UN Day Lecture 2019

Commentary by Dr Neil Hannan[1]

I am grateful to have been asked to comment on Stewart's paper which clearly sets out some of the major issues being experienced with implementation of the UNCITRAL Model Law on Cross -Border Insolvency (**Model Law**).

Model Law

Whilst accepting that at a practical level these issues exist, we should not look at them from a prism of being common lawyers. The Model Law like other international instruments is drafted in the form and language of international instruments. The language used is not that used in statutes in common law countries and is more an expression of overriding principles. It is designed to take account of different legal systems and heritages and therefore has several gaps that can be filled in by the enacting country. In drafting, the Model Law UNCITRAL was cognisant of the fact that a number of countries in which it may apply, do not have a sophisticated legal or insolvency system. Model laws by their very nature are not conventions whose terms are fixed in stone, they are designed to be enacted into the domestic law of a State in whole or in part with or without amendment. By way of example, Canada has only enacted 20 of the 32 articles in the Model Law into their domestic legislation.[2]

This Model Law must also be seen as a political compromise between competing legal systems with different legal heritages and predispositions as to the way insolvency law operates (e.g. Islamic, common and civil law jurisdictions). It is designed to not be offensive to the customs and beliefs of different cultures. It has been prepared by pooling the knowledge of experts in this area of law from competing jurisdictions both on substantive matters and current international practice.[3]

Block-Lieb and Halliday have speculated that model laws, are just an incremental step towards an international convention.[4] As they are not a convention, the Vienna convention[5] does not apply to the interpretation of model laws.

The Model Law cannot be interpreted using strict common law methods of interpretation. This is recognised in the Model Law itself in Article 8 which provides:

> *'In the interpretation of the present Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.'*

---

[1] B.Ec, LLB (Monash) PhD (UWA), Partner Thomson Geer

[2] *Companies Creditors Arrangement Act*, RSC 1985, c C-36 ss 44-61; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ss 267-284

[3] Justice Clive Croft, *United Nations Day Lecture 2017* Commentary https://www.supremecourt.vic.gov.au/sites/default/files/assets/2018/02/f6/10689997d/UnitedNationsDayLecture201724Oct2017_v2.pdf 3

[4] Susan Block-Lieb and Terence C Halliday, 'Incrementalisms in Global Lawmaking' (2007) 32 *Brooklyn Journal of International Law* 851

[5] *Vienna Convention on the Law of Treaties 1969*, opened for signature 30 November 1969,[1974] ATS 2 (entered into force in Australia 27 January 1980)

In *TCL Air Conditioning*, two judges of the High Court of Australia, when considering a similar provision in the UNCITRAL Model Law on International Commercial Arbitration, recognised the unique position of UNCITRAL model laws and indicated that:

> '*Those considerations of international origin and international application make imperative that the Model Law be construed without any assumptions that it embodies common law concepts or that it will apply only to arbitral awards or arbitration agreements that are governed by common law principles*.'[6]

It is submitted that similar consideration apply when interpreting the present Model Law.

The Model Law should not been seen in isolation. It was the first part in an ongoing project by UNCITRAL's Working Group V to bring internationally accepted solution to disharmony cause by different national laws governing cross border Insolvency. Australia, as a common law jurisdiction, has traditionally benefitted from having a number of procedures being available to enable our courts to enable them to assist and recognise cross border insolvency administrations. As identified by Stewart, these included the principles of comity and statutory provisions that allowed courts to recognise and assist courts of certain other jurisdictions.[7] In civil law jurisdictions they have largely relied upon conventions and treaties existing between States in order for their domestic courts to assist.[8]

UNCITRAL Working Group V at its meeting in May 2019, at which the writer was present, confirmed that the Model Law on Cross Border insolvency and its Guide to Enactment (updated 2013) was part of a suite of publications that it was preparing in relation to insolvency law. This suite included the following:

(a) UNCITRAL Legislative Guide on Insolvency Law (2004);
(b) Introduction to the Legislative Guide on Insolvency Law (2004);
(c) UNCITRAL Model Law on Cross –Border Insolvency Law: The Judicial Perspective (2004 and updated in 2013);
(d) UNCITRAL: Practice Guide on Cross –Border Insolvency Cooperation (2009);
(e) UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018);
(f) UNCITRAL Model Law on Enterprise Group Insolvency (2019).

In addition, a reference has now been given by UNCITRAL to the working group to deal with the following issues:

(a) Choice of law rules in insolvency matters;
(b) Asset Tracing.

---

[6] *TCL Air Conditioning (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 545 [8] (French CJ and Gageler J).
[7] See eg *Corporations Act 2001* (Cth) s 581; *Bankruptcy Act 1966* (Cth) s 29
[8] See eg *Montevideo Treaty on Commercial International Law* Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay (entered into force 1889) arts 35-48.

Model Law on Recognition and Enforcement of Insolvency-Related Judgments

As Stewart has mentioned, Model Law on Recognition and Enforcement of Insolvency-Related Judgments was developed in light of a perception that the decisions in *Rubin v Eurofinance SA*[9] and *Singularis Holdings Ltd v PricewaterhouseCoopers*[10] and the English common law position known as *Gibbs Rule* (see below) would hinder the recognition of restructuring proceedings and other judgements arising out of insolvency proceedings. It was perceived that it was possible that courts in the United Kingdom and those jurisdictions who have a right of appeal to the Privy Council may not recognise foreign reorganisation judgments relating to entities that have no relevant relationship with or are not incorporated in that foreign jurisdiction or which seek to compromise debts which arise out of contracts in which the proper law is not that of the jurisdiction in which such reorganisation is occurring. This would affect the viability of a number of reorganisation proceedings especially those using the USA Chapter 11 and equivalent procedures, involving multinational corporations.

This model law also facilities the recognition of the myriad of judgments that can arise out of an insolvency proceedings, including those in relation to antecedent transactions especially where such judgments originate from Courts of a debtor's centre of main interest.

Gibbs Rule

The rule in Gibbs case, provides that English law does not recognise a foreign insolvency restructuring to the extent to which it seeks to discharge debts that arose pursuant to a contract governed by English law, without such restructuring being subject to an equivalent English restructuring proceeding.[11] This is clearly contrary to the principles of modified universalism which are the basis of the model law on cross border insolvency. There are two Australian decisions which provide that the rule does not apply in Australia where a restructuring is occurring through a scheme of arrangement.[12] There is no decision directly to the contrary in Australia in an insolvency context. Similarly, in Singapore the High Court has refused to recognise this rule upon the basis the parties to a contractual relationship governed by the law of a jurisdiction adhering to the *Gibbs* rule should be attributed with the expectation that their claims might be discharged in proceedings in a jurisdiction where the debtor has an established connection based on residence or ties of business.[13]

There is still an unanswered question as to how this rule will interact in England with Model Law on Recognition and Enforcement of Insolvency-Related Judgments and whether the courts of England will

---

[9] *Rubin v Eurofinance SA* [2013] 1 AC 236.
[10] *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675.
[11] *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, 405-6; Bakhshiyeve re *Re OJSC International Bank of Azerbaijan v Sberbank of Russia* [2018] EWHC 59 (Ch); Bakhshiyeve re *Re OJSC International Bank of Azerbaijan v Sberbank of Russia* [2018] EWHC 792 (Ch); *Bakhshiyeve re OJSC International Bank of Azerbaijan v Sberbank of Russia* [2018] EWCA Civ 2802 (18 December 2018).
[12] *Re Bulong Nickel Pty Ltd* [2002] WASC 226 [11]-[12] (28 June 2002); *Re Glenore Nickel Pty Ltd* (2003) 44 ACSR 210; *Re BIS Finance Pty Ltd* [2017] NSWSC 1713] (8 December 2017).
[13] *Pacific Andes Resources Development Ltd*, [2016] SGHC 210 [48]

use this rule as the basis upon which to refuse recognition using the public policy exception or to limit the effect of any foreign insolvency judgement.

Choice of Law Rules

The issue of choice of laws was purposely excluded from the earlier model laws until major trading nations had obtained sufficient experience with cross border issues such that some consensus could be reached.

Under the European Commission Insolvency Regulation, the law of the jurisdiction in which the proceedings are issued applies.[14]

Justice Perram of the Federal Court of Australia has confirmed what is stated in the *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* that whilst the model law gives foreign representatives standing to bring proceedings, it does not give the court jurisdiction in relation to proceedings were such jurisdiction does not otherwise exist using that jurisdiction's ordinary choice of law principles.[15]

In insolvency matters, choice of law principles are by no means uniform. By way of illustration:

(a) In the USA, the Bankruptcy jurisdiction is considered an *in rem* jurisdiction. All that is required is that the entity has an asset, place of business or domicile in the USA.[16] Entities can arrange to have property transferred to the US in order to secure the court's jurisdiction.[17] All that is required is for an entity to have money held by their lawyers in order for their courts to have jurisdiction.[18] Once the US court has jurisdiction it invariably applies US law. The US Bankruptcy courts have, however, applied foreign law in order to overcome difficulties created by their legislation in relation to recovery of antecedent transactions.[19]

(b) The United Kingdom Supreme Court has determined that proceedings in respect of the recovery of antecedent transactions issued pursuant to insolvency laws are proceedings *in personam* and subject to the ordinary principles of private international law with respect to recognition of judgments.[20]

The English courts by reason of the *Gibbs Rule* have been reluctant to recognise foreign restructuring proceedings that discharge debts in England unless those debts are discharged pursuant to the law of the contract or the creditor has submitted to the jurisdiction of the foreign

---

[14] *Regulation EC No 848 /2015 of the European Council on Insolvency Proceedings* [2000] OJ L 141/29 art 7(1).

[15] *King, in the matter of Zetta Jet Pte Ltd v Linkage Access Limited* [2018] FCA 1979, [35] –[38] citing United Nations Commission on International Trade Law, *Model Law on Cross-Border Insolvency: The Judicial Perspective*, UN Doc V.14-00242 (March 2014) [185].

[16] 11 USC § 109(a).

[17] See *Re BCI Finances Pty Ltd* 583 BR 288 (Bankr, SD NY, 2018)

[18] *Re Octaviar Administration Pty Ltd,* 511 BR 361 (Bankr, SD NY, 2014);); *Re Ocean Rig UDW Inc*, 570 BR 687 (Bankr SD NY, 2017); *Re BCI Finances Pty Ltd* 583 BR 288 (Bankr, SD NY, 2018).

[19] *Re Condor Insurance Ltd*, 601 F.3d 319, 329 (5th Cir, 2010)

[20] *Rubin v Eurofinance SA* [2013] 1 AC 236, 250-1 citing Lord Collins et al (eds), *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012), 689-90 [14R-054].

insolvency proceeding.[21] The English Court of Appeal has suggested in order to bind creditors bound by English law that procedurally separate proceedings should be issued in England that a scheme of arrangement encompassing the terms of the restructuring should be issued under part 26 of the Companies Act 2006 (UK).

(c) In Australia, as indicated above the Supreme Courts of both Western Australia and New South Wales have approved schemes of arrangement contrary to the *Gibbs Rule* which seek to compromise creditors' claims which are governed by the laws of a different country than that in which the foreign insolvency proceeding is issued .[22]

If there is to be some international commercial certainty then some uniform rules which refer back to the concept of centre of main interest are required. The question will remain as to how these will operate in relation to corporate groups.

Maritime Claims and Stays

Whilst I accept there is a natural tension between insolvency and admiralty lawyers as to which laws should prevail, I believe Australia has reached the correct balance between the interests of the individual, who has the benefit of the lien, and creditors as a whole. In Australia, Admiralty liens are accepted as a type of security interest which are not required to be registered and their holders fall within the definition of a secured party as set out in section 51B of the *Corporations Act 2001*.[23]

Pursuant to section 16 of the *Cross-Border Insolvency Act 2008* (Cth), the automatic stay that applies upon recognition of a foreign main proceeding is the same that would apply if the stay or suspension arose under:

(a) The *Bankruptcy Act 1966*; or
(b) Chapter 5 (Other than parts 5.2 and 5.4A) of the *Corporations Act 2001*

It is for the court granting recognition to determine what the closest type of insolvency or restructuring proceeding in Australia is.[24] Where the proceeding for which recognition is sought is a restructuring proceeding there are two types of proceedings it could be closest to, namely a scheme of arrangement or voluntary administration. There is no automatic stay in Australia in relation to creditors schemes of arrangement, although stays can be granted by the court once a proposed scheme is announced and before a formal application is lodged to the court pursuant to section 411(16) of the *Corporations Act*

---

[21] *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, 405-6; Bakhshiyeve re *Re OJSC International Bank of Azerbaijan v Sberbank of Russia* [2018] EWHC 59 (Ch); Bakhshiyeve re *Re OJSC International Bank of Azerbaijan v Sberbank of Russia* [2018] EWHC 792 (Ch); *Bakhshiyeve re OJSC International Bank of Azerbaijan v Sberbank of Russia* [2018] EWCA Civ 2802 (18 December 2018).

[22] *Re Bulong Nickel Pty Ltd* [2002] WASC 226 [11]-[12] (28 June 2002); *Re Glenore Nickel Pty Ltd* (2003) 44 ACSR 210; *Re BIS Finance Pty Ltd* [2017] NSWSC 1713] (8 December 2017).

[23] *Yakushiji v Daiichi Chuo Kisen Kaisha* [2015] FCA 1170 [16]-[22] (2 November 2015)

[24] Suk v Hanjin Shipping Co Ltd [2016] FCA 1404 [22] –[37] (23 November 2016); *Re Senvion GmbH* (No 2) [2019] FCA 1732 [18]-[20] (22 October 2019)

2001.[25] Where a scheme of arrangement is the closest type of proceeding in Australia, an order for a stay would have to be sought pursuant to article 21 of the Model Law.

On the other hand, a voluntary administration has an automatic stay under sections 440B, 440D and 440F of the *Corporations Act 2001*. The stay applies only to 'proceedings in a court'.[26] Because of the definition of 'court' contained in section 58AA, it does not apply to arbitration proceedings.[27] In the case of a voluntary administration, most rights of a secured creditor are caught by the stay.[28] Only those creditors with security over substantially the whole of the company's property and who seek to enforce before or during the decision period can seek to do so.[29] The stay prevents secured creditors seeking to enforce their rights during a corporate restructuring without the administrator's written consent or leave of the court, which is commercially desirable to allow a breathing space whilst a company is being restructured.[30]

Where the closest proceeding in Australia is a court ordered winding up, then secured creditor rights to deal with the secured property are not affected pursuant to section 471C of the *Corporations Act 2001*. Further the stay operates only in relation to 'proceedings in a court' or 'enforcement against the property of the company' without leave of the court.[31] Any attachment or execution against the property of a company after the commencement of proceedings seeking winding up by the court is void.[32]

Where the closest proceeding in Australia is a creditor's voluntary winding up, then a secured creditor requires leave of the court to enforce their security pursuant to section 500(2) of the *Corporations Act 2001*. The stay operates in respect of 'any action or other civil proceedings'.[33] This phrase is purported to capture arbitral proceedings.[34] This section also prevents any attachment, sequestration, distress or execution against the property of the company.[35]

In *Senvion,* Justice Anastassiou of the Federal Court has recently determined that any exception to the automatic stay is to be determined in accordance with the relevant statutory provisions in relation to the stay applicable.[36]

Article 18 – 'serious lacuna'

Stewart has clearly identified a practical issue that has arisen in more than one State. Both he and I were involved with the *Hanjin* administration where this issue arose. The foreign representative had been removed by the Korean court and another representative appointed to liquidate the assets. The original

---

[25] See *Re Boaret Longyear Ltd* [2017] NSWSC 537 (27 April 2017)
[26] *Corporations Act 2001* (Cth) s 440D.
[27] *Auburn Council v Austin Australia Pty Ltd* (Admin Apptd) (2004) 22 ACLC 766; *Brian Rochford Ltd (Administrator Appointed) v Textile Clothing and Footwear Union of NSW* (1999) 17 ACLC 152.
[28] See *Corporations Act 2001* (Cth) ss 441A to 441J for exceptions.
[29] *Corporations Act 2001* (Cth) s 441A
[30] *Corporations Act 2001* (Cth) s 440B(2)
[31] *Corporations Act 2001* (Cth) s 471B.
[32] *Corporations Act 2001* (Cth) s 468(4).
[33] *Corporations Act 2001* (Cth) s 500(2).
[34] *Re Vassal Pty Ltd* [1983] 2 Qd R 769.
[35] *Corporations Act 2001* (Cth) s 500(1)
[36] *Re Senvion GmbH* (No 2) [2019] FCA 1732 (22 October 2019)

representative indicated that under Korean Law he lacked power to do anything further in relation to the company. The new foreign representative indicated he had nothing to do with the application.

At a practical level, I would suggest that our courts once recognition of a restructuring proceeding has been granted instead of closing the file, adjourn it for a telephone or administrative mention on a fixed date, before which time the applicant must provide the court with an update as to the status of the restructuring proceedings. The court could also impose a term in their grant of recognition that it only lasts as long of the foreign proceeding remains on foot.

The court may also wish to seek and record in its order, a personal undertaking from the foreign representative to comply with Article 18 and to provide the court with updates as to the administration of the foreign proceedings as required by the court. In such a circumstance, there would be an obligation upon the foreign representatives' lawyers to explain to the foreign representative the effect of such an undertaking and that it would continue to apply even if they were removed as the debtor's representative in their home jurisdiction.