remission because, as a foreign revenue creditor, he could not be admitted to proof in the Cayman Islands under its local law. The ATO sought orders from the Federal Court of Australia for “adequate protection” under Article 22 of the Model Law. Justice Rares made orders permitting the ATO to use its enforcement powers to recover its tax debt from Saad’s Australian assets. Any recoveries were to be capped at the equivalent of the amount the ATO would have received had it been able to prove as a creditor in the Cayman Islands.

Liquidator’s appeal

Saad’s liquidators appealed that decision, arguing that the orders undermined the universalist intent of the Model Law by promoting a territorialist outcome. They argued that under the Model Law, one insolvency proceeding should be universally recognised in its centre of main interests and all assets of the insolvent company and all creditors’ claims should be administered in and according to the law of that centre of main interests.

Responding to the ATO’s claims of unfairness arising from its inability to prove in the Cayman Islands, the liquidators argued that this was the consequence of accepted international legal principles, also applicable in Australia, that see foreign revenue creditors rejected from proving (see *Government of India v Taylor* [1995] 1 All ER 292). Similarly, the Foreign Judgments Act 1991 (Cth) excludes judgments relating to taxes, fines, penalties and similar charges.

¹⁶³ Dicey and Morris, op. cit., page 1142, and Fletcher, op. cit., page 168.

¹⁶⁴ Dicey and Morris, op. cit., page 1142, and Fletcher, op. cit., page 169.

¹⁶⁵ Fletcher, op. cit., page 169 and Smart, “Cross-Border Insolvency”, 1st Ed. (Tottel) pp. 104-112.

¹⁶⁶ Fletcher, op. cit., pages 167 to 168.

¹⁶⁷ [2014] FCAFC 57

The decision

The Full Federal Court of Australia rejected the liquidators' argument confirming the earlier decision to grant leave to the ATO to take enforcement action against Saad's Australian assets.

While accepting the universalist intent of the Model Law, the Court held that its universalism is qualified by the capacity to modify and terminate the effects of recognition granted under Article 17 of the Model Law, and qualified by the obligation under Article 21.2 to protect local creditors.

The Court stated that "the universalism that underpins the Model Law and the Cross-Border Insolvency Act is one for the benefit of all creditors, and the protection of local creditors is expressly recognised."

The reasons advanced by the Court expressed concern with the ATO's inability to prove as a creditor in the Cayman Islands and considered that a fair outcome was one where creditors worldwide received equal treatment. It did not accept that the outcome for which the liquidators contended properly reflected the objective of the Model Law to achieve fairness.

The decision reduces certainty about the operation of the Model Law by making a decision favouring a local creditor who considers that its position is disadvantaged in the forum of the main liquidation.¹⁶⁸

¹⁶⁸ Atkins, Scott, "First Appellate Decision on Model Law Reduces Certainty, May 2014.

Legislation Referenced

The UNCITRAL Model Law on Cross-border Insolvency*

The Central Bank Act, 1971

The Companies' Creditors Arrangement Act, 1985*

The Bankruptcy Act, 1988

The Companies Act, 1990

The Netting of Financial Contracts Act, 1995

The Investment Intermediaries Act, 1995

The Investor Compensation Act, 1998

The European Communities (Finality of Settlement in Payment and Securities Settlement Systems) Regulations, 1998 (S.I. No. 539 of 1998)

The Insolvency Act, 2000*

The Investment Funds, Companies and Miscellaneous Provisions Act, 2000

The Asset Covered Securities Act, 2001

The Council Directive 2001/17/EC*

The Council Directive 2001/24/EC*

The European Communities (Corporate Insolvency) Regulations 2002 (S.I. 333 of 2002) *

The European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 2003 (S.I. No. 211 of 2003) *

The European Communities (Reorganisation and Winding-up of Insurance Undertakings) * Regulations 2003

The European Communities (Reorganisation and Winding-up of Credit Institutions) Regulations 2004*

The Cross-Border Insolvency Regulations, 2006*

The European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. No. 60 of 2007) *

Regulation 5, European Communities (Mutual Assistance for the Recovery of Claims relating to Certain Levies, Duties, Taxes and Other Measures) (Amendment) Regulations 2007 (S.I. No. 249 of 2007)

The Cross-Border Insolvency Act 2008*

The Arbitration Act, 2010

The European Communities (Settlement Finality) Regulations 2010 (S.I. No. 624 of 2010)

The European Communities (Financial Collateral Arrangements) Regulations 2010 (S.I. No. 626 of 2010)

The Personal Insolvency Act, 2012

The Companies Act, 2014

Regulation (EU) 2015/848 of the European Parliament and of the Council*

The Treaty on European Union and the Treaty on the Functioning of the European Union, 2016*

*Denotes legislation from other jurisdictions

Glossary of Terms

CLRG	Company Law Review Group
EC	European Commission
EU	European Union
The EC Insolvency Regulation	Council Regulation (EC) No 1346/2000
The EU Insolvency Regulation	Regulation (EU) 2015/848 of the European Parliament and of the Council
1963 Act	Companies Act, 1963
2014 Act	Companies Act, 2014
The Minister	The Minister for Business, Enterprise & Innovation
UNCITRAL	United Nations Commission on International Trade Law
1988 Act	The Bankruptcy Act, 1988
2012 Act	The Personal Insolvency Act, 2012
COMI	Centre of Main Interests
The Enactment Guide	Guide to the Enactment and Interpretation of the Model Law on Cross-border Insolvency