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US exceptionalism and UK localism? Cross-Border Insolvency Law in Comparative Perspective

Abstract

This article addresses how the UNCITRAL Model Law on Cross Border Insolvency has been implemented and interpreted in the US and UK. The Model Law has attained a measure of international acceptance and is intended to achieve greater efficiencies in the administration of insolvency cases with transnational dimensions. But different manners of implementation in different countries and differing interpretations may hinder the prospects for harmonization and coordination of laws. The paper will address in particular whether US interpretations differ from those in the UK and whether the US decisions are so infused with ‘American exceptionalism’ that they cannot be relied upon as sure guides in other countries.

Article

The UNCITRAL Model Law on Cross Border Insolvency aims to achieve greater efficiencies in the administration of international insolvency cases.¹ The Model Law has attained a measure of international acceptance² with the US and UK among the implementing States as well as Canada³ and Australia⁴. In the US, the Model Law takes the form of a new Chapter

¹ The Model Law (1997) is available at the United Nations Commission on International Trade Law (UNCITRAL) website - www.uncitral.org/. For analyses of the Model Law by those involved in its drafting – see A Berends ‘UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview’ (1998) 6 *Tulane Journal of International & Comparative Law* 309; J Clift ‘The UNCITRAL Model Law on Cross-Border Insolvency: A Legislative Framework to Facilitate Coordination and Cooperation’ (2004) 12 *Tulane Journal of International & Comparative Law* 307.

² But a somewhat different view see S Chandra Mohan ‘Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?’ (2012) 21 *International Insolvency Review* 199 who suggests that the belief that the adoption by the US and UK “might encourage adoption by a wider circle of countries” has simply not materialised. For the current list of adoptions see the UNCITRAL website – www.uncitral.org/

³ See Chapter 47 of the Statutes of Canada, 2005, introducing new provisions into the Bankruptcy and Insolvency Act (BIA) and Companies’ Creditors Arrangement Act (CCAA). For a general discussion see J

15 of the US Bankruptcy Code added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. According to a US congressional report, Chapter 15 ‘largely tracks the language of the Model Law with appropriate United States references’.⁵ The legislative history emphasises the international origins of the Model Law and the need for a consistent interpretation with that in other countries. This is said to improve the prospects for international harmonization and coordination of laws. The congressional report also suggests that if the US courts cite, and rely on, foreign decisions, their own decisions will more likely be regarded as persuasive elsewhere.⁶

This paper will address whether

- US interpretations of the Model Law provisions differ from those in the UK where the Model Law has been implemented through the Cross Border Insolvency Regulations (CBIR) 2006.⁷
- US decisions on the Model Law provisions have taken appropriate account of foreign decisions.
- US decisions should be regarded as authoritative interpretations or whether the decisions are so infused with American exceptionalism that they cannot be relied upon as sure guides in other countries?⁸

Sarra ‘Northern Lights, Canada’s version of the UNCITRAL Model Law on Cross-Border Insolvency’ (2007) 16 *International Insolvency Review* 19.

⁴ Cross-Border Insolvency Act 2008; on which see R Mason ‘Cross-border insolvency and legal transnationalisation’ (2012) 21 *International Insolvency Review* 105; A Hargovan ‘The Cross-Border Insolvency Act 2008 (Cth) – Issues and Implications’ (2008) 22 *Australian Journal of Corporate Law* 188.

⁵ See HR Rep No 31, 109th Congress 1st Session at paras 106, 107 and 109.

⁶ *Ibid* at para 109.

⁷ SI 2006/1030. Reg 2 provides that ‘(1) The UNCITRAL Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to these Regulations (which contains the UNCITRAL Model Law with certain modifications to adapt it for application in Great Britain)’.

⁸ See the strictures uttered by Scalia J in the US Supreme Court in Roper v Simmons (2005) 543 US 551 about the use of foreign law and American exceptionalism,

In addressing these issues, the paper is divided into six substantive sections followed by a general conclusion. The first section looks at general Model Law philosophy and the role of the Model Law within the national bankruptcy firmament.⁹ The second section considers the COMI test for the recognition of foreign insolvency proceedings. The third section considers timing and the jurisdictional tests; in particular at what point of time the application for recognition should meet the threshold requirements. The fourth section considers another jurisdictional hurdle apparently erected by the US courts – the need for the applicant for recognition to qualify as a ‘debtor’ under the US Bankruptcy Code. The fifth section addresses the availability of relief consequent on recognition under Chapter 15 and in particular whether the application of foreign insolvency law is permitted. The sixth section considers the application by the US courts of the public policy qualification on recognition and relief. In all of these sections, the paper will consider whether, and to what extent, US interpretations of the Model Law mirror those adopted in the UK; whether the US decisions are inspired by peculiarly US concerns and relatedly, whether the US decisions should be followed in other countries. In the general conclusion, the responses to the three research question are considered and reviewed.

1. The Model Law Philosophy and its relationship to national law provisions

This section will consider the general structure and principles of the Model Law; how its underlying philosophy has been understood in the US; how the Model Law has been incorporated in the US through Chapter 15 and whether this understanding and incorporation

⁹ In this paper the expressions ‘bankruptcy’ and ‘insolvency’ are used interchangeably.

(a) matches that in other countries particularly the UK and (b) consequently is of sound precedential value for other countries.¹⁰

The Model Law provides for the recognition of foreign insolvency proceedings and for extending cooperation to foreign courts and foreign insolvency representatives. Foreign proceedings may be either ‘main’ or ‘non-main’. Foreign main proceedings are defined as proceedings taking place in the state where the debtor has its centre of main interests (‘COMI’) and non-main proceedings where the debtor has an ‘establishment’.¹¹ Once foreign main proceedings are recognised, there is generally a stay on proceedings against the debtor or its assets; execution proceedings against the debtors’ assets are barred and the right of the debtor to dispose of assets is suspended.¹² Additional ‘appropriate’ relief may also be granted by the recognising court as a matter of discretion.¹³ In respect of foreign non-main proceedings, there are no automatic consequences of recognition but the court is empowered, on a discretionary basis, to grant all the kinds of relief that it could have granted in relation to foreign main proceedings.

This principle of recognition and cooperation extends both to traditional liquidation type procedures of the kind found in Chapter 7 of the US Bankruptcy Code and restructuring proceedings of the kind found in Chapter 11 of the Bankruptcy Code.¹⁴ The Model Law is

10 See generally I Mevorach ‘On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency’ (2011) 12 European Business Organization Law Review 517.

11 See Model Law, Articles 2(g) and (h).

12 Article 20.

13 Article 21

14 There are also liquidation and business rescue or restructuring provisions (referred to as ‘administration’) in the UK Insolvency Act but note a potentially significant difference in wording between the implementation of the Model Law in the US and UK. Under s 101(23) of the US Bankruptcy Code foreign proceeding covers proceedings in a foreign country ‘under a law relating to insolvency or adjustment of debt’ whereas in the UK the Cross-Border Insolvency Regulations 2006, SI 2006/1030, Sch 1, reg 2(i) does not specifically define foreign proceedings to include proceedings for the adjustment of debts.

however, a less ambitious instrument than the EU Insolvency Regulation.¹⁵ Under the Regulation recognition of foreign insolvency proceedings opened elsewhere in the EU is automatic rather than dependent on application to the court which is the case under the Model Law. The Regulation in Articles 4-15, unlike the Model Law, also contains mandatory uniform rules on conflict of laws. It is specifically stated that the law of the State which opens insolvency proceedings applies to those proceedings, subject to certain exceptions, but there is no such statement in the Model Law. Moreover, the Regulation directly allocates jurisdiction to open insolvency proceedings whereas under the Model Law regime, national implementing legislation makes it clear that existing jurisdictional rules remain in place.¹⁶ The mere fact that a company may have assets or even its centre of main operations in a particular State does not necessarily mean that the courts of that State have the jurisdiction to open insolvency proceedings in a particular case. It depends on the relevant national law.

Be that as it may, one could argue that both the Model Law and the European Insolvency Regulation adopt an approach of ‘mitigated universalism’.¹⁷ The assumption in each case is that of unitary insolvency proceeding for each debtor, with universal scope but, in addition, there may be territorial insolvency proceedings with the effects of those proceedings restricted to the assets of the debtor in that territory. Moreover, and despite its limitations, the Model Law should nevertheless lead to greater efficiencies in administering the affairs of

¹⁵ Regulation 1346/2000. The Regulation is presently being ‘recast’ by the European authorities but the recast does not affect the substance of the points under discussion. For the text of the ‘recast’ see 16636/14 MN/FC/ra DGD 2 of 26th February 2015.

¹⁶ See section 1520(c) Bankruptcy Code in the US and Cross-Border Insolvency Regulations 2006, SI 2006/1030 sch 1, art 20(5) in the UK.

¹⁷ See however, Sefa Franken ‘Comparative Insolvency Law: A Comparative Institutional Analysis’ (2014) 34 Oxford Journal of Legal Studies 97 at 104 who argues the Model Law embodies an approach of ‘cooperative territorialism’ but she does not address any analysis or judicial pronouncements to the contrary.

insolvent multi-state enterprises. This is particularly the case if (a) it is implemented widely and uniformly and (b), if central coordinating responsibility for the insolvent enterprise is entrusted to the courts, or insolvency representatives, in one country.

The preamble to the Model Law speaks of achieving greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies and protecting and maximising the value of the debtor's assets.¹⁸ In its recognition and relief provisions, it addresses the common pool and anti-commons problems at the heart of the modern law of corporate distress.¹⁹ By effectively banning the seizures of the debtor's assets by individual creditors, the Model Law should enhance the value of the debtor's estate as a whole i.e. the so-called 'common pool'. If individual creditors take control of assets that may be essential to the carrying on of a debtor's business, then the going concern of the business is lost. At the heart of the business is a network of relationships and assets that should be worth more collectively than if they are sundered to the four winds. The US scholar, Thomas Jackson, has made the point admirably: ²⁰

'To the extent that a non-piecemeal collective process (whether in the form of liquidation or reorganization) is likely to increase the aggregate value of the pool of assets, its substitution for individual remedies would be advantageous to the creditors as a group. This is derived from the commonplace notion: that a collection of assets is sometimes more valuable than the

¹⁸ It also refers to facilitating the rescue of financially troubled businesses, thereby protecting investment and preserving employment. For discussion of the wider goals of insolvency law see E Warren 'Bankruptcy Policy' (1987) 54 U Chicago L Rev 775; 'Bankruptcy policymaking in an imperfect world' (1993) 92 Michigan Law Review 336 and see also AR Keay 'Insolvency Law: A Matter of Public Interest?' (2000) 51 NILQ 509 at 527: 'It is glib to say ... that insolvency law only deals with economics and is only concerned with the plight of persons who have not been paid what they are owed.'

¹⁹ See generally S Paterson 'Rethinking the Role of the Law of Corporate Distress in the Twenty-First Century' LSE Law, Society and Economy Working Papers 27/2014

²⁰ See Thomas H Jackson The Logic and Limits of Bankruptcy Law (Cambridge Mass, Harvard University Press 1986) p 14. For a European perspective see Horst Eidenmueller 'Trading in Times of Crisis: Formal Insolvency Proceedings, Workouts and the Incentives for Shareholders/Managers' [2006] European Business Organization Law Review 239.

same assets would be if spread to the winds. It is often referred to as the surplus of a going concern value over a liquidation value.’

The Model Law provides for the possibility of additional relief and for enhanced cooperation between insolvency representatives in different countries. In these respects, it should also mitigate the so-called ‘anti-commons’ problem. By this is meant blocking actions by individual creditors with a view to frustrating the wishes of the majority.²¹

The US court in ABC Learning Centres Ltd expounded somewhat on these themes referring to what it saw as the underlying ‘universalist’ philosophy of the Model Law and contrasting it with a value-destructive ‘territorialist’ approach. It said:²²

‘The Model Law reflects a universalism approach to transnational insolvency. It treats the multinational bankruptcy as a single process in the foreign main proceeding, with other courts assisting in that single proceeding. In contrast, under a territorialism approach a debtor must initiate insolvency actions in each country where its property is found. This approach is the so-called ‘grab’ rule where each country seizes assets and distributes them according to each country’s insolvency proceedings.’²³

The court suggested that Chapter 15 also embraced the universalism approach. The ancillary nature of Chapter 15 proceedings emphasised the US policy of acting in ‘aid of the main

21 For a discussion of ‘anti-commons’ problems see DG Baird and RK Rasmussen ‘Anti-bankruptcy’ (2010) 119 Yale Law Journal 648; RJ de Weijts ‘Harmonisation of European Insolvency Law and the need to tackle two common problems: Common pool and Anticommons’ (2012) 21 International Insolvency Review 67 and more generally MA Heller ‘The Tragedy of the Anticommons: Property in the Transition from Marx to Markets’ (1998) 111 Harvard Law Review 622.

22 In re ABC Learning Centres Ltd. (2013) 728 F3d 301 at 307. The court cited Andrew Guzman ‘International Bankruptcy: In Defense of Universalism’ (2000) 98 Michigan Law Review 2177 at 2179.

23 For the universalism versus territorialism debate see JL Westbrook ‘A Global Solution to Multinational Default’ (2000) 98 Michigan Law Review 2276; L Lo Pucki ‘The Case for Co-operative Territoriality in International Bankruptcy’ (2000) 98 Michigan Law Review 2216; L Lo Pucki, ‘Universalism Unravels’ (2005) 79 American Bankruptcy Law Journal 143; R Rasmussen ‘Where are all the Transnational Bankruptcies?: The Puzzling Case for Universalism’ (2007) 22 Brooklyn Journal of International Law 983.

proceedings, in preference to a system of full bankruptcies ... in each state where assets are found.’²⁴ The Chapter 15 court in the US was said to act as an adjunct or arm of a foreign bankruptcy court where the main proceedings were conducted. The ancillary proceeding in the US provided support to the foreign insolvency administrator: ‘The goal is to direct creditors and assets to the foreign main proceeding for orderly and fair distribution of assets, avoiding the seizure of assets by creditors operating outside the jurisdiction of the foreign main proceeding.’²⁵

The ABC Learning analysis has also been adopted by courts in other countries including the UK.²⁶ The Australian Federal Court in Akers v Deputy Commissioner of Taxation²⁷ has however, tempered the high flown rhetoric in ABC Learning in at least two respects. First, it acknowledged that the universalism of the Model Law was qualified²⁸ and also suggested that the ‘universalism’ description could only be accepted ‘for what it is worth’.²⁹ Secondly, it suggested that “local” law may have to be applied in respect of the distribution of assets

24 HR Rep No 109–31 at para 108.

25 See JL Westbrook ‘Chapter 15 at Last’ (2005) 79 American Bankruptcy Law Journal 713 at 726.

26 On the UK generally, see the judgments of Lord Hoffmann in Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc) [2007] 1 AC 508 and in Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852 distinguishing between the universalism and territorialism of insolvency proceedings and referring to the principle of modified universalism as the ‘golden thread’ of the common law. It should be noted that while Lord Collins in Rubin v Eurofinance [2012] UKSC 46 at para 92 hails ‘Lord Hoffmann’s brilliantly expressed opinion in Cambridge Gas and his equally brilliant speech in HIH,’ the UK Supreme Court in Rubin holds that Lord Hoffmann was wrong in Cambridge Gas. In Rubin the UK Supreme Court paid lip service to the principle as an underlying principle of international insolvency law, but effectively denuded the principle of much practical power. The court seemed to foreclose the possibility of further judicial developments in this field leaving the matter within the exclusive domain of the legislature and reciprocal arrangements with other countries. See also to the same effect the Privy Council in Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36 where Lord Neuberger at para 157 referred to ‘the extreme version of the principle of universality’ in Cambridge Gas.

27 [2014] FCAFC 57 at para 111.

28 See generally L Clark and K Goldstein ‘Sacred Cows: How to Care for Secured Creditors’ Rights in Cross-Border Bankruptcies’ (2011) 46 Texas International Law Journal 513 at 518-519 describing ‘modified universalism’ as a practical alternative to the difficulty of implementing a fully universal system of international insolvency.

29 [2014] FCAFC 57 at para 120.

collected locally rather than the law of the main insolvency proceedings.³⁰ Allsop CJ said that ‘the sacrifice of the rights ... of local creditors upon an altar of universalism may be to take the general informing notion of universalism too far.’³¹

There is a controversial assertion in ABC Learning Centres that wholesale endorsement of the Model Law by Congress was indicated by the fact that it had ‘changed so little of the wording’. While the legislative intent in the US does appear to have been to stay loyal to the spirit of the Model Law, the legislative record also indicates significant rewriting to ‘comport with US procedural terminology’ and the expression of concepts ‘more clearly in United States vernacular’.³² There are also some substantive variations. To exemplify the general point, while Article 7 of the Model Law provides that nothing limits the power of a court to provide additional assistance to a foreign representative under other laws of the enacting State, the US provision is subtly different. Section 1507 limits the grant of additional relief to situations where the foreign proceedings have already been recognised. It does not allow relief where the grounds for recognition under Chapter 15 have not been met.³³ In the Bear Stearns case³⁴ it was held that Chapter 15 is the sole gateway for a US court to provide assistance to a foreign court and that there is no residual common law discretion.³⁵ The

30 For a discussion of why ‘developed States’ may prefer ‘universalist’ insolvency norms see Lord Hoffmann in Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc) [2007] 1 AC 508 and for some reasons why developing countries might want to ring-fence assets for the benefit of local creditors see the paper by the former Singapore Chief Justice Chan Sek Keong ‘Cross-Border Insolvency issues affecting Singapore’ (2011) 23 Singapore Academy of Law Journal 413 at 419.

31 Ibid at para 118. See also the paper by Judge Allan Gropper ‘The Payment of Priority Claims in Cross-Border Insolvency Cases’ (2011) 46 Texas International Law Journal 559 which notes at p 564 that there are few reported cases of assets being handed over to a foreign insolvency representative where there are potential disadvantages to US creditors.. He criticises the argument that Chapter 15 permits the remission of assets to a foreign representative over the objection of, and in derogation of the rights of, US priority creditors.

32 See HR Rep No 31, 109th Congress 1st Session at paras 106, 107 and 109.

33 See A Ranney-Marinelli, ‘Overview of Chapter 15 Ancillary and other Cross-Border Cases’ (2008) 82 American Bankruptcy Law Journal 269.

34 Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd (2007) 374 BR 122 and affirmed (2008) 389 BR 325.

35 Chapter 15 has been described as consisting of as ‘a series of carefully crafted compromises and recognising a residual common law discretion would undermine these compromises and run counter to the spirit of the

enactment of Chapter 15 was said to herald a shift to a more rigid recognition standard from the subjective comity-based process under the earlier law which Chapter 15 replaced.³⁶

The US approach towards Model Law enactment may be contrasted with that in the UK. In the UK, the Model Law is not the sole gateway for providing assistance to a foreign insolvency representative. The UK remains subject to the European Insolvency Regulation in respect of insolvency proceedings emanating from another EU Member State.³⁷ The Cross-Border Insolvency Regulations (CBIR) also leave other tools of cross-border insolvency co-operation intact³⁸ such as the common law³⁹ and s 426 Insolvency Act 1986. The Insolvency Act provision allows UK courts to respond to requests for assistance from certain designated foreign countries though the US is not among the list of designated countries.⁴⁰ Moreover, the UK Insolvency Service in drafting the CBIR explained that it had sought to stay as close as possible to the Model Law drafting “to try and ensure consistency, certainty and harmonization with other States enacting the Model Law and to provide a guide for other States who are considering enacting the law. Our policy has been to try and enact as drafted, which may result in the use of some terms, which may not be standard in British insolvency law.”⁴¹

legislation – see Judge Leif Clark, “‘Centre of Main Interests’ Finally Becomes the Center of Main Interest in the Case Law’ (2008) 43 Texas International Law Journal Forum 14 at 17.

³⁶ The earlier law was contained in s 304 of the US Bankruptcy Code as originally enacted. See generally JL Westbrook ‘Locating the Eye of the Financial Storm’ (2007) 32 Brooklyn Journal of International Law 1019 and see generally G McCormack ‘COMI and comity in UK and US Insolvency Law’ (2012) 128 LQR 140.

³⁷ This is with the exception of Denmark which has effectively opted out of the Regulation. The terms of the Danish opt-out were considered in Re Arena Corporation Ltd [2004] BPIR 375 where it was held that in accordance with recital (33) of the Regulation, Denmark was not to be considered as an EU ‘Member State’ for the purposes of the Regulation.

³⁸ See Schedule 1 Article 7 ‘Nothing in this Law limits the power of a court or a British insolvency officeholder to provide additional assistance to a foreign representative under other laws of Great Britain.’

³⁹ For the parameters of common law judicial assistance see now the Privy Council decision in Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36.

⁴⁰ Section 426(4) uses the crucial words ‘shall assist’. Certain countries and territories have been designated by the Co-Operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, SI 1986/2123, as amended by SI 1996/253 and SI 1998/2766. These consist of Commonwealth countries and territories with the addition of the Republic of Ireland and Hong Kong but excluding the US.

⁴¹ See UK Insolvency Service ‘Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain’ (2005) at para 7.

In conclusion on this section, while US judicial exposition of Model Law philosophy is broadly in line with that in other countries and will go to reinforce foreign judicial interpretations, the translation of the Model Law into US legislative vernacular means that in general US decisions may be of less value as precedents in other countries that have enacted the Model Law. As an example of this as far as the UK is concerned, Lewison J in Re Stanford International Bank Ltd⁴² noted that Chapter 15 contained some significant divergences from the terms of the Model Law and he suggested that US Chapter 15 authorities had to be treated with some caution for this reason. The next section will consider this issue more fully in the context of the “centre of main interests” or “COMI” criterion for the recognition of main insolvency proceedings.

2. Centre of main interests, “COMI” and the recognition of foreign insolvency proceedings

This section will consider the value of US precedents in the context of the extent of the recognition afforded foreign insolvency proceedings. As we have seen, under the Model Law this depends on whether the proceedings are classed as ‘main’ or ‘non-main’.⁴³ Foreign main proceedings are defined as proceedings taking place in the state where the debtor has its centre of main interests or ‘COMI’ and ‘non-main’ proceedings where the debtor has an establishment. Article 16(3) of the Model Law contains a presumption that the debtor’s registered office or habitual residence in the case of an individual, is the COMI but this presumption is subject to rebuttal by proof to the contrary.

In the process of translating Article 16(3) into US domestic law, Congress changed the wording so that the presumption may be rebutted by ‘evidence’ rather than ‘proof’ to the contrary. Consequently, it has been held that the burden of proof lies on the party who is

⁴² [2009] BPIR 1157.

⁴³ Articles 20 and 21.

asserting that particular proceedings are “main proceedings” and the burden of proof is never on the party who is opposing that contention.⁴⁴ Furthermore, in Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd,⁴⁵ Judge Lifland said except in circumstances where there is no contrary evidence, the location of the registered office did not have any special evidentiary value. The case concerned a structured investment vehicle incorporated in the Cayman Islands that was being liquidated in the Caymans. It was held, however, that the Cayman liquidation was not entitled to recognition in the US as either ‘foreign main proceedings’ or ‘foreign non-main proceedings’. The statutory presumption that the Caymans, as the place of incorporation, constituted the COMI was held to be rebutted by contrary evidence. It was also held that the Cayman liquidation did not qualify as ‘foreign non-main proceedings’ since the investment vehicle did not have any place of operations in Cayman where it carried out ‘non-transitory economic activity’.⁴⁶

From the Bear Stearns case, it appears that COMI is determined by where the most material contacts are to be found, especially management direction and control of assets. These contacts ‘include the location of the debtor’s headquarters, the location of those who actually manage the debtor, the location of the debtor’s primary assets, the location of a majority of the debtor’s creditors or of a majority of creditors who would be affected by the case and the jurisdiction whose law would apply to most disputes’.⁴⁷

The concept of “principal place of business” is a familiar notion in US domestic jurisprudence in terms of the allocation of jurisdiction between individual States. Judge Klein made the equation between principal place of business and COMI in one of the first US

⁴⁴ See Judge Klein in Re Tri-Continental Exchange Ltd (2006) 349 BR 629 at 635.

⁴⁵ (2007) 374 BR 122 and affirmed (2008) 389 BR 325. See also Re Basis Yield Alpha Fund (2008) 381 BR 37; Re Ernst & Young (2008) 383 BR 773.

⁴⁶ See also on ‘establishment’ Re British American Insurance Company Ltd (2010) 425 BR 844.

⁴⁷ See Lewison J in Re Stanford International Bank Ltd [2009] BPIR 1157 at para 66.

Chapter 15 case - Re Tri-Continental Exchange⁴⁸ asserting that an entity's "principal place of business" in US jurisprudence was that entity's COMI. In Hertz Corp v Friend⁴⁹ the US Supreme Court concluded that 'principal place of business' was best read as 'referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the ... the corporation's "nerve center". And in practice it should normally be the place where the corporation maintains its headquarters – provided that the headquarters is the actual center of direction, control, and coordination, i.e. the 'nerve center,' and not simply an office where the corporation holds its board meetings ...' The court suggested that a 'nerve centre' approach was simpler to apply, compared with other possible approaches, and that administrative simplicity was a major virtue. Hertz Corp v Friend and the nerve centre test was cited by Lifland J with apparent approval in a US Chapter 15 recognition case – Re Fairfield Sentry Ltd⁵⁰ though he also cited his earlier decision in Re Bear Stearns⁵¹ that the court could not rely solely on the presumption of concordance between COMI and registered office but must consider all the relevant evidence.

The COMI concept is also found in Art 3(1) of the EU Insolvency Regulation⁵² as the basis of the jurisdiction to open main insolvency proceedings in respect of a debtor whose centre of main interests is located in the EU. There is guidance from the European court on how COMI is to be interpreted in the context of the EU regulation. This guidance attaches greater weight to the registered office/COMI presumption. In Case C-341/04 Re Eurofood IFSC Ltd ⁵³ the European Court said that where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut

48 (2006) 349 BR 627 at 634.

49 (2010) 559 US 1 at 14-15.

50 (2010) 440 BR 60.

51 (2007) 374 BR 122.

⁵² Regulation 1346/2000.

⁵³ [2006] ECR I-03813 at para 37 and see the more recent Interedil Case C-396/09; [2011] BPIR 1639 and Mediasucre Case C-191/10; OJ 2012 C39/3. These cases suggest a slight relaxation of the presumption.

the presumption. In Re Stanford International Bank Ltd it was suggested that the English courts should follow the European Court approach even in relation to cases under the UK enactment of the Model Law. The US jurisprudence was considered to be of lesser weight given the difference in legislative wording in the US⁵⁴ and it was considered absurd to have different ‘COMI’ tests in the Model Law and in the Regulation.⁵⁵

There is much to be said however, for the view articulated by Professor Jay Westbrook that the great debate over COMI is overblown.⁵⁶ Westbrook reports, in an empirical study of all cases filed under Chapter 15, that applicants seeking recognition of foreign proceedings were successful in the great majority of cases.⁵⁷ Westbrook is very much a Chapter 15 ‘booster’ and his interpretation of the empirical data might be treated by some with caution for this reason.⁵⁸ In the vast majority of cases, nevertheless, a decision on COMI is likely to be fairly straightforward and the EU ‘strong presumption’ and the US ‘multi-factor balancing test’ will produce the same result in practice. The Bear Stearns case itself is a case in point. The case involved an ‘offshore’ hedge fund incorporated as a Caymans Islands company but with no managers or indeed employees in the Caymans. The investment manager was located in New York and the back-office operations including books and records were also administered from the US. Moreover, before the commencement of the Cayman proceedings, all the

54 [2011] Ch 33 at para 54.

55 Cases in the UK where the COMI test has been considered and applied in the context of the EU Regulation include Re Kaupthing Capital Partners II Master LP Inc [2010] EWHC 836, [2011] BCC 338; Re European Directories [[2010] EWHC 3472 (Ch), [2012] BCC 46; Re Arm Asset Backed Securities SA [2013] EWHC 3351 (Ch).

56 See JL Westbrook ‘An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency’ (2013) 87 American Bankruptcy Law Journal 247 at 261 ‘COMI is a very interesting issue but is generally not a major problem in the American courts.’

57 For information on the number of Chapter 15 filings – see the US Courts website – <http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx> -which reveals that there were 58 filings in 2014 – 33 of which were either in the Southern District of New York or Delaware.

58 For a different view on the empirical data see J Leong ‘Is Chapter 15 Universalist or Territorialist? Empirical Evidence from the United States Bankruptcy Court Cases’ (2011) 29 Wisconsin International Law Journal 110. See also the comment by L LoPucki in ‘Universalism Unravels’ (2005) 79 American Bankruptcy LJ 143, 166: ‘Universalists are trying to bring their system in through the back door. The UNCITRAL Model law was negotiated by a delegation led by universalist Jay L Westbrook, and then sold to Congress as not really universalist.’

company's liquid assets were located in the US. The only business done in the Caymans, it appears, were those acts necessary to maintain the status of the company as a registered Cayman company. If these facts were present in an EU regulation context, the court would surely be justified in concluding that the registered office equals COMI presumption would be rebutted, even if it were given some weight.⁵⁹

In conclusion, US decisions on the 'COMI' test for main insolvency proceedings are useful and influential in other jurisdictions that have enacted the Model Law but their value as precedents in the UK is somewhat limited by the influence of the jurisprudence on the European Insolvency Regulation.

3. Timing –and the relevant foreign proceedings.

The next section will consider the provenance and influence of US decisions on another “gateway” issue; namely the timing of the relevant foreign proceedings. In deciding on a recognition application, the question arises as to the point at which the ‘COMI’ or ‘establishment’ should be made – at the time of the commencement of the relevant foreign proceedings or at the time of the application for recognition. There is much to be said for the view that the most logical and convenient time for making the determination is the time of the commencement of the relevant foreign proceedings. Making the determination with reference to the time of commencement of the foreign insolvency proceeding would create a universally fixed time and lead to greater certainty in the process of deciding on recognition applications in different foreign courts.

⁵⁹ The court might conclude that the company was a letter box company and Re Kaupthing [2010] EWHC 836 (Ch), [2011] BCC 338 is a somewhat analogous UK case where the registered office/COMI presumption was applied but held to have been rebutted in respect of a letterbox company.

In Re Fairfield Sentry Ltd⁶⁰ the Second Circuit Court of Appeals held however, that COMI should be determined on the basis of the debtor's activities at, or around, the time of filing of the Chapter 15 petition. The decision adds to the ability of a foreign party to plan its cross-border insolvency strategy but the court also entered a cautionary note stating that where there was an allegation that COMI had been manipulated in bad faith, it could review the period between the commencement of the foreign proceedings and the application for recognition.

In Fairfield Sentry the economic activity undertaken by the debtor was entirely in New York but it had ceased economic activity by the time that the Chapter 15 petition was filed. It instituted insolvency proceedings in its place of incorporation, namely, the British Virgin Islands (BVI) and these proceedings were pending for some time before an application for recognition was made under Chapter 15. The court granted the application on the basis that the debtors' COMI had become located in the BVI and the date of the filing of the Chapter 15 petition was the relevant date for determining the location of COMI. Against the decision in the case, one might argue that recognition as 'non-main' insolvency proceedings requires the carrying out of some real economic activity⁶¹ and it follows, a fortiori, that a COMI determination requires even more economic activity.

The decision makes it easier for foreign proceedings to achieve recognition in the US if there is any significant interval between the commencement of the foreign proceedings and the

60 (2013) 714 F3d 127.

61 On the definition of 'establishment' see Re British American Insurance Company Ltd (2010) 425 BR 844 where Kimball J said at para 30: 'To have an establishment in a country, the debtor must conduct business in that country. The location should constitute a "seat for local business activity" for the debtor... The term "operations" and "economic activity" require showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property. See also Lavie v Ran (2009) 406 BR 277, 286: "From the outset, it stretches credulity to view a bankruptcy proceeding as an industrial or professional activity ... Further, though a bankruptcy proceeding does pertain to economic matters, it does not comport with traditional notions of economic activity in the marketplace." For an 'establishment' under the EU Insolvency Regulation, the English Court of Appeal has required 'external, market-facing activity' and not merely the carrying out of a liquidation process – see Re Olympic Airlines SA [2013] EWCA Civ 643, [2013] BPIR 663.

recognition application because the appointment of a foreign liquidator is likely to result in a shift in the debtor's activities to the State that opens the proceedings. It is submitted that the decision opens up the possibility of conflicting decisions in different countries depending on the timing of a recognition application in that particular country. The court however, based its decisions firmly on the wording of Chapter 15 and suggested that if Congress had intended bankruptcy courts to view the COMI determination through a look-back period or on a specific past date, it could easily have said so. It said that international sources were of limited use on this issue.⁶²

The result in the case owes more to Chapter 15's positioning within the Bankruptcy Code rather than its origins in an international model law and any desire to achieve uniform interpretations across different countries. Consequently, it is not likely to have a strong influence in other countries. While there does not appear to be any UK or other foreign authority directly contradicting the US position, it is noteworthy that UNCITRAL in 2013 produced a revised guide to enactment of the Model Law which takes a different stance.⁶³ The revised guide states that the date of commencement of the relevant foreign proceedings provides a test that can be applied with certainty to all insolvency proceedings.⁶⁴

4 'Debtor' requirement under the US Bankruptcy Code

This section will go to consider another area where the result is explained by the mode of enactment of Chapter 15 in the US rather than its international model law antecedents. This

⁶² See Re Emerging Global Emerging Credit Master Fund Ltd (2011) 458 BR 63 for contrary US authority suggesting that the court, in deciding a recognition application, should consider COMI on the date of the commencement of the relevant foreign proceedings.

⁶³ It seems the background to the revised guide are concerns by the US delegation about judicial interpretations of the Model Law. But perhaps such concerns are best addressed by changes to domestic law that implements the Model Law. For a general discussion explaining the background see Look Chan Ho 'The Revised UNCITRAL Model Law Enactment Guide – A Welcome Product' [2014] *Journal of International Banking Law and Regulation* 325.

⁶⁴ See revised guide at para 159 and see generally the discussion at paras 157-160.

in turn reduces the influence and impact of the US jurisprudence in the UK and other 'Model Law countries'. This is the requirement that an applicant seeking recognition of foreign proceedings should qualify as a 'debtor' under the Bankruptcy Code.

Section 109(a) of the Bankruptcy Code requires that a debtor should have a residence, domicile, place of business or assets in the US before filing for bankruptcy under the Code. This requirement applies both to the liquidation chapter – chapter 7 – and the restructuring chapter – chapter 11 - of the Code. In Drawbridge, the US Second Circuit Court of Appeals held that it also applied to a party seeking recognition of foreign insolvency proceedings under Chapter 15. The court therefore reversed a decision that had granted recognition to Australian insolvency proceedings even though there had been no evidence introduced of US assets or operations. The court adopted a close textual analysis of the Bankruptcy Code in general, and Chapter 15 in particular. It referred to s 103 which provides that chapter 1 of the Bankruptcy Code applies in a case under Chapter 15. 'Section 109, of course, is within Chapter 1 of Title 11 and so, by the plain terms of the statute, it applies in a case under chapter 15.' The court emphasised the straightforward nature of the interpretive process in this case and it rejected policy oriented arguments that might suggest a different result.

The decision undoubtedly makes it more difficult for a foreign debtor to obtain relief under Chapter 15. It might also be argued that to require a foreign representative to identify US assets prior to a recognition application would facilitate the concealment of assets thereby defeating a fundamental purpose of chapter 15. It could also hamper the use of Chapter 15 for the legitimate investigation of claims and assets in the US. The problems are likely to be particularly acute in insolvency proceedings arising out of fraud or misfeasance where the most significant recoveries for creditors could come from litigation claims.

It is important to note though, a couple of caveats that limit the significance of Drawbridge. Firstly, the eligibility requirements of s 109(a) are not that difficult to satisfy in the majority of cases, particularly the requirement that a debtor should have property in the US. It has been held that foreign domiciled debtors whose connections with the US are marginal, at most, are eligible to file for restructuring under Chapter 11 of the US Bankruptcy Code upon showing a mere “peppercorn” of property interests in the US.⁶⁵ Furthermore, to the extent that entities do not have assets in the US, this deficiency can be remedied by opening a US bank account or perhaps by providing a retainer for US bankruptcy counsel.⁶⁶ This type of strategic filing might be challenged however, and may result in dismissal of the case on the ground that the filing has not been made in good faith.⁶⁷

In conclusion, it is submitted that the Drawbridge decision is likely to be of minimal significance in other jurisdictions such as the UK since its whole rationale derives from specifically American concerns.

5. Relief consequent on the recognition of foreign insolvency proceedings including use of foreign law

The next issue to be considered is the relief that flows from the recognition of foreign insolvency proceedings. This is also an area where US decisions owe much to peculiarly US concerns thereby reducing the weight of the decisions in other countries that have enacted the Model Law.

⁶⁵ See the statement in In re Globo Comunicacoes E Participacoes SA (2004) 317 BR 235 at 249 that ‘courts have required only nominal amounts of property to be located in the United States’, and have noted that there is ‘virtually no formal barrier’ to having US courts adjudicate bankruptcy proceedings in respect of foreign debtors. See generally E Healy ‘All’s Fair in Love and Bankruptcy? Analysis of the Property Requirement for Section 109 Eligibility and Its Effect on Foreign Debtors Filing in US Bankruptcy Courts’ (2004) 12 American Bankruptcy Institute Law Review 535.

⁶⁶ See In re Global Ocean Carriers Ltd (2000) 251 BR 31 which concerned a shipping company headquartered in Greece and where it was held that the unearned portions of retainers provided to US counsel constituted property that was sufficient to form the basis for a US bankruptcy filing.

⁶⁷ See Re Yukos Oil Co (2005) 321 BR 396; Re Aerovias Nacionales de Colombia SA Avianca (2004) 303 BR 1 and see generally M Hoogland ‘Recent Trends in International Chapter 11 Cases: Pragmatic Reorganizations’ (2006) 41 Texas International Law Journal 145.

Under Article 20 of the Model Law, recognition of foreign main insolvency proceedings has three automatic consequences. There is an automatic stay on individual proceedings against the debtor or its assets; a stay on executions against the debtor's assets and thirdly, the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. The stay and suspension is however, expressly stated to be subject to whatever limitations that are part and parcel of domestic insolvency law. Article 20 is supplemented by Article 21 which applies whether the foreign proceedings are 'main' or 'non-main'. It allows appropriate relief to be given as a matter of discretion and this 'appropriate' relief can take the form, inter alia, of:

- (1) 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;
- (2) entrusting the administration or realisation of all or part of the debtor's assets to the foreign representative or another person designated by the court;
- (3) extending interim relief;
- (4) granting any further relief that might be available to an insolvency office holder in domestic proceedings.

In translating Articles 20 and 21 into Chapter 15, the US has made legislative adjustments though the nature of these adjustments has proved controversial in some instances. The adjustments will be considered under three heads; (a) scope of the stay; (b) asset disposals and (c) avoidance of transactions and application of foreign law

(a) scope of the stay

The US courts have inferred extra-territorial effect from the general language of the "stay" provision in s 362 and also from s 541 which defines property of the bankruptcy estate to include property belonging to the debtor 'wherever located and by whomever held'. It has

been held that the bankruptcy estate comprises all the debtor's property, in whatever part of the globe it is located,⁶⁸ and that the opening of bankruptcy proceedings under Chapters 7 or 11 of the Code triggers an automatic worldwide automatic stay on proceedings against the debtor and its property.⁶⁹ This stay bars all actions by creditors, wherever situated, on pain of sanctions for contempt of the US court.⁷⁰ The long arm of the US bankruptcy jurisdiction coupled with the global economic reach of the US means that foreign creditors can ill-afford to ignore US bankruptcy proceedings. It is only where they have their assets or connections in the US are completely non-existent that they are safe from the automatic stay.⁷¹

Section 1520(a)(1) provides that upon the recognition of foreign main proceedings, an automatic stay operates 'with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States'. Nevertheless, it has been argued, on the basis of the general bankruptcy code provisions, that the automatic stay should extend beyond the territorial boundaries of the US in Chapter 15 cases in the same way that it does in fully fledged bankruptcy cases filed under Chapter 7 or 11. This argument was considered by the bankruptcy court in JSC BTA Bank⁷² but it was held that, as a general rule, the stay should not apply extraterritorially.

The court took a 'plain meaning' interpretation of s 1520(a)(1) and ruled that, while the provision stayed actions against a foreign debtor within the US, it only applied outside the US to the extent that such actions affected property of the debtor within US territorial

⁶⁸ See Hong Kong & Shanghai Banking Corp v Simon (In re Simon) (1998) 153 F3d 991 at 996: 'Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate'.

⁶⁹ See s 362(a).

⁷⁰ See Nakash v Zur (In re Nakash) (1996) 190 BR 763 where the automatic stay was enforced against a foreign receiver in respect of the foreign assets of a foreign debtor.

⁷¹ To reinforce the message to creditors and others, the stay is sometimes backed up by a judicial restraining order, whether temporary or permanent, and this has been described in Nakash v Zur (In re Nakash) (1996) 190 BR 763 at 767 as a prophylactic measure to apprise third parties of the existence and effect of s 362 of the US Bankruptcy Code.

⁷² (2010) 434 BR 334.

jurisdiction. The court pointed out that Chapter 15 cases differ from fully fledged bankruptcy cases in certain respects including the fact that no separate bankruptcy estate is created upon the commencement of a chapter 15 case. Reference was made to the international origins of Chapter 15 and the explicit instruction in s 1508 to consider those origins in interpreting particular provisions. The court rejected an argument that s 1520(a)(1) distinguished between the debtor, on the one hand, and its property, on the other. It said that this interpretation was ‘focused too narrowly on scanning the words and ignores the ancillary nature of chapter 15, the specialized definition of the word “debtor”, and the interpretive mandate of section 1508’.⁷³

The court said that recognition of foreign main proceedings under Chapter 15 should not become, by operation of law, a worldwide anti-suit injunction in respect of any proceedings, regardless of subject matter, that may be pending or threatened against the foreign debtor in whatever country. This result was said to be clearly at odds with the legislative intent behind Chapter 15. The court suggested that the concept of territorial jurisdiction was an essential element in promoting cooperation and greater legal certainty in cross-border cases. The Chapter 15 stay was held to apply for all purposes to the debtor within the US and might extend to the debtor in respect of proceedings in other jurisdictions for the purpose of protecting the debtor’s property within US territorial jurisdiction. In this particular case, the action sought to be stayed – a Swiss arbitration - had ‘no connection to the United States and no conceivable impact on debtor property in this country’.⁷⁴ The court did however state that irrespective of its venue in another country, arbitration proceedings with different facts involving a determination of third party rights in the US located property of a foreign debtor would be subject to the automatic stay under s 1520(a)(1).

⁷³ *Ibid* at p 14 of the judgment.

⁷⁴ *Ibid* at p 16.

Welcome though the decision in JSC BTA Bank is, it may not be of great practical significance as a precedent for courts in other countries since general bankruptcy stays in these countries are not likely to have extraterritorial effect. This is certainly the case as far as England is concerned for it has been held that the stay does not extend to proceedings brought in foreign courts.⁷⁵ The English courts may however, issue an anti-suit injunction restraining a party who is subject to the personal jurisdiction of the court from continuing with proceedings in a foreign court.⁷⁶

(b) asset disposals

US bankruptcy law contains a general ‘debtor in possession’ norm in respect of restructuring proceedings under Chapter 11 of the Code. This means that the existing management structures of the debtor are not automatically displaced in favour of an outside administrator.⁷⁷ The debtor in possession is permitted by s 363 to dispose of assets in the ordinary course of business but disposals outside the ordinary course, including substantial asset disposals, require express court sanction and the courts apply a ‘business justification’ test.⁷⁸ In Krys v Farnum Place LLC foreign proceedings were recognised for Chapter 15 purposes and the foreign court authorised a disposal of assets that were within US territorial jurisdiction. The question arose whether the US court should effectively ‘rubber-stamp’ the foreign decision on the basis of comity or instead apply its own ‘business justification’ test.

⁷⁵ See Mazur Media Ltd v Mazur Media GmbH [2004] 1 WLR 2966 and Bloom v Harms Offshore AHT [2010] Ch 187. See also Re Vocalion (Foreign) Ltd [1932] 2 Ch 196 and Kemsley v Barclays Bank [2013] EWHC 1274.

⁷⁶ See Stichting Shell Pensioenfond v Krys [2014] UKPC 41.

⁷⁷ On the relative merits of debtor-in-possession versus management displacement restructuring regimes see D Hahn ‘Concentrated Ownership and Control of Corporate Reorganisations’ (2004) 4 JCLS 117; G McCormack ‘Control and Corporate Rescue – An Anglo-American Evaluation’ (2007) 56 ICLQ 515.

⁷⁸ According to In re Lionel Corp (1983) 722 F 2d 163 at 1071 a judge is required to find from the evidence a good business reason to approve the sale though the bankruptcy court is said to have broad discretion and flexibility to enhance the value of the estate before it.. Salient factors include whether the asset is increasing or decreasing in value.

It had transpired that by the time of the US hearing, the assets were worth significantly more than they appeared to be worth at the time of the agreement for sale and, in a bout of vendor's remorse, the foreign liquidator asked the US court not to approve the sale on the basis that it was no longer prudent. The Second Circuit Court of Appeals were sympathetic to this line of argument and held that a s 363 standard of review was appropriate.

The court essentially adopted a 'plain meaning' interpretation of Chapter 15 and in particular s 1520(a)(2) which provides, inter alia, that s 363 applies to a transfer of an interest of the debtor in property that is within US territorial jurisdiction. The court held that once the territorial prerequisite had been met, the sale must be reviewed under s 363 to the same extent as it would be under Chapter 11, without regard to whether principles of comity would require deference to a decision of the foreign court approving the sale.

The decision however, could be criticised on the basis that it conflicts with the primacy of the foreign main insolvency proceedings. The Chapter 15 proceedings are ancillary proceedings and intended to assist the court in the foreign main proceedings. On this basis, the value that creditors will receive and the appropriateness of a particular sale should be a function of the court in the main proceedings and not of the US court in Chapter 15.

If the same fact situation were to recur in a UK context then it is submitted that Krys v Farnum Place LLC⁷⁹ would be a relevant, though not necessarily a controlling, precedent. Art 20(6) provides that the court may modify or terminate a suspension of the debtor's power to dispose of assets on such terms and conditions as the court thinks fit. The courts would recognise the title to corporate assets of a foreign liquidator and a legally binding contract to sell such assets entered into by the liquidator. If however, the sale agreement was made subject to the sanction of the UK Court, it is likely that the court would hold that the

⁷⁹ Krys v Farnum Place LLC (In re Fairfield Sentry Ltd), No 13-3000, 2014 WL 4783370 (2d Cir Sept 26, 2014).

liquidator is under a duty to maximise the value of the assets even if this meant disregarding the agreement.

Under the principle in Ex parte James⁸⁰, officers of the court are expected to behave ‘in an honourable and high-minded way’⁸¹ in administering assets in an insolvency. This may include the observance of agreements that are not legally binding.⁸² But the definition of ‘officers of the court’ under Ex parte James is somewhat anomalous in that it includes insolvency practitioners in certain types of insolvency proceedings but not others. Bankruptcy trustees and liquidators in a compulsory winding up are regarded as officers of the court for this purpose, and administrators in administration proceedings are deemed by statute to be officers of the court, whether or not they have been appointed by the court.⁸³ A liquidator in a voluntary winding up has however, been held not to be an officer of the court⁸⁴ even though the liquidator, in a broad sense, is subject to surveillance by the court and can apply to the court for directions. For the same reasons, a foreign liquidator would not be regarded as an officer of the English court.

(c) Application of foreign insolvency law

In granting relief consequent on the recognition of foreign insolvency proceedings, the Model Law does not expressly permit the application of foreign insolvency law. The issue was hotly debated in the negotiations that led up to the enactment of the Model law but ultimately the provision authorising the application of foreign law disappeared from the text.⁸⁵

⁸⁰ Re Condon, ex parte James (1874) LR 9 Ch 609. For a general discussion of the rule see I Dawson ‘The Administrator, Morality and The Court’ [1996] JBL 437.

⁸¹ Re TH Knitwear (Wholesale) Ltd [1988] Ch 275 at 288 per Slade LJ referring to the observations of Lord Esher MR in Ex parte Simmonds (1885) 16 QBD 308 at 312.

⁸² See the comments of Templeman J in Re Wyvern Developments Ltd [1974] 1 WLR 1097 at 1105 and Harman J in Re John Bateson & Co Ltd (1985) 1 BCC 99378.

⁸³ Schedule B1 Insolvency Act 1986, para 5.

⁸⁴ Re TH Knitwear (Wholesale) Ltd [1988] Ch 275.

⁸⁵ See the discussion by Morgan J in Re Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) at paras 81-87 and see his conclusion at para 87: ‘My reaction to the discussions of the working group is that it seems improbable that the working group, having deleted (from what is now article 21(1)(g)) a power for the recognising court to

Nevertheless, under Article 21 a recognising court is authorised to grant various reliefs on a discretionary basis and the fact that various reliefs are specified does not detract from the general discretion.

In the US, Chapter 1521(a)(7) limits the effect of Article 21 by expressly stipulating that the additional relief does not include relief available under the transactional avoidance provisions of the Bankruptcy Code. These include the power to avoid transactions as preferences under s 547 and the power to avoid ‘fraudulent’ transfers, including ‘undervalue’ transfers, under s 548.⁸⁶ Article 23 of the Model Law gives a foreign representative the power, on conditions similar to domestic insolvency office holders, to initiate proceedings for the avoidance of actions, or transactions, detrimental to creditors. In Chapter 15, Article 23 has been altered somewhat, with s 1523 stating that a foreign representative only has the standing to invoke the US avoidance provisions where full, plenary bankruptcy proceedings have been commenced under Chapters 7 or 11. According to the congressional report on Chapter 15, this limitation reflects the concerns that a simple grant of standing to initiate actions neglects to address very difficult choice of law and forum issues⁸⁷. In other words, foreign insolvency representatives might ‘forum shop’ avoidance actions to the US.⁸⁸ It is the case however, that full bankruptcy proceedings under Chapters 7 or 11 are likely to be significantly more expensive than Chapter 15 proceedings and certain foreign debtors, including foreign-incorporated insurance companies, are specifically precluded from using Chapters 7 and 11.⁸⁹

apply the law of the foreign proceeding, intended to bring back in such a power under the general wording which refers to “any appropriate relief””.

⁸⁶ See s 548(a)(1)(b).

⁸⁷ See HR Rep 109 – 31 at para 152

⁸⁸ For a recent example of such an attempt see Re Hellas Telecommunications (Luxembourg) 11 SCA: Hosking v TPG US Bankruptcy Court SDNY 29th January 2015 (Judge Martin Glenn).

⁸⁹ Section 109(3) Bankruptcy Code.

The prohibition on the use of Chapters 7 and 11 was largely the reason why in Re Condor Insurance Ltd⁹⁰ a foreign representative sought to use foreign fraudulent transfer law to invalidate a large transfer by the company to a US affiliate. The company was in liquidation in its ‘home’ jurisdiction of Nevis. The US Fifth Circuit Court of Appeals recognised the Nevis liquidation as ‘foreign main proceedings’ under Chapter 15 and held that the foreign liquidator could then use Nevis law to avoid the transfer in the context of the Chapter 15 proceedings. The court took the view that Chapter 15 permitted the application of foreign insolvency law; referring to the fact that debtors might otherwise be tempted to hide assets in the US out of the reach of the foreign jurisdiction. The court adverted to the cost and inconvenience of full US bankruptcy proceedings which, in any event, were statutorily prohibited in this case. It observed that the US Congress had not explicitly barred all avoidance actions from whatever source – an easy step to take had it wished to do so.⁹¹

The court also referred to the ‘helpful marriage of avoidance and distribution whether the proceeding is ancillary applying foreign law or a full proceeding applying domestic law—a marriage that avoids the more difficult . . . rules of conflict law presented by avoidance and distribution decisions governed by different sources of law’.⁹² It suggested that this solution met the concern that foreign representatives might bring an ancillary action simply to gain access to avoidance powers not provided by the relevant foreign law. This interpretation of Chapter 15 was said to be consistent with judicial interpretation of the predecessor provision – s 304 of the Bankruptcy Code.⁹³

90 (2010) 601 F 3d 319. For criticism see S Schorr ‘Avoidance Actions under Chapter 15: Was Condor Correct?’ (2011) 35 Fordham International Law Journal 350. See also Re Hellas Telecommunications (Luxembourg) 11 SCA: Hosking v TPG (US Bankruptcy Court, SDNY 29th January 2015).

91 See (2010) 601 F 3d 319 at 325–327.

92 (2010) 601 F 3d 319 at 327.

93(2010) 601 F 3d 319 at 329.

The decision is a bold one for at least four reasons. Firstly, the court's view on the proper interpretation of s 304 of the Bankruptcy Code – s 304 – is by no means an uncontroversial one. Apart from Re Metzeler⁹⁴ there are decisions on s 304 that permit a degree of “mix and match”; allowing a foreign representative to use avoidance powers under both US and foreign law in s 304 ancillary proceedings.⁹⁵ Secondly, the detailed investigation of the Model Law's legislative history, carried out by the English court in Re Pan Ocean Co Ltd,⁹⁶ suggests that the examination and conclusions on this history by the court in Condor are questionable at best. Thirdly, one might argue from the US Bankruptcy Code as a whole that foreign avoidance laws may be relevant, but only in a Chapter 7 or 11 bankruptcy. The Maxwell case⁹⁷ shows that while foreign law may not be used as the basis for avoidance actions in Chapters 7 or 11, nevertheless foreign law might be used as a defence if the transaction sought to be impeached was connected strongly with a foreign country i.e. the centre of gravity of the relevant transaction was ‘foreign’.

Fourthly, the Condor decision effectively permits foreign representatives to “Chapter shop”. The foreign representative would seek to bring Chapter 15 ancillary proceeding when seeking exclusively to use foreign law, and Chapter 7 or 11 proceedings when using US domestic avoidance law.

The Condor decision is conceptually neat and brings benefits to foreign representatives by enhancing possible asset recoveries. Nevertheless, the decision does not sit very well with the structure of Chapter 15 which seems designed to keep a tight grip on avoidance actions by foreign representatives through confining use of US avoidance law to fully blown US

94 (1987) 78 BR 674.

95 See Re Axona International Credit & Commerce Ltd (1988) 88 BR 597.

96 [2014] EWHC 2124 (Ch) at para 106.

97 In re Maxwell Communication Corporation (1994) 170 BR 800; affirmed (1995) 186 BR 807; affirmed (1996) 93 F3d 1036, 1051. See generally G McCormack ‘Conflicts, Avoidance and International Insolvency 20 years on’ [2013] JBL 141.

bankruptcy proceedings. Neither does Condor discuss the possibility of using US law as a “shield” when a transaction is challenged under foreign avoidance law pursuant to Chapter 15. If the transaction out of which a disputed transfer arises was governed by US law, and US law does not allow the transfer to be set aside, it is very questionable whether a US court would allow the settled expectations of the parties to be disturbed on the basis of foreign law.

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In the UK, the courts have taken a different view from the US courts and held that Chapter 15 does not authorise the application of foreign insolvency law. In Re Pan Ocean Co Ltd⁹⁹ the court recognised that the words ‘appropriate relief’ in Art 21 had a wide literal meaning but the very width of their literal meaning led to the conclusion that a broad interpretation was inappropriate. The court considered the preliminary materials leading to the elaboration of the Model Law and it appeared from these documents that a recognising court was not authorised to grant relief that it could not grant in a domestic insolvency.¹⁰⁰

The court in Re Pan Ocean Co Ltd also said its conclusions on Article 21 were supported by the decision of the UK Supreme Court in Rubin v Eurofinance SA¹⁰¹ that the only relief available was of a procedural nature. In Pan Ocean, the relief requested went well beyond matters of procedure and affected the substance of the rights and obligations of parties under a contract. The case concerned a contract of carriage which a Brazilian company had entered into with a Korean shipper. The contract was governed by English law and contained a clause

98 See Re Hellas Telecommunications (Luxembourg) 11 SCA: Hosking v TPG US Bankruptcy Court SDNY 29th January 2015 (Judge Martin Glenn) which involves the almost converse situation where a foreign insolvency representative sought to avoid transactions on the basis of New York Debtor and Creditor Law but the court rejected the attempt on the basis, inter alia, that the relevant transactions were more closely related to foreign law (which did not allow avoidance in the particular case).

99 [2014] EWHC 2124 (Ch).

100 Ibid at paras 81-87.

101 [2013] 1 AC 236 at para 143.

allowing the Brazilian party to terminate the contract in certain events, including if the shipper entered insolvency proceedings. The shipper entered insolvency proceedings in Korea and the Brazilian party wished to activate the termination provision. The shipper's insolvency representative, on the other hand, sought to keep the contract alive because it was quite profitable for the shipper and under Korean insolvency law, unlike the UK, termination clauses of this type could apparently be overridden. Morgan J concluded that even if he had the power to do so, it would not be appropriate in this particular case to give effect to the provisions of Korean insolvency law. The parties would be surprised if an English court applied Korean insolvency law to their substantive rights under a contract which they had agreed should be governed by English law.¹⁰²

In concluding this section, one might argue that US decisions are of some value abroad in relation to the relief that is available following the recognition of foreign insolvency proceedings. Moreover, the jurisprudence is quite 'internationalist' by permitting, in certain circumstances, the application of foreign law in a Chapter 15 context. Nevertheless, this particular interpretation can be explained on the basis of the distinctive legislative context in the US; namely, the fact that US transactional avoidance law has been shut off to foreign insolvency representatives whereas in the UK the foreign representative is empowered, on the same basis as domestic insolvency office holders, to institute transactional avoidance actions.¹⁰³ Therefore, it does not quite have the same significance as might first appear.

6. Public Policy

Under this heading, the paper considers how the public policy qualification on recognition and relief under the Model Law has been interpreted and applied in the US and UK.

¹⁰² [2014] EWHC 2124 (Ch) at para 112.

¹⁰³ See Cross-Border Insolvency Regulations 2006, SI 2006/1030 schedule 1, art 23(1) which sets out the list of avoidance actions to which the provision is intended to apply.

The Model Law states that nothing in the Law prevents the court from refusing to take an action that would be manifestly contrary to the public policy of the enacting State. Section 1506 of the US Bankruptcy code reproduces this provision more or less exactly as does the Cross Border Insolvency Regulations Schedule 1, Article 6 in the UK. The exception provides States with potentially a lot of leeway to avoid recognising foreign insolvency proceedings for, as UNCITRAL itself has recognised, the “notion of public policy is based on national law and accordingly may differ from State to State”.¹⁰⁴ Moreover, in some States the notion of "public policy" is given a broad interpretation and can relate to any mandatory rules of national law. But in other States, the notion may be restricted to fundamental legal principles such as constitutional guarantees and recognition would only be refused where there is an infringement of those fundamental principles.

The scope for divergence between States in the application of the public policy criterion is compounded in the insolvency field. Bankruptcy policies and procedures differ substantially between States and Lord Millett has gone so far as to say that no branch of the law “is moulded more by considerations of national economic policy and commercial philosophy”.¹⁰⁵ Countries may differ on the parties that may be subject to bankruptcy proceedings; the scope of such proceedings; the procedures employed in adjudicating claims that arise in the course of such proceedings and the effect of any discharge of debts. On one view, these are simple matters of civil procedure that may be the subject of legitimate disagreement between and within States. On another view, they involve fundamental matters of constitutional policy enshrining basic values of the particular legal system.¹⁰⁶

¹⁰⁴ See ‘UNCITRAL Model Law on Cross-Border Insolvency Law with Revised Guide to Enactment and Interpretation’ (2013) at paras 101, 102.

¹⁰⁵ P Millet ‘Cross-Border Insolvency: The Judicial Approach’ (1997) 6 International Insolvency Review 99 at 109.

¹⁰⁶ See generally G McCormack ‘Bankruptcy Forum Shopping: The UK and US as venues of choice for foreign companies’ (2014) 63 ICLQ 815 at 816-9 and 823-4.

The differing national views on the permissibility of intercepting a bankrupt's emails came to the fore in Re Toft¹⁰⁷ where a debtor was the subject of insolvency proceedings in Germany and the German courts authorised mail interception. The insolvency representative initiated Chapter 15 proceedings to gain access to the debtor's email accounts that were stored on the servers of two internet service providers in the US. An English court recognised and gave effect to the German order holding that it was in the public interest and necessary in a democratic society to intercept the bankrupt's communications because otherwise bankrupts might be able to evade bankruptcy trustees and avoid paying their creditors.¹⁰⁸ The US Bankruptcy Court however, took the view that recognising the German order would be manifestly contrary to US public policy since it would infringe US constitutional safeguards that protected the safety of electronic communications.

The US courts have said however, in cases including Re Toft, that a restrictive view should be taken of the public policy exception. The use of the word 'manifestly' limited it to exceptional circumstances implicating the most fundamental policies of the United States. These judicial statements have also been carried through in practice.¹⁰⁹ For example, in Re ABC Learning Centres,¹¹⁰ it was held that Australian proceedings were not manifestly contrary to US public policy and could be recognised under Chapter 15 even if they allowed creditors with security over all the debtor's assets to retain these assets rather than providing for the general administration of creditor claims with distributions accordingly.

It is worth pointing out however, that most of the applications for Chapter 15 recognition have come from common law jurisdictions where procedures are broadly analogous to those in the US. There is a long standing principle, predating the Model Law, that US courts should

107 In re Toft (2011) 453 BR 186. See also In re Gold & Honey Ltd (2009) 410 BR 357.

108 Re a Bankrupt - Prager v Toft [2012] BPIR 469 citing Foxley v UK [2000] BPIR 1009.

109 See also the Congressional report on Chapter 15 - HR Rep No 109-31 at para 109.

110 (2013) 728 F3d 301.

be favourably disposed towards recognition and relief applications from such countries. For example, in Hilton v Guyot,¹¹¹ the Supreme Court held that if the foreign forum provides ‘a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting’, the judgment should be enforced and the matter not tried all over again.

This point was reiterated and reinforced in Re Board of Directors of Hopewell International¹¹² where the court said that if the foreign proceedings are in ‘a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings.’

The US and Canada share the same common law traditions and fundamental legal principles that afford creditors a full and fair opportunity to be heard. Consequently, US courts have repeatedly granted comity to Canadian proceedings even though bankruptcy law and procedure is not exactly on all fours in the US and Canada. A case in point is Re Ephedra¹¹³ where the US courts recognised and enforced in the US a claims resolution procedure ordered by a Canada court even though the procedure made no provision for jury trial which would have been the norm had the matter been the subject of plenary proceedings in the US.

One of the areas for potential disagreement between the US and Canada concerns bankruptcy orders that permit third parties to be relieved from liability for certain actions. A US court

111 (1895) 159 US 113 at 202–03.

112 (1999) 238 BR 25 at 66 and affirmed (2002) 238 BR 699.

113 (2006) 349 BR 333.

remarked in Re Metromedia¹¹⁴ that a ‘nondebtor release is a device that lends itself to abuse. By it, a non-debtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity.’ Canadian courts appear to grant such releases on a more liberal basis than US courts but nevertheless, US courts have recognised Canadian proceedings with non-debtor releases. Case in point include Re Sino-Forest Corp¹¹⁵ and Metcalfe¹¹⁶ where the court pointed out that the Canadian plan had received near-unanimous creditor support despite the inclusion of the non-debtor releases.

These decisions are to be contrasted with Vitro¹¹⁷ where the relief requested was refused. There are some similarities between the cases. All three, at least partially, involved non-debtor releases that, as a matter of substantive US law, were not likely to have been approved in Chapter 11. There are also some differences; not least the fact that Sino-Forest and Metcalfe originated from Canada whereas Vitro was a Mexican case. But what seems to have decisive against recognition in Vitro was the fact that the Mexican restructuring plan only received creditor approval on the basis of votes from ‘insider’ creditors. If ‘outside’ creditors were considered in isolation, then the plan did not meet with creditor approval.

In addressing relief under Chapter 15, the 5th Circuit Court of Appeals¹¹⁸ in Vitro suggested that, first of all, the court should ask whether the relief requested is specifically enumerated in s 1521; secondly, if not, it should then consider whether it falls more generally under the

¹¹⁴ Re Metromedia FiberNetwork Inc (2005) 416 F3d 136.

¹¹⁵ (2013) 501 BR 655 (SDNY).

¹¹⁶ In re Metcalfe & Mansfield (2010) 421 BR 685.

¹¹⁷ In re Vitro SAB de CV (2012) 701 F 3d 1031. For another case in a somewhat different context involving the denial of comity to Mexican proceedings see Milbank v Phillips Lighting (2014) 521 BR 189.

¹¹⁸ (2012) 701 F 3d 1031 at 1054.

grant of any appropriate relief in s 1521 and thirdly, it should move on to consider whether the relief could count as ‘additional assistance’ under s 1507.¹¹⁹ In this particular case, the court concluded that s 1507 theoretically provided for the relief sought because the section was intended to provide relief that was not otherwise available under US law. Nevertheless, the relief would not be appropriate because Vitro had failed to demonstrate ‘extraordinary circumstances’. At first instance, the bankruptcy court had invoked public policy to justify the denial of relief but the Court of Appeals cautioned against engaging in an ‘independent determination about the propriety of individual acts of a foreign court.’¹²⁰ It avoided ruling on the question whether the Mexican restructuring would be manifestly contrary to a fundamental public policy of the US.

Perhaps the most controversial consideration of the public policy exception in the US came in Re Qimonda but again the Court of Appeals¹²¹, unlike the Bankruptcy Court¹²², was able to resolve against the particular relief requested by the insolvency representative without having to invoke public policy as the basis of the decision. Qimonda concerned a German company that produced computer chips and which held thousands of patents, including US patents. It made joint venture and patent cross-licensing agreements with US entities. Later it entered insolvency proceedings in Germany and, under German insolvency law, it could reject the licensing agreements resulting in termination of the licensee’s rights to use the patents. Under the US Bankruptcy Code however, a licensee would retain its rights under the contract if it continued to make royalty payments.¹²³

In Chapter 15 proceedings, the US Bankruptcy Court refused on public policy grounds to allow the provisions of German insolvency law to take precedence. It said there were three

119 But see Re Atlas Shipping A/S (2009) 404 BR 726 where it was said that the jurisdiction to grant appropriate relief was ‘exceedingly broad’.

120 Reference was made to In re Ran (2010) 607 F3d 1017 at 1021 and Metcalf 421 BR at 697.

121 (2013) 737 F3d 14.

122 (2011) 462 BR 165.

123 Section 365(n) Bankruptcy Code.

relevant considerations. Firstly, the mere fact of conflict between foreign law and US law was not enough. Secondly, there should be no deference to foreign proceedings where the procedural fairness of these proceedings was doubtful and could not be cured by the adoption of additional protections. Thirdly, recourse to the public policy exception was also appropriate to prevent actions that would impinge severely on a US constitutional or statutory right.

In this case, the procedural fairness of the German proceedings was not in question. Germany was reckoned to have a mature and well-developed system of insolvency law with goals congruent to those of US bankruptcy law, including maximizing returns to creditors and treating equally-situated creditors equally. In addition, aggrieved parties had ready access to a functioning and fair court system to challenge these decisions. The US bankruptcy court held however, that deferring to German law, to the extent that this permitted the cancellation of the US patent licenses, would be manifestly contrary to US public policy. The court acknowledged that terminating the licenses would enhance the value to the debtor's estate¹²⁴ but it considered that this legitimate interest was outweighed by the risk to the licensees who had invested substantially in research and manufacturing facilities relying on the design freedom provided by the licensing agreements. The court was concerned that terminating the licenses would create uncertainty leading to a slower pace of innovation and detriment to the US economy.¹²⁵

It might be argued however, that the balance between debtor and creditor interests and also between protecting existing employment as distinct from facilitating the creation of new employment are areas where national governments and national insolvency laws may justifiably take different views. The particular protections afforded by US bankruptcy law

¹²⁴ (2011) 462 BR 165 at 182.
¹²⁵ (2011) 462 BR 165 at 185.

are not mirrored around the globe and many countries might find, in particular, the debtor in possession norm reflected in the US Chapter 11 to be somewhat quixotic.¹²⁶ The bankruptcy court in Qimonda conceded that the balancing of debtor and creditor interests was close. In these circumstances, it hardly seems appropriate to wave the big stick of public policy and refuse the application of German insolvency law. After all, the court specifically mentioned that mere differences in laws between countries were not enough to warrant reliance on public policy.

The Court of Appeals was able to decide the case without reference to public policy. Essentially the relief requested by the German insolvency representative was an order entrusting him with the administration or realization of all or part of the assets of Qimonda within the territorial jurisdiction of the US and specifically identifying the company's US patents as among the US assets he sought to control. Section 1521(b) states that the debtor's assets located in the US can only be handed over to a foreign representative where the court is satisfied that the interests of creditors in the US are sufficiently protected. The Court of Appeals said that the bankruptcy court had a broad latitude to mould relief to the circumstances and the insertion of a proviso safeguarding the rights of patent licensees under US law was considered to be a justified exercise of the power to ensure protection of US creditors.

If the facts of Vitro or Qimonda were to occur in an English context, it is submitted that the English court would come to a broadly similar conclusion through recourse to the 'adequate protection for local creditors' qualification on relief under the Model Law and the Cross-

¹²⁶ The importance of creditor rights in insolvency proceedings including management displacement in favour of an outside administrator was stressed in the 'legal origins' or 'law matters' thesis; on which see R La Porta, F Lopez de Silanes, A Shleifer and R Vishny 'Legal Determinants of External Finance' (1997) 52 *Journal of Finance* 1131 and by the same authors 'Law and Finance' (1998) 106 *Journal of Political Economy* 113. The first three named authors refine the 'legal origins' thesis and defend it against criticisms in 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285.

Border Insolvency Regulations. In Qimonda, if assets in the UK were handed over to a foreign representative with creditors shorn of their rights under UK law, it can hardly be said that creditors in the UK are adequately protected.

The fact situation in Vitro is perhaps more interesting from an English perspective. On the one hand, creditors in the UK could be said to be prejudicially affected if they were prevented from suing third parties who had guaranteed discharge of the debtor's obligations to the creditors. This state of affairs therefore justifies a straightforward application of Article 22 of the Model Law and refusing the relief sought by the foreign representative. On the other hand, 'non-debtor' discharges seem to have become an established feature of UK restructuring law particularly in the context of schemes of arrangement under the Companies Act.¹²⁷ If English courts have jurisdiction to approve 'non-debtor' discharges in a domestic insolvency, it might be argued that they have a similar jurisdiction when sanctioning the grant of appropriate discretionary relief to a foreign representative under Article 21 of the Model Law. After all, it is said that discretionary relief encompasses the kind of things a court might do in a domestic insolvency.¹²⁸

The leading case on non-debtor releases under UK restructuring law is Re T & N Ltd (No 3).¹²⁹ It was held that that a company could propose, in return for the benefits that it was providing under the scheme, that creditors should discharge not only the debts and liabilities of the company, but also the liabilities of guarantors for these same debts. Something of a cautionary note however, was introduced by the Court of Appeal in Re Lehman Brothers

¹²⁷ It seems though that the position is more controversial in relation to voluntary arrangements under the Insolvency Act - see Johnson v Davies [1999] Ch 117. In Australia a distinction is also drawn between non-debtor releases in schemes of arrangement and deeds of company arrangement - so-called 'docas' - see Fowler v Lindholm (2009) 178 FCR 563 and City of Swan v Lehman Bros Australia Ltd [2010] HCA 11 and see generally J Harris 'Charting the Limits of Insolvency Reorganisations' (2010) 32 Sydney Law Review 141.

¹²⁸ See Re Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) at paras 90-92 and Rubin v Eurofinance SA [2013] 1 AC 236 at para 28 per Lord Collins. It should be noted however, that in the absence of statutory authority, the UK courts cannot permit a foreign liquidator to do the same kind of things that might be done in a domestic insolvency - see Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36.
¹²⁹ [2006] EWHC 1447 (Ch), [2007] 1 All ER 851.

International (Europe)¹³⁰ where Patten LJ suggested that the release of third party claims should be ‘merely ancillary’ to the arrangement between the company and its own creditors.¹³¹

In concluding this section, it is suggested that UK courts might come to similar conclusions as the US Bankruptcy Courts in Vitro and Qimonda but analogous to the US Circuit Court of Appeals are likely to eschew reliance on the public policy qualification on recognition and relief under the Model Law. A UK court would no doubt be mindful of the fact that statutory procedures and insolvency/restructuring law differs substantially between countries. Nevertheless, if the non-debtor release contained atypical features and/or the requirements for getting the release approved lacked procedural rigour, then it is submitted the court would deny any relief under Article 21 that allowed the release to take effect in England. Article 21 relief is discretionary and needs to be appropriate, and the courts would be wary of measures such as a permanent injunction staying actions against third parties in respect of the debt.¹³²

General conclusion

At the outset, this paper asked three related questions. The first was whether US interpretations of the Model Law provisions differ from those in the UK. On this point, one must conclude that there have seem some significant differences but these stem essentially

130 [2009] EWCA Civ 1161; [2010] BCC 272. See also Re La Seda de Barcelona SA [2010] EWHC 1364 (Ch); [2011] 1 BCLC 555.

131 Ibid at para 63. Lord Neuberger MR implied that creditors' rights against the third parties should be closely connected with their rights as creditors against the company and he also said that the decision in T&N Ltd (No 3) was near the outer limits of the court's jurisdiction to sanction schemes of arrangement.

132 See also the generally accepted principle of English law articulated in Wight v Eckhardt Marine GmbH [2003] UKPC 37, [2004] 1 AC 147 at para 11 that the discharge of a contract is governed by its proper law i.e. a discharge from any debt or liability under a foreign insolvency law is recognised as a discharge from the debt or liability in England if, and only if, it is a discharge under the law that applies to the contract. This principle was held in the PT Bakrie case [2011] EWHC 256 (Comm); [2011] 1 WLR 2038 to have survived the Model Law and the enactment of the Cross-Border Insolvency Regulations.

from the local legislative adjustments made in the two countries particularly in the US, where the provisions now form an integral part of the Bankruptcy Code. For instance, the US courts have applied the general bankruptcy requirement that an applicant for Chapter 15 relief should be a 'debtor' under the Code. The requirement does not mean much in practice however, for all that is needed is that the debtor should have property or a place of business in the US and even property moved to the US in anticipation of the bankruptcy filing suffices for this purpose.

The US courts have also sanctioned the application of foreign transactional avoidance law by way of relief following recognition of foreign proceedings. This approach however, flows in large part from the way in which the relevant provisions in the Model Law have been restricted in a US context. A UK court, on the other hand, has refused to apply foreign insolvency law. The court pointed out that there was no express authorization to apply foreign law in either the Model Law or the Cross Border Insolvency Regulations. This legislative silence was considered to be significant for there was a statutory precedent in the UK for the application of foreign insolvency law under s 426 Insolvency Act 1986.

In some instances, the US/UK differences are more apparent than real. For example, US courts at first instance appear to have been more willing to apply the 'public policy' qualification on recognition of foreign proceedings although this willingness has been tempered on appeal. Therefore, one reaches pretty much the same result as in the UK that the 'public policy' criterion should only be resorted to in very exceptional circumstances.

Another superficial difference lies in the application of the COMI test for the recognition of foreign main insolvency proceedings. The US courts adopt a multi-factor test in the COMI determination with no special weight attached to the location of the registered office. The UK courts, on the other hand, apply a presumption, only rebuttable by firm evidence to the contrary, that COMI equals the location of the registered office. In the vast majority of

cases, especially with companies incorporated in tax-haven ‘letterbox’ jurisdictions, the two tests are likely to lead to the same outcome.

The US decisions are more controversial however, on when the COMI condition has to be met before the foreign proceedings are recognized. The case law now suggests that the COMI has to be in the relevant foreign jurisdiction at the time of the application for recognition rather than at the time of the opening of the foreign proceedings. There are no UK decisions directly in point but it is submitted that the courts in the UK are not likely to follow their US counterparts. This is because the US approach may lead to different decisions on recognition in different countries, depending on when the application for recognition is made. Moreover, UNCITRAL’s revised guide to enactment of the Model Law suggests that in a recognition application, COMI should be considered with reference to the time when the relevant foreign proceedings were opened.

The second research question set out in the introduction to this paper can be answered in the affirmative. US Chapter 15 decisions have taken account of appropriate foreign decisions. For instance, even though the function and form of the COMI test is somewhat different under Chapter 15 than it is under the EU Insolvency Regulation, the leading European Court of Justice case on COMI; namely Eurofood¹³³, has been cited in numerous Chapter 15 cases. Moreover, and on a related point, it seems that, despite the prognostications of certain commentators¹³⁴, the enactment of chapter 15 has increased the willingness of US courts to

133 Case C-341/04 Re Eurofood IFSC Ltd [2006] ECR I-03813 and the more recent Interdil Case C-396/09; [2011] BPIR 1639 and Mediasucre Case C-191/10; OJ 2012 C39/3 cases.

134 See J Leong ‘Is Chapter 15 Universalist or Territorialist? Empirical Evidence from the United States Bankruptcy Court Cases’ (2011) 29 Wisconsin International Law Journal 110 and K Yeatter ‘Judicial Vagaries and their Potential Impact on the Valuation of Distressed Debt: Reasonable Minds Can Differ as to What it All Means’ (Nov 2007) 26 American Bankruptcy Institute Journal 50 at 51.

recognize foreign insolvency proceedings. One empirical study has found that US courts, in about 96% of the cases filed, have granted some form of recognition.¹³⁵

The answer to the third question is more mixed. US Chapter 15 decisions have been referred to extensively elsewhere, certainly in the UK and Australia. This may be due to the force of the intellectual argument and/or because of the legal and economic might of the US. But to come back to earlier conclusions, the US decisions are less authoritative than they might be however, because of the particular way in which the Model Law has been implanted into the US Bankruptcy Code and the inter-relationship between Chapter 15 and other Bankruptcy Code provisions. This is true especially of US decisions on whether a Chapter 15 applicant for relief must qualify as a debtor under the Bankruptcy Code and on the application of foreign insolvency law in transactional avoidance cases. Other US decisions are more controversial still; namely on the time when the Chapter 15 conditions for relief have to be satisfied. This has led to a revision of UNCITRAL's Guide to Enactment making it clear that the US interpretation on this point should not be followed in other countries.¹³⁶

To conclude with a fairly obvious point, the fact that the Model Law has been enacted in both the US and UK does not mean that Cross-Border insolvency law is more or less the same in both US and UK. For a start, while in the US the Model Law is the sole channel for providing assistance in respect of foreign insolvency proceedings, there is a much more fragmented regime for international insolvency co-operation in the UK. In the UK, the Model Law in appropriate cases sits alongside the EU Insolvency Regulation as well as the common law and s 426 Insolvency Act. The different modes of interpretation of the Model Law in the two countries, as well as different judicial interpretations, also leads to some

¹³⁵ See JL Westbrook 'An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency' (2013) 87 American Bankruptcy Law Journal 247 at 254.

¹³⁶ See revised guide at para 159 and discussion at paras 157-160.

measure of disharmony. Nevertheless, both countries sing from the same hymn sheet in the form of the Model Law and this means some common minimum standards for co-operation in the cross-border insolvency sphere. That is no bad thing and the achievement is not to be decried.