

Cross-Border Insolvency

Promoting international
cooperation and coordination

Corporate Law Economic Reform Program
Proposals for Reform: Paper No. 8

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Permission to reprint the United Nations Publication, UNCITRAL Model Law on Cross-Border Insolvency, is acknowledged.

The Government is seeking comments from interested parties on the detail of the proposals in this paper. Comments should be forwarded to the following address:

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The closing date for submissions is 31 December 2002.

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FOREWORD

I am pleased to announce a further phase of the Government's Corporate Law Economic Reform Program — CLERP 8. This paper canvasses the enactment by Australia of a model law on cross-border insolvency.

In May 1997 the United Nations Commission on International Trade Law (UNCITRAL), with Australia's support, adopted a Model Law on Cross-Border Insolvency ('the Model Law'). The purpose of the Model Law is to provide effective and efficient mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) co-operation between the courts and other authorities 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;
- (d) protection and maximisation of the value of assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Over the past decade the international community has devoted much effort to improving the international financial architecture. Effective cross-border insolvency arrangements will be an important aspect of this effort and have the potential to enhance the operation of the global financial system, providing long-term benefits to Australian businesses.

This paper sets out a number of proposals in connection with the enactment in Australia of the Model Law. The Government welcomes comments on the proposals.



Senator the Hon Ian Campbell
Parliamentary Secretary to the Treasurer
Parliament House
Canberra

TABLE OF CONTENTS

Introduction	1
Reform Proposals	3
Cross-border insolvency and the UNCITRAL Model Law	7
What is cross-border insolvency?.....	7
Risks of cross-border insolvency	7
Background to the UNCITRAL Model Law	8
Should Australia enact the UNCITRAL Model Law	11
Views of international commentators on the UNCITRAL Model Law	11
Why should Australia enact the Model Law?.....	13
Approaches to cross-border insolvency	17
Underlying approaches to cross-border insolvency	17
Legal mechanisms	18
The current Australian framework.....	19
Enacting the UNCITRAL Model Law in Australia: Issues for consideration	21
General approach of the Model Law	21
Main features of the Model Law.....	22
Key issues for possible enactment of the Model Law in Australia	23
Appendix: UNCITRAL Model Law	39

INTRODUCTION

On 25 June 2002, the Federal Government announced that the next phase of the Government's Corporate Law Economic Reform Program (CLERP) would be a review of cross-border insolvency law, including possible enactment of an international Model Law developed by the United Nations Commission on International Trade Law (UNCITRAL). The review would be called CLERP 8.

The Parliamentary Secretary to the Treasurer, Senator the Hon Ian Campbell, said that global economic integration and technological change have created both opportunities and new risks for Australian businesses. The adoption of efficient cross-border insolvency laws is an important aspect of our efforts to build a sounder international framework to address those risks.

The purpose of this paper is to seek comments on the possible enactment by Australia of the UNCITRAL Model Law on cross-border insolvency ('the Model Law').

REFORM PROPOSALS

Proposal 1

It is proposed that Australia enact the UNCITRAL Model Law on Cross-Border Insolvency, subject to the proposals below regarding the details of implementation.

Proposal 2

It is proposed that the enactment of the UNCITRAL Model Law be by separate enactment of the Commonwealth Parliament.

Proposal 3

It is proposed that the Insolvency and Trustee Service Australia consider and make recommendations to the Government about the application of the Model Law to individual debtors in Australia. This review would be conducted with a view to applying the Model Law to insolvent corporations and, if appropriate, some or all types of individual debtors at the same time.

Proposal 4

It is proposed to exclude corporate entities that are currently subject to special insolvency regimes at the Commonwealth level (including financial institutions) from the scope of the Model Law. Views of States and Territories will be sought on exclusion of further types of entities under special insolvency frameworks.

Proposal 5A

It is proposed that subsections 601CL(14)–(16) of the *Corporations Act 2001* concerning the cessation of business of a foreign company be retained to address circumstances that fall outside the scope of the Model Law or where the Model Law is not invoked. It should be made clear that section 601CL shall not operate in derogation of the Model Law where the Model Law is invoked.

Reform proposals

Proposal 5B

It is proposed that Part 5.7 of the Corporations Act — Winding Up Bodies other than Companies — be retained, but with such changes as are necessary to ensure it operates harmoniously with the proposed Model Law and consistently with the remainder of Chapter 5 of the Corporations Act.

Proposal 5C

It is proposed that Division 9 of Part 5.6 be retained in relation to external administration matters arising under the Corporations Act.

Proposal 6A

Subject to the proposal concerning Article 13 below, it is proposed that Chapters I and II of the Model Law (Articles 1-14) be adopted essentially as written.

Proposal 6B

In relation to Article 13 it is proposed to adopt the optional provision in Article 13(2) that provides that the Model Law does not affect the exclusion of revenue claims by a foreign State from insolvency proceedings under Australian law.

Proposal 6C

It is proposed that Articles 15 to 18 of the Model Law relating to recognition of a foreign proceeding be adopted as written.

Proposal 6D

It is proposed that Articles 19 to 24 of the Model Law concerning the consequences of recognition of a foreign insolvency proceeding be adopted as written. For the purposes of Article 20(2), it is proposed that exceptions will be the right of a secured creditor to enforce a security over property of the debtor, or specific relief from the effects of the stay granted by a court. For the purposes of Article 23(1), it is proposed to specify the voidable transactions provisions in Division 2 of Part 5.7B.

Proposal 6E

It is proposed that Chapter IV of the Model Law (Articles 25-27) — Cooperation with Foreign Courts and Foreign Representatives — be adopted as written.

Proposal 6F

It is proposed that Chapter V of the Model Law (Articles 28-32) — Concurrent Proceedings — be adopted essentially as written.

Proposal 6G

It is proposed that there be included in the provisions adopting the Model Law a facility to provide (by way of regulation or other suitable instrument) for streamlining and tailoring the Model Law as it applies to particular types of proceedings or proceedings involving a specific State.

CROSS-BORDER INSOLVENCY AND THE UNCITRAL MODEL LAW

This part explains the issue of cross-border insolvency, and outlines the background to the development of the UNCITRAL Model Law on cross-border insolvency.

WHAT IS CROSS-BORDER INSOLVENCY?

Cross-border insolvency is a term used to describe circumstances in which an insolvent debtor has assets and/or creditors in more than one country.

Many businesses have interests stretching beyond their home jurisdictions. Firms are increasingly organising their activities on a global scale, forming production chains including inputs that cross national boundaries. With the advent of sophisticated communications and information technology cross-border trade is no longer the preserve only of large multi-national corporations.

These factors have led to an increasing number of situations where Australian businesses are involved in matters where cross-border insolvency issues arise. This trend is not likely to change.

RISKS OF CROSS-BORDER INSOLVENCY

One of the risks that all businesses face is that of a trading partner's failure. Most domestic laws provide for the handling of an insolvent enterprise. Typically, domestic laws will prescribe procedures for:

- identifying and locating the debtors' assets;
- 'calling in' the assets and converting them into a monetary form;
- identifying and reversing any voidable or preference transactions which occurred prior to the administration;

- identifying creditors and the extent of their claims, including determining the appropriate priority order in which claims should be paid; and
- making distributions to creditors in accordance with the appropriate priority.

In a cross-border insolvency context, additional complexities that may arise include:

- the extent to which an insolvency administrator may obtain access to assets held in a foreign country;
- the priority of payments: whether local creditors may have access to local assets before funds go to the foreign administration, or whether they are to stand in line with all the foreign creditors;
- recognition of the claims of local creditors in a foreign administration;
- whether local priority rules (such as employee claims) receive similar treatment under a foreign administration;
- recognition and enforcement of local securities over local assets, where a foreign administrator is appointed; and
- application of transaction avoidance provisions.

The additional complexities surrounding cross-border insolvencies necessarily result in uncertainty, risk and ultimately costs to businesses. It would be of overall benefit to businesses in all countries to have adequate mechanisms in place to deal efficiently and effectively with cross-border insolvencies. Given Australia's place in the world economy, it is especially important to adopt policies that promote efficiency, reduce legal uncertainties and transaction costs and enhance international trading efficiency.

BACKGROUND TO THE UNCITRAL MODEL LAW

UNCITRAL was created by the United Nations in 1966 'to further the progressive harmonisation and unification of the law of international trade'.

The original suggestion to undertake work on cross-border insolvency was made to UNCITRAL by practitioners directly concerned with the problem, in particular at the UNCITRAL Congress, 'Uniform Commercial Law in the 21st Century' held in May 1992.

Australia recognised the importance of this issue for international trade and its delegates to UNCITRAL actively encouraged the Commission to pursue work in this area. Australia's experience with attempting to recover assets from foreign jurisdictions in the wake of high profile corporate collapses in the late 1980s and early 1990s provided impetus for Australia's support for the work.

There was some opposition to UNCITRAL commencing this work, along the lines that national differences in approach to insolvency law and policy would present insuperable difficulties to getting agreement among countries. However, in 1995 the Commission agreed to establish a Working Group to develop model legislation relating to cross-border insolvency. The Treasury and the Attorney-General's Department, which has responsibility for personal insolvency policy, supported the Working Group of UNCITRAL in the development of the Model Law.

Over the next two years the text of the Model Law was developed at meetings of the Working Group, comprising representatives from 36 UNCITRAL member countries and 40 observer states, in consultation with 13 international organisations representing practitioners, judges and lenders. In comparison with other comparable projects, the Model Law was developed quickly, due in large part to the enthusiasm for the work on the part of the participants.

The Working Group on Insolvency presented its finalised text to the UNCITRAL annual session of 1997, where it was endorsed by the Commission. In association with the Model Law the Commission has approved the publication of a *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*.¹ The Model Law is reproduced in the appendix to this Discussion Paper.

1 The Model Law and Guide is available at <http://www.uncitral.org/english/texts/insolven/insolvencyindex.htm>.

SHOULD AUSTRALIA ENACT THE UNCITRAL MODEL LAW

This part of the paper considers in general terms the advantages and disadvantages for Australia in proceeding to adopt the UNCITRAL Model Law.

VIEWS OF INTERNATIONAL COMMENTATORS ON THE UNCITRAL MODEL LAW

In April 2001, the World Bank published a paper, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*. It noted that insolvency proceedings may have international aspects, and insolvency laws should provide for rules of jurisdiction, recognition of foreign judgments, cooperation among courts in different countries and choice of law.¹ Insolvency laws should provide for:

- foreign insolvency administrators to have direct access to courts and other relevant authorities;
- a clear and speedy process for obtaining recognition of foreign insolvency proceedings opened in accordance with internationally recognized standards of jurisdiction;
- a moratorium or stay at the earliest possible time in every country where the debtor has assets;
- no discrimination between creditors, regardless of the nationality, residence or domicile of the parties concerned; and
- courts and administrators to cooperate in international insolvency proceedings, with the goal of maximizing the value of the debtor's worldwide assets, protecting the rights of the debtor and creditors, and furthering the just administration of the proceedings.

¹ World Bank *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, Principle 24, page 52, retrieved from <http://www.worldbank.org>.

Should Australia enact the UNCITRAL Model Law

The World Bank paper stated that the most effective and expeditious way to achieve these objectives was to enact the UNCITRAL Model Law on Cross Border Insolvency.

The International Monetary Fund also expressly supported the enactment of the Model Law. In its 1999 Report on *Orderly & Effective Insolvency Procedures* it concluded that, in light of the growing importance of cross-border insolvencies, measures should be introduced to facilitate the recognition of foreign proceedings and cooperation and coordination among courts and administrators of different countries. The enactment by countries of the Model Law prepared by UNCITRAL would provide an effective means of achieving these objectives.²

The UNCITRAL Model Law has also received almost universal endorsement from leading practitioners and academics around the world. Some examples of the views on the Model Law are that it:

- ‘will help alleviate the current difficulties arising when attempts are made to effect rescue of an ailing enterprise in more than one jurisdiction’ — Canada;
- ‘[offers a] reasonable equilibrium between the ideal of a single international insolvency and the protection of local creditors’ interests within a foreign insolvency’ — Switzerland;
- ‘[is] a significant contribution to the effort to solve the international problem of insolvencies’ — Chile;
- ‘is ambitious and measured. Ambitious because [it] seeks to propose to States common rules for the treatment of international insolvencies... Measured, because the rules do not require States to introduce profound legislative changes...’ — France; and
- ‘represents perhaps the most important step taken thus far in trying to achieve a truly international framework for cooperation in insolvencies, in contrast to the limitations of uniquely domestic legislation as well as previous efforts on a regional scale, not all of which have met with success.’ — Malaysia.³

2 International Monetary Fund, (1999). *Report on Orderly & Effective Insolvency Procedures*, page 54, retrieved from <http://www.imf.org>.

3 Paul J. Omar, (2000, May). ‘International Insolvency Co-Operation: The UNCITRAL Model Law’, *Malayan Law Journal*, retrieved August 16, 2002 from <http://www.mlj.com.my/articles/default.htm>.

Finally, while noting some matters requiring consideration (discussed further below), a leading Australian academic in the field of cross-border insolvency concluded that 'the Model Law has the potential to advance cooperation and coordination in Australian cross-border insolvencies'.⁴

WHY SHOULD AUSTRALIA ENACT THE MODEL LAW?

Despite the apparent widespread praise for the Model Law, one might ask what the concrete benefits are for Australia in its enactment? It might be argued that enacting the Model Law does more to assist foreign administrations than it does to assist domestic ones.

A leadership role for Australia

The major benefits, in terms of equality of treatment for Australian creditors, ease of recovering assets from foreign jurisdictions and more efficient treatment of international insolvencies involving Australian businesses, will come only if other jurisdictions also enact the Model Law. The Model Law does not rely on reciprocity for effectiveness. However, many jurisdictions may adopt a 'wait and see' approach, and not proceed to enact the Law until a critical mass of jurisdictions have done so.

At the government level, there has been movement toward enactment although not at the pace that might have been expected. Since 1997, only a handful of nations have enacted the Model Law.⁵ A number of other nations have made positive statements at government level about incorporating the Model Law into their legal systems, including the United States,⁶ the United Kingdom, Canada, New Zealand and Malaysia.

Australia has a solid history of promoting sound insolvency policies in the Asia-Pacific region and beyond. It has been, and continues to be, active through UNCITRAL and other forums such as APEC and the OECD in encouraging nations to develop effective and efficient insolvency frameworks. A number of Australian insolvency practitioners are well regarded around the world and

4 Rosalind Mason, 'Implications of the UNCITRAL Model Law for Australian Cross-Border Insolvencies', 8(2) *International Insolvency Review* 83, 107.

5 Eritrea, Mexico, South Africa, Montenegro, Japan and India.

6 The USA introduced the law in a Bill but it failed to progress due to reasons unconnected with the Model Law.

Should Australia enact the UNCITRAL Model Law

they have tended to feature prominently in leadership groups of international insolvency-related organisations.⁷

Given Australia's active involvement in developing the Model Law and its position in the international insolvency community, other jurisdictions will be monitoring progress of Australia's consideration of the Model Law's implementation. If Australia were not to proceed with enactment in the near to medium term, this is likely to have a direct influence on the position of other countries, particularly in the Asia-Pacific. New Zealand, for example, proposes to enact the Model Law but will not commence it until Australia implements the law.

Difficulties with alternative approaches

Although Australia already has some laws dealing with cross-border insolvency cases, they are not well suited to dealing with all of the consequences and complexities of cross-border insolvencies. The current system is dealt with in more depth in later parts of this paper. Enactment by Australia will support development of a well-understood, uniform, internationally recognised framework for administering cross-border insolvencies. An international model endorsed by UNCITRAL and known to the courts and authorities of many countries is more likely to attract support and cooperation from other countries than the current mechanisms of the law which have been adopted unilaterally.

Conventions, treaties or bilateral agreements can provide some solution to cross-border insolvency difficulties but they are not easy to negotiate, especially when the insolvency laws and commercial laws and policies of the various jurisdictions are fundamentally different. Australia is not currently a party to a multilateral convention on cross-border insolvency and there is no convention which it could appropriately enter into for this purpose. For Australia, the UNCITRAL Model Law is the leading initiative on this issue.

⁷ For example, Mr Ron Harmer, recognised as the chief architect of Australia's voluntary administration system, is a leading figure in international insolvency reform and was a major contributor to the development of the UNCITRAL Model Law through work with INSOL International, the International Federation of Insolvency Professionals. Another practitioner of Australian origin (now working in Hong Kong), Mr John Lees, is current President of INSOL International. Mr Terry Gallagher, Inspector-General of the Insolvency and Trustee Service Australia, is current President of the International Association of Insolvency Regulators (IAIR).

A question of sovereignty?

If Australia enacts the Model Law it will become part of Australia's domestic law like any other law. Though it is open to an enacting State to enact the Model Law as it sees fit in conformity with its national law and procedural system, states are encouraged to make as few changes as possible in incorporating the Model Law into their legal systems in order to achieve a satisfactory degree of harmonisation and certainty, and uniformity of interpretation.

The question of whether enacting a text developed elsewhere into domestic law is a diminution of the sovereignty of the State was considered by the New Zealand Law Reform Commission in its report on the Model Law.⁸ This issue was dismissed on the grounds that to ignore global commercial trends may discourage foreign investment. Moreover, the Model Law was procedural in nature and did not purport to affect substantive domestic laws in any case. A further factor in this regard may be that Australia, like New Zealand, played a role in developing the Model Law.

Proposal 1

It is proposed that Australia should enact the UNCITRAL Model Law on Cross-Border Insolvency, subject to the proposals below regarding the details of implementation.

⁸ New Zealand Law Commission, Report 52, *Cross-border insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency?*, Wellington, New Zealand, February 1999.

APPROACHES TO CROSS-BORDER INSOLVENCY

The approach to cross-border insolvency matters differs across national borders and legal systems.

UNDERLYING APPROACHES TO CROSS-BORDER INSOLVENCY

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*.

Universal 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 in, and possibly also according to, the law of 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.

A modified form of this approach is adopted when there is a primary proceeding in the place of incorporation with secondary or ancillary proceedings occurring in other jurisdictions where assets of the insolvent enterprise are located. The secondary administrator assists the primary administrator collecting assets and, after satisfying preferred creditors and other approved payments, remits the surplus to the primary administrators. This modified universal approach is reflected in part of Australia's current law (Corporations Act, section 601CL).

Territorial approach

The *territorial approach* assumes that each country will have exclusive jurisdiction over the insolvency of a particular debtor and that separate proceedings for each country under that countries' 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 may be 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. Debtors and creditors can take advantage of time delays and differing laws concerning voidable transactions and preferred creditors to minimise any loss resulting from the debtor's inability to pay all debts. The *territorial approach* to cross-border insolvencies is also reflected in part of Australia's current law (Corporations Act, Part 5.7).

LEGAL MECHANISMS

There are several types of legal mechanisms that have been used to address cross-border matters, which vary in their degree of formality. They include legislation, common law doctrine, judicial cooperation and inter-governmental agreements. Often more than one of the mechanisms are combined.

Recognition statutes

An approach often used in common law-based countries is to enact legislation specifically dealing with recognition of foreign insolvency proceedings. The legislation allows (or requires) courts in the home jurisdiction to recognise certain foreign insolvency proceedings, and provide assistance to foreign courts conducting such proceedings.

In Australia, this approach has been adopted in both the *Bankruptcy Act 1966* and the *Corporations Act 2001*. The provisions in these laws generally provide that Australian courts must act in aid of courts of prescribed foreign countries in matters of bankruptcy and insolvency and may act in aid of other countries. The countries prescribed include the Bailiwick of Jersey, Canada, Papua New Guinea, Malaysia, New Zealand, Singapore, Switzerland, the United Kingdom, and the United States of America.

Conventions

Some countries have entered into conventions for dealing with cross-border insolvencies in member States. The European Union Regulation on Insolvency

Proceedings, which came into effect on 31 May 2002, introduces improved arrangements for coping with cross-border insolvencies in the European Union. The American Law Institute's Transnational Insolvency Project has developed cooperative procedures for use in business insolvency cases involving companies with assets or creditors in more than one of the three North American Free Trade Agreement countries — the United States, Mexico, and Canada.

THE CURRENT AUSTRALIAN FRAMEWORK

Notwithstanding the existence of some provisions in Australia's corporate and personal insolvency laws to tackle cross-border insolvency matters, they are quite skeletal. The provisions have been criticised because they contain elements of both the territorial and the universal approach. One commentator analysing the provisions in detail in 1998 concluded that Australian creditors and Australian insolvency administrators may face considerable difficulties 'because of the inadequacy and lack of clarity' in the provisions.¹

As to non-statutory mechanisms, such as conventions, as mentioned above, Australia is not a party to any conventions along those lines, and is highly unlikely to be in a position to deal with its cross-border insolvency issues in that way.

1 Geoff Sutherland, 'Issues in Cross-Border Insolvency Law in Australia', *Commercial Law Quarterly*, June 1998 7, 11.

ENACTING THE UNCITRAL MODEL LAW IN AUSTRALIA: ISSUES FOR CONSIDERATION

This part of the paper is limited to describing the main features of the Model Law, highlighting issues of particular relevance to Australia's enactment of it. There are a number of other publications containing more detailed descriptions and analyses of the Model Law provisions.¹

GENERAL APPROACH OF THE MODEL LAW

The Model Law reflects a universal approach to cross-border insolvency. It is based on the principle that the domestic courts of each home country should endeavour to cooperate with the courts of other countries in cross-border insolvency cases. It is generally accepted that adoption of such an approach is more likely to successfully address the problems of cross-border insolvencies than a territorial approach.

The Model Law is modest in its objectives. It does not attempt to impose substantive laws or rules for the choice of substantive laws. It is essentially procedural in nature — laying out a practical framework for administering cross-border insolvencies. It provides for judicial cooperation between States, rights of access for foreign insolvency administrators and recognition of foreign insolvency proceedings by participating States.

A key feature of the Model Law is that it is not based upon a principle of reciprocity between States. There is no condition or requirement that a foreign representative wishing to access facilities under the Model Law must have been appointed, or foreign proceedings commenced, under the law of a State which has itself enacted the Model Law. The underlying assumption is that some countries will, in enacting the Model Law without any precondition of reciprocity, set an example for others and, in this way, raise levels of international awareness and cooperation.

¹ The report of the New Zealand Law Commission cited above, together with the articles cited elsewhere in this paper, are some examples. See also Ian F. Fletcher, 'Bridges to the Future — Building Tomorrow's Solutions for International Insolvency Problems', [2000] *Company Financial and Insolvency Law Review* 161.

MAIN FEATURES OF THE MODEL LAW

The Model Law comprises a Preamble, followed by 32 articles, which together take the form of model provisions intended to be enacted by participating States.

Objectives and key features

The Preamble states that:

‘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) Cooperation 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.’

The remaining 32 articles:

- set out the conditions under which the person administering a foreign insolvency proceeding has access to the courts of the State that has enacted the Model Law (Chapter II);
- sets out the conditions for recognition of a foreign insolvency proceeding and for granting relief to the representative of such foreign proceeding (Chapter III);
- allow foreign creditors to participate in proceedings in the local jurisdiction (Articles 13-14);
- permit courts and insolvency administrators from different countries to cooperate more effectively (Chapter IV); and

- make provision for coordination of insolvency proceedings that are taking place concurrently in different States (Chapter V).

In summary, the Model Law covers the following procedural issues:

- *inbound requests for recognition* of a foreign insolvency proceeding;
- *outbound requests for assistance* from a foreign State in connection with a proceeding in the enacting State under its laws relating to insolvency;
- *requests* for coordination of insolvency proceedings taking place concurrently in a foreign State and the enacting State in respect of the same debtor; and
- *participation by foreign creditors* or other interested parties in proceedings occurring in the enacting State.

To constitute a ‘foreign proceeding’ in a foreign State, the proceeding must be a ‘collective judicial or administrative proceeding’, it must be ‘pursuant to a law relating to insolvency’, it must entail control or supervision of the assets and affairs of the debtor by a foreign court or other authority, and it must be for a ‘purpose of reorganisation or liquidation’.

In the Australian Corporations Act context, that means the scope of the Model Law would extend to liquidations arising from insolvency, reconstructions and reorganisations under Part 5.1 and voluntary administrations under Part 5.3A. It would not extend to receiverships involving the private appointment of a controller. It would also not extend to a members’ voluntary winding up or a winding up by a court on just and equitable grounds as such proceedings may not be insolvency related.

The types of debtor covered by the Model Law is discussed further in the next part.

KEY ISSUES FOR POSSIBLE ENACTMENT OF THE MODEL LAW IN AUSTRALIA

If Australia proceeds with enacting the Model Law, there are a number of issues that need to be resolved.

What form would the enactment take?

There would be legislative power under the Constitution to enact the legislation at the federal level through one or more of the insolvency, external affairs, and/or corporations powers.

There are essentially two options for incorporation of the Model Law into Australia's domestic law: it could be enacted as a 'stand alone' Act of Commonwealth Parliament, or it could be incorporated into the relevant existing laws on insolvency (the Corporations Act and/or the Bankruptcy Act).

New Zealand is proposing to enact through a separate Act. South Africa has already done likewise. By contrast, the United States proposes to include the Model Law as part of the Bankruptcy Code. However, in considering enactment of the UNCITRAL Model Law, the National Bankruptcy Review Commission said that:

'It is recommended that the law be adopted as a single section, with a few exceptions. The law is drafted as a coherent whole and will be more useful to the courts in that form. Furthermore, because it is hoped that other countries will follow the United States' lead in adopting it, our approval will be clearer and more demonstrable if it is all in one place in our law, rather than in bits and pieces.'²

Advantages of having a separate Act include that:

- it is more visible internationally (the point made by the United States National Bankruptcy Review Commission);
- it could be extended to personal insolvency contexts, if required (see below);
- as its language does not line up precisely with standard drafting of Commonwealth Acts it would not 'dovetail' easily with existing Acts;

Disadvantages include that:

- the whole of the law concerning corporate/personal insolvency would not be in the one place; and
- there may be more risk for argument about legislative intention and conflict of laws — for example, unintentional 'override' of domestic provisions by enacting a later law outside the existing framework.

² National Bankruptcy Review Commission, Transnational Insolvency, retrieved on 6 August 2002, from <http://govinfo.library.unt.edu/nbrdc/report/10transn.html>

Whatever form of enactment is adopted, relevant Bills would be subject to the requirements of the Corporations Agreement concerning consultation with, and approval of, the Ministerial Council for Corporations regarding potential effects on the operation of the national corporate regulation scheme.

Proposal 2

It is proposed that the enactment of the UNCITRAL Model Law would be by separate enactment of the Commonwealth Parliament.

Would the scope of the Model Law cover insolvency of corporations and natural persons?

The focus of the Model Law is squarely on business debtors. The guide to enactment mentions that enacting States may wish to exclude from the scope of the cross-border provisions consumer debtors (or non-traders).

In Australia, there is no obvious legal barrier in terms of insolvency law applicable to traders and non-traders — rather, on the one hand, corporate insolvency is dealt with under the Corporations Act, while personal bankruptcy of natural persons is dealt with under the Bankruptcy Act.

Should that distinction be retained under the Model Law, so it only applies to corporate insolvency proceedings, or should it be extended to some (or all) personal bankruptcies also?

On one hand, applying the cross-border provisions only to corporate insolvencies could be justified on the basis that Australian businesses with an international dimension are very likely to involve corporations. Use of the provisions against Australian consumer debtors could be controversial, and Australia's legal framework does not contain obvious legal boundaries between consumer debtors and business debtors in the context of individual bankruptcy. Designing an appropriate interface between the Model Law and the Bankruptcy Act may involve some complexities.

On the other hand, 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.

Proposal 3

It is proposed that the Insolvency and Trustee Service Australia consider and make recommendations to the Government about the application of the Model Law to individual debtors in Australia. This review would be conducted with a view to applying the Model Law to insolvent corporations and, if appropriate, some or all types of individual debtors, at the same time.

What special categories of debtor should be excluded from the scope of the Model Law?

Article 1(2) of the Model Law envisages that entities such as banks or insurance companies that are subject to special insolvency arrangements under their respective statutory schemes may be excluded by enacting States from the application of the Model Law. It is recognised that the peculiar policy considerations applying to the insolvency of those entities should not be disturbed by operation of the Model Law.

As there are special insolvency arrangements for authorised deposit-taking institutions and insurance companies in the Banking Act, the Insurance Act and the Life Insurance Act, it would be appropriate to exclude institutions regulated by these Acts.

There may also be special categories of entity under State and Territory law that are given special treatment in cases of insolvency, such as corporations whose business involves the provision of essential services. These categories of debtor may also be excluded.

Proposal 4

It is proposed to exclude corporate entities that are currently subject to special insolvency regimes at the Commonwealth level (including financial institutions) from the scope of the Model Law. Views of States and Territories will be sought on exclusion of further types of entities under special insolvency frameworks.

Should the current cross-border framework in the Corporations Act be repealed or retained to operate in parallel with the Model Law?

The Corporations Act currently provides alternative procedures for winding up an insolvent foreign company which is registered as a foreign company in Australia or which carries on business in Australia: under section 601CL and Part 5.7. The Corporations Act also gives recognition to the operation of principles of comity in international insolvency (Division 9, Part 5.6). The question arises as to how these various provisions should continue to operate vis-à-vis the Model Law.

Section 601CL: Winding up a registered foreign company

The Corporations Act provides that where a registered foreign company commences to be wound up or is dissolved or deregistered in its place of origin, the local agent of the company must lodge notice of the fact with the Australian Securities and Investments Commission and the Australian court must, on application by the foreign liquidator of the company, appoint an Australian liquidator of the foreign company: subsection 601CL(14).

The Model Law addresses the typical circumstances of a winding up of a registered foreign company and expands on the framework set out in section 601CL. It is arguable that subsections 601CL(14)-(16) are no longer required as the Model Law will cover the situations to which section 601CL applies.

However, a cross-border insolvency law should address the full range of circumstances that arise in an insolvency context, including novel or atypical situations that may not fall within the intended scope of the Model Law, or where the Model Law is not invoked (for example, where no foreign representative is appointed or authorised to act).

Section 601CL expressly addresses one such situation, that is where a registered foreign company is dissolved or deregistered in its place of origin. The provision imposes obligations on the foreign company's local agent to take steps to have the company's affairs in Australia dealt with. The Model Law does not impose such obligations — it merely facilitates action. It may be advantageous, therefore, to retain the framework in subsections 601CL(14)-(16) for such situations.

A possible disadvantage in retaining what is effectively an alternative means of proceeding in a cross-border insolvency is that it may detract from the operation of the Model Law. Retaining a procedure under section 601CL in

addition to the Model Law may serve to complicate cross-border insolvency law. However, this may be overcome by clarifying the scope of application of subsections 601CL(14)-(16) and including measures to ensure that it will not operate in derogation of the Model Law.

Proposal 5A

It is proposed that subsections 601CL(14)-(16) of the Corporations Act concerning the cessation of business of a foreign company be retained to address circumstances that fall outside the scope of the Model Law or where the Model Law is not invoked. It should be made clear that section 601CL shall not operate in derogation of the Model Law where the Model Law is invoked.

Part 5.7: Winding up bodies other than companies

Part 5.7 of the Corporations Act authorises a court to wind up a Part 5.7 body, a term which includes a foreign company that is registered under Division 2 of Part 5B.2, as well as a foreign company that is not registered under that Division but 'carries on business in this jurisdiction and outside its place of origin'. It provides an alternative mechanism for winding up a foreign company which is not available or is not pursued under section 601CL. However, it overlaps in part with section 601CL as it may be utilised where the foreign company is in the process of being wound up or has been dissolved, deregistered or otherwise ceased to exist as a body corporate under the laws of the place of its incorporation.

Part 5.7 envisages a local winding up of the foreign company in accordance with the normal winding up provisions of Chapter 5 (Parts 5.4, 5.4A and 5.4B), with the Australian liquidator redeeming the local assets and paying the creditors in accordance with the priority provisions of the Corporations Act. A Part 5.7 body may be wound up under Chapter 5 with such adaptations as are necessary in addition to the adaptations specified in section 583. Part 5.7 establishes a separate insolvency administration in Australia and does not give recognition to any foreign insolvency proceeding.

It is arguable that Part 5.7 should be retained as a feature of Australia's insolvency law as it is necessary to provide for the administration of a foreign company where the Model Law cannot or has not been invoked, for example, where no foreign proceeding has been commenced or the foreign company has been dissolved in its place of origin. Further, retaining Part 5.7 allows creditors, whether Australian or foreign, the option of having an Australian liquidator

appointed to a foreign company with the powers, procedures and avenues available to a liquidator in a winding up under Chapter 5.

The drafting of Part 5.7 has been criticised.³ In *Kintsu Co Ltd v The Peninsular Group Ltd*, Santow J noted that Part 5.7 has remained essentially unaltered notwithstanding significant changes to Part 5.4 made by the *Corporate Law Reform Act 1992*. Part 5.7 could be reviewed to ensure that its provisions are consistent with the Model Law and the remaining parts of Chapter 5.

Proposal 5B

It is proposed that Part 5.7 of the Corporations Act — Winding Up Bodies other than Companies — be retained, but with such changes as are necessary to ensure it operates harmoniously with the proposed Model Law and consistently with the remainder of Chapter 5 of the Corporations Act.

Division 9 of Part 5.6: Cooperation between Courts

Division 9 of Part 5.6 of the Corporations Act (comprising sections 580 and 581), sets out a statutory scheme for cooperation between Australian and foreign courts in external administration matters. Australian courts are required to act in aid of, and be auxiliary to, the courts of prescribed countries that have jurisdiction in external administration matters (paragraph 581(2)(a)) and may act in aid of other countries (paragraph 581(2)(b)). Prescribed countries are the United Kingdom, the United States, Singapore, New Zealand, Malaysia, Canada, Papua New Guinea, Switzerland and Jersey.⁴

Subsection 581(3) also provides that where a letter of request from a foreign country requesting aid in an external administration matter is filed with an Australian court the court may exercise the powers that it would have had if the matter had arisen within its own jurisdiction. The letter of request will be obtained by the foreign insolvency administrator making an application to the foreign court.

Subsection 581(4) permits an Australian court to request a court of an external Territory, or of a country other than Australia, that has jurisdiction in external

³ See *Kintsu Co Ltd v The Peninsular Group Ltd*, 27 ACSR 679 and *The Peninsular Group Ltd v Kintsu Co Ltd*, 28 ACSR 632.

⁴ Corporations Regulation 5.6.74. Countries are prescribed where analogous provisions are a feature of their own laws. See, for example, section 304, Bankruptcy Code (US); section 426, Insolvency Act (UK).

administration matters to act in aid of, and be auxiliary to, it in an external administration matter.

Articles 25 to 27 of the Model Law would provide a more comprehensive set of principles and practices for formal cooperation and communication between the courts of different countries. They not only authorise cooperation and direct communication between local courts and foreign courts or foreign representatives but also mandate it. Chapter V of the Model Law complements these provisions by means of specific directives as to the procedures to be followed in cases where there are concurrent proceedings under the laws of the different States, and addresses the rights of creditors participating in more than one proceeding. Article 7 recognises that additional assistance may be provided under other laws of an enacting State and seeks to preserve the efficacy of those laws.

However, retention of the existing provisions could be advantageous because they have been a long standing feature of insolvency/bankruptcy and, in the view of one commentator, they have operated in an effective way and would add extra avenues for recognition and cooperation.⁵

Proposal 5C

It is proposed that Division 9 of Part 5.6 be retained in relation to external administration matters arising under the Corporations Act.

Implementation of the Model Law — specific proposals

Scope of the Model Law

Article 1 of the Model Law outlines the intended scope of its application. It is intended to apply:

- where assistance is sought locally by a ‘foreign court’ or a ‘foreign representative’ in connection with a ‘foreign proceeding’;
- where assistance is sought in a foreign State in connection with a proceeding under the enacting State’s insolvency laws;

⁵ Rosalind Mason, ‘Implications of the UNCITRAL Model Law for Australian Cross-Border Insolvencies’, 8 *International Insolvency Review* 83, 107.

- where concurrent insolvency proceedings are taking place in the enacting State and in a foreign State;
- where creditors or other interested persons in a foreign State have an interest in initiating a local proceeding.

'Foreign proceeding' is defined by Article 2(a) as:

'a collective judicial or administrative proceeding, including a proceeding opened on an interim basis, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation'.

Under Article 9, a 'foreign representative' is entitled to apply directly and immediately to a court in the enacting State to apply for relief and assistance in relation to a foreign proceeding, including interim relief pending recognition and/or to seek recognition of a 'foreign proceeding'. A 'foreign representative' is defined by Article 2(e) as:

'a person or body, including a person or body appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding'.

The right to apply for relief and assistance is not subject to any precondition that the foreign proceeding must first have been accorded formal recognition. Consequently, prompt action can be taken to protect the debtor's assets from local acts of individual enforcement without the customary delay that ordinarily follows from the need to obtain an order of recognition and execution from a local court before anything can be done under the law of that State. The Model Law will not override the separate legal entity concept. In the case of an entity such as a subsidiary of a foreign company, the Model Law will apply to the subsidiary in its capacity as a separate legal entity.

Article 11 confers on a 'foreign representative' the further right to apply to commence a proceeding under the local insolvency law of the enacting State if the conditions for commencing such a proceeding are otherwise met. Such a right may help to 'collectivise' matters affecting the debtor's assets in the enacting State and put a halt to local actions by individual creditors directed against particular assets. This right is not dependent on a requirement that the foreign proceeding must first have been accorded formal recognition.

The Model Law aims to ensure the equal treatment of foreign and local creditors. Article 13 provides that foreign creditors have the same rights to

commence and participate in a proceeding under the laws of the enacting State as local creditors. It also permits an enacting State to specify how claims of foreign creditors are to be ranked. Article 14 ensures that foreign creditors are notified of proceedings equally with local creditors. In relation to notification of foreign creditors it may be appropriate to permit a court to allow for some other form of notification (such as, by electronic means or via a web site) where a court considers it just to do so.

Proposal 6A

Subject to the proposal concerning Article 13 below, it is proposed that Chapters I and II of the Model Law (Articles 1-14) be adopted essentially as written.

Ranking of foreign and domestic creditors

The Model Law is primarily concerned with the foreign representative's rights of access to courts. However, Chapter II (Articles 9-14) also contains some provisions which confer rights of access upon foreign creditors. Under Article 13(1), foreign creditors are to have the same rights as local creditors regarding the commencement of and participation in an insolvency proceeding.

Article 13(2) provides that Article 13(1) does not affect the ranking of claims in an insolvency proceeding under local law. An optional version of Article 13(2) under the Model Law expressly refers to the treatment under local law of foreign revenue claims. Under the current Australian common law, claims on behalf of a foreign State to recover revenue claims due under its laws are not provable in insolvency proceedings.

Proposal 6B

In relation to Article 13 it is proposed to adopt the optional provision in Article 13(2) that provides that the Model Law does not affect the exclusion of revenue claims by a foreign State from insolvency proceedings under Australian law.

Recognition of the foreign proceeding

Notwithstanding the absence of any precondition that recognition of the foreign proceeding must first be granted, the substantive benefits available under the Model Law flow from recognition of the foreign proceeding. The criteria for such recognition contained in Articles 15 to 17 seek to simplify the process of recognition. The Model Law provides for two categories of recognition: the foreign proceeding may qualify as a 'main' or as a 'non-main' proceeding according to the circumstances under which it has been opened under the law of the foreign State. If it is taking place in the State where the debtor has the centre of its main interests, it is recognised as a 'foreign main proceeding': Article 17(2)(a). If the debtor has an establishment (within the meaning of Article 2(f)) in the foreign country where the proceeding is pending it is recognised as a 'foreign non-main proceeding' under Article 17(2)(b).

Articles 2(b) and 2(c) define what is meant by a 'foreign main proceeding' and a 'foreign non-main proceeding'. A 'foreign main proceeding' means 'a proceeding taking place in the State where the debtor has the centre of its main interests'. A 'foreign non-main proceeding' means 'a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (g) of this Article'. Under Article 2(f) 'establishment' means 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services'. There would be no recognition of an insolvency proceeding commenced in a foreign State which is not the debtor's centre of main interests or which does not have a place of operations qualifying as an 'establishment'.

'Centre of main interests' is not defined. It is therefore open to a court to elaborate its meaning. A definition would be likely to prove over-prescriptive and limit a court's ability to react to changing business practices. Article 16(3) supplies a rebuttable presumption that the debtor's registered office is presumed to be the 'centre of main interests'. Under Article 15(1), a foreign representative may apply to a court of the enacting State for recognition of the foreign proceeding in which he or she has been appointed. Articles 15(2) to (4) set out formal and documentary requirements in support of an application. Article 17(1) sets out the grounds on which a decision to recognise a foreign proceeding is to be recognised. The permissible categories of recognition — 'main' or 'non-main' proceeding — are confirmed by Article 17(2). Article 17(3) requires a court to decide upon an application for recognition at the earliest possible time. Under Article 17(4) recognition may be modified or terminated in the light of altered circumstances or further information becoming available to the court. Article 18 requires foreign representatives to inform the court promptly of changes in the status of the recognised proceeding or other foreign proceeding regarding the debtor or changes in the status of the foreign representative's appointment.

Proposal 6C

It is proposed that Articles 15 to 18 of the Model Law relating to recognition of a foreign proceeding be adopted as written.

Relief that may be granted

Article 19 permits a court of the enacting State to grant relief of a provisional nature under the law of the enacting State from the time of the application for recognition until the application is determined where relief is urgently needed to protect assets or the interests of creditors. Such relief is subject to the discretion of the court but a non-exhaustive list of the kind of relief that may be granted is set out in Article 19. This includes a stay of execution against the assets of the debtor, and entrusting the administration of assets of the debtor to the foreign representative or a person designated by the court.

Articles 20 and 21 detail the main effects and benefits of recognition. Article 20 applies only to cases where a foreign proceeding is recognised as a foreign main proceeding. The effects of recognition are automatic and are not dependent on the exercise of any judicial discretion. On recognition of a foreign main proceeding the following occurs:

- the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- any type of execution against the debtor's assets is stayed;
- the debtor's rights to transfer, encumber or otherwise dispose of any assets is suspended.

Article 20(2) allows an enacting State to specify exceptions to the automatic stay and suspension under Article 20(1). Such exceptions may typically include the right of a secured creditor to enforce a security over property of the debtor, or specific relief from the effects of the stay granted by a court.

Article 21 applies where a foreign proceeding is recognised either as a main or as a non-main proceeding. It confers a general discretionary power upon the court of the enacting State to grant 'any appropriate relief' including the relief specified in Articles 21(1)(a) to (g).

Under Article 21(2), a foreign representative may request the making of an order turning over the assets by the court of the enacting State where it is

satisfied that the interests of creditors in the enacting State are adequately protected. Under Article 22(1) the court is allowed to satisfy itself as a precondition to exercising its powers to grant relief that the interests of the creditors and other interested persons including the debtor are adequately protected. Under Article 22(2) the court may attach conditions to relief granted under Articles 19 or 21.

Under Article 23, recognition of a foreign proceeding enables the foreign representative to initiate the types of actions which are available under the law of the enacting State to enable the office holder in insolvency proceedings to avoid acts detrimental to the interests of creditors generally.

Under Article 24, upon recognition of a foreign proceeding the foreign representative acquires standing to intervene in any proceedings in the enacting State to which the debtor is a party. Article 12 allows the foreign representative to 'participate' in a proceeding regarding the debtor under the insolvency laws of the enacting State. The right of 'participation' is a limited one, merely enabling the foreign representative to make petitions, requests or submissions.

Proposal 6D

It is proposed that Articles 19 to 24 of the Model Law concerning the consequences of recognition of a foreign insolvency proceeding be adopted as written. For the purposes of Article 20(2), it is proposed that exceptions will be the right of a secured creditor to enforce a security over property of the debtor, or specific relief from the effects of the stay granted by a court. For the purposes of Article 23(1), it is proposed to specify the voidable transactions provisions in Division 2 of Part 5.7B.

Cooperation between Australian and foreign courts in external administration matters

Chapter IV of the Model Law aims to establish a favourable climate for the resolution of cross-border insolvency issues. The provisions are designed to perform a number of key functions, most importantly to provide for courts in the enacting State to:

- make **outgoing requests** for assistance; and
- receive **incoming requests** for assistance.

Although jurisdictions like Australia and the United Kingdom presently have this capacity, these provisions will overcome a legislative gap in many jurisdictions which will allow cooperation, where before it was impossible.

Article 25 directs the courts of the enacting State to cooperate with foreign courts and foreign representatives through the principle of direct communication between the courts of the respective States, the courts of the enacting State and any foreign representative. Article 26 directs foreign representatives similarly.

Under Article 27, cooperation can be implemented by any appropriate means. Those means include: appointment of a person or body to act at the direction of the court; communication of information by any means considered appropriate by the court; coordination of the administration and supervision of the debtor's assets and affairs; approval or implementation by courts of agreements concerning the coordination of proceedings; and coordination of concurrent proceedings regarding the same debtor.

Proposal 6E

It is proposed that Chapter IV of the Model Law (Articles 25-27) — Cooperation with Foreign Courts and Foreign Representatives — be adopted as written.

Concurrent proceedings

Articles 28 to 32 of the Model Law complement provisions of Chapter IV concerning cooperation between foreign courts and representatives in setting out mandatory requirements regarding the procedures to be followed in the event that there are concurrent proceedings under the laws of different States.

Article 28 permits local proceedings to be commenced if the debtor has assets within the jurisdiction even if a local court has recognised a foreign main proceeding. This limitation has been criticised on the ground that it may prevent a local winding up which would otherwise be beneficial.⁶ Some jurisdictions have chosen to exercise their jurisdiction to wind up a foreign company notwithstanding the absence of local corporate assets. The Guide to Enactment of the Model Law recognises that the mere presence of assets within the jurisdiction is not sufficient to allow an insolvency proceeding to be

⁶ Rosalind Mason, 'Implications of the UNCITRAL Model Law for Australian Cross-Border Insolvencies', 8 *International Insolvency Review* 83, 105.

commenced in some jurisdictions. However, the Model Law favoured the adoption of a broad ground for commencing insolvency proceedings after a foreign main proceeding has been recognised.

Under Article 31 recognition of a foreign proceeding as a main proceeding gives rise to a rebuttable presumption of the debtor's insolvency for the purpose of commencing an insolvency proceeding under the law of the enacting State.

Article 32 adopts the principle of hotchpot. Professor Fletcher outlines the essence of the rule as follows: 'A creditor who has already received partial satisfaction of his unsecured balance of claim against the debtor by participating in a process of distribution taking place in another jurisdiction, is not allowed to participate in any other process without fully accounting for what has already been received in respect of the claim for which proof is lodged. Then, after due allowance has been made for those amounts, the creditor is not entitled to be paid any share of the current distribution so long as the payment to the other creditors whose claims are ranked in the same class is proportionately less than the payment the creditor has already received.'⁷

Proposal 6F

It is proposed that Chapter V of the Model Law (Articles 28-32) — Concurrent Proceedings — be adopted essentially as written.

Additional assistance

The UNCITRAL Model Law is intended to provide States with a modern, harmonised and fair framework for addressing more effectively the problems that arise in cross-border insolvencies. However, it has been suggested that there may be scope to develop a more detailed framework that would result in further procedural streamlining in a subset of cases. For example, States with a large volume of cross-border activity between them, and with similar insolvency frameworks, may wish to agree that specified events under insolvency law in the foreign State have automatic consequences in the enacting State without the need for court involvement that would otherwise be necessary under the Model Law.

7 Ian F. Fletcher, 'Bridges to the Future — Building Tomorrow's Solutions for International Insolvency Problems', [2000] *Company Financial and Insolvency Law Review* 161, 172.

Possible approaches include agreements between participating countries about enhancements to the procedures provided by the Model Law, more detailed protocols between countries as to the handling aspects of cross-border insolvencies (including effects in the enacting State without the need for court intervention), or other arrangements for tailored cooperation between countries.⁸

Proposal 6G

It is proposed that there be included in the provisions adopting the Model Law a facility to provide (by way of regulation or other suitable instrument) for streamlining and tailoring the Model Law as it applies to particular types of proceedings or proceedings involving a specific State.

8 International colloquiums are developing guidelines/measures to enhance cooperation between courts in cross-border insolvency proceedings: see UNCITRAL/INSOL Multinational Judicial Colloquium <http://www.uncitral.org/en-index.htm> and the Draft Principles of Co-Operation in Transnational Insolvency Cases Among Members of the North American Free Trade Agreement prepared by the American Law Institute <http://iiiglobal.org/international/projects.html>).

APPENDIX: UNCITRAL MODEL LAW

UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

Preamble

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) Cooperation 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.

Chapter I. General provisions

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]*; 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 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;

(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 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 4. [Competent court or authority]¹

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

Article 5. Authorization of [insert the title of the person or body administering reorganization or liquidation under the law of the 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.

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.

1 A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in this State governing the authority of *[insert the title of the government-appointed person or body]*.

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.

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.

Chapter II. Access of foreign representatives and creditors to courts in this state

Article 9. Right of direct access

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

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

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 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]*.

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 laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than *[identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims]*.²

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

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

² The enacting State may wish to consider the following alternative wording to replace paragraph 2 of article 13(2):

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]*.

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.

Chapter III. Recognition of a foreign proceeding and relief

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 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 17. Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized 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.
2. The foreign proceeding shall be recognized:
 - (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of 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 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 recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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.

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;

(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.

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 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 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].
2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

Article 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.

Chapter IV. Cooperation with foreign courts and foreign representatives

Article 25. Cooperation 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].
2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26. Cooperation 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.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

- (a) Appointment of a person or body to act at the direction of the court;
- (b) Communication of information by any means considered appropriate by the court;
- (c) Coordination of the administration and supervision of the debtor's assets and affairs;
- (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) Coordination of concurrent proceedings regarding the same debtor;
- (f) *[The enacting State may wish to list additional forms or examples of cooperation].*

Chapter V. Concurrent proceedings

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 cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

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

(ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;

(b) When the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,

(i) Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and

(ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in 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 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 cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) Any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;

(b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

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.

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.