THE ADOPTION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: ITS POTENTIAL IMPACT ON AUSTRALIA'S COOPERATION AND COMMUNICATION WITH FOREIGN COURTS AND FOREIGN INSOLVENCY PRACTITIONERS[1]

An overview of the issues posed by cross-border insolvencies

The orderly and efficient external administration of the affairs of a company with assets and creditors in multiple jurisdictions confronts two fundamental problems.

The first of these is that insolvency regimes vary greatly, as do the philosophies underlying them, with some jurisdictions, such as the United States of America, favouring a debtor in possession approach, whilst others prefer to exclude former management from any role in the insolvent administration.

The second major issue is that there is no universally agreed way of determining which insolvency regime should apply and that private international law also varies greatly from country to country, private international law being the unique set of principles and rules which the courts of a country apply in *"resolving the conflicts which arise because of the interaction between different legal systems".*[2]

The matters falling to be determined by a court under private international law include whether the court has jurisdiction to deal with a matter, whether it should exercise that jurisdiction or defer to another forum, what system of law is to be applied and whether foreign judgments should be recognised and enforced. In dealing with these questions, the courts of some countries have demonstrated a very broad view of their own jurisdiction and, at the same time, a reluctance to defer to the jurisdiction of other courts or to apply law other than their own. This problem is commented on in the *Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings* (**Draft UNCITRAL Notes**), released by the United Nations Commission on International Trade Law (**UNCITRAL**) in 2008:[3]

> *"Many national insolvency laws have claimed, for their own insolvency proceedings, application of the principle of universality, with the objective of a unified proceeding where court orders would be effective with respect to assets located abroad. At the same time, those laws did not accord recognition to universality claimed by foreign insolvency proceedings".*

In an extra-curial paper, Spigelman[4] has contrasted the position which applies in the insolvency context with the more seamless approach which applies to international commercial arbitrations:

> *"With respect to commercial disputes in which insolvency does not intervene and which are, accordingly, able to be resolved by international commercial arbitration, the adoption of the*

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[1] Submitted for the Insolvency Education Program conducted by the Insolvency Practitioners Association of Australia and the Queensland University of Technology

[2] P Nygh and M Davies, *Conflict of Laws in Australia*, 7th ed, Butterworths, Sydney, 2002.

[3] United Nations Commission on International Trade Law, *Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings*, 2008 at page 10.

[4] J Spigelman, 'Cross-border Insolvency: Co-operation or Conflict?' (2009) 83 *ALJ* 44 at 45.

> *UNCITRAL Model Law on International Commercial Arbitration … is so widespread that the resolution of such disputes can be conducted in almost the same borderless manner as was the case when the rights and obligations were originally created. When insolvency intervenes, the position is entirely different. Instead of a widely accepted international regime, there is a patchwork quilt of particular provisions of varying degrees of comprehensiveness and efficiency.*
>
> *Divergences in the respective national regimes for insolvency, together with the direct intrusion of policy considerations in the statutory framework, prevent the kind of seamless regime that exists for international commercial arbitration from being replicated in the context of an insolvency or in the context of a restructuring in the shadow of insolvency".*

In considering whether Brazil should adopt the *UNCITRAL Model Law on Cross-Border Insolvency* (**Model Law**),[5] Locatelli has encapsulated the issues presented by cross-border insolvencies in the following summary:[6]

> *"(i) each country has its own legal framework to deal with international insolvency; (ii) there is no legal mechanism that can be recognised and enforced in all jurisdictions in which the company maintains business relations; and (iii) the insolvency regimes and procedures are quite different around the world".*

It is against this backdrop that the liquidator of a company with assets and creditors in multiple jurisdictions approaches the complex task of administering the company's affairs. First, the liquidator may need to approach the courts of several jurisdictions to ensure that the company's assets are identified, protected and realised. This may require a court-supervised investigation of the company's affairs and proceedings in one or more jurisdictions to set aside certain transactions. Next, the claims of creditors need to be assessed and, where claims are disputed, creditors need to be afforded the opportunity of a judicial review. The jurisdiction in which this occurs and the insolvency laws which are applied may have a significant bearing on the outcome as the principles relating to such matters as set-off vary considerably. The proceeds of the realisation of the assets then need to be distributed between creditors whose claims have been admitted. However, as the principles governing such matters as priority creditors vary between jurisdictions, the precise manner in which the distribution occurs will also depend on which set of insolvency laws applies.

Long standing cooperation between courts using principles such as modified universality

Before turning to the response which the Model Law offers to these issues, reference needs to be made to the body of jurisprudence which developed in many countries to try to achieve a degree of coordination in cross-border liquidations and to the fact that a cooperative approach has found legislative support in some jurisdictions.

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[5] *Model Law on Cross-Border Insolvency*, adopted by the United Nations Commission on International Trade Law on 30 May 1997, approved by resolution of the United Nations General Assembly on 15 December 1997 and published in Official Records of the General Assembly, Fifty-second Session, Supplement No 17 (A/52/17, annex I)(UNCITRAL Yearbook, Vol XXVIII: 1997, Pt 3).

[6] F Locatelli, 'International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? An Economic Analysis of Its Benefits on International Trade' (2008) 14 Law and Business Review of the Americas 314 at 317.

The English jurisprudence is the subject of a helpful exposition in the decision of the House of Lords in *Re HIH Insurance Ltd*.[7]Although decided after the adoption of the Model Law in Great Britain, *HIH Insurance Ltd* turned on whether the law as it existed prior to the adoption of the Model Law in Great Britain in 2006 gave its courts jurisdiction to direct liquidators appointed in Great Britain to pay the proceeds of the realisation of assets to liquidators appointed by the Supreme Court of New South Wales.

The case arose out of an application by the Supreme Court of New South Wales under section 426 of the *Insolvency Act 1986* (UK) which, Lord Hoffmann noted[8], had been introduced into the insolvency law of the United Kingdom following the review of the Cork Committee[9] in 1982 which *"drew attention to the inadequacy of the statutory provisions for international co-operation in personal bankruptcy and their complete absence in the law of corporate insolvency"*.

Section 426(4) provides:

> *"The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in ... any relevant country ..."*

In reversing the decisions of the judge at first instance and of the Court of Appeal, the House of Lords unanimously held that s 426 gave the court jurisdiction to accede to a request by a relevant country to direct liquidators in England and Wales in an ancillary liquidation to pay over to the main liquidators in the relevant country all sums collected or to be collected by them, after paying or providing for all their proper costs, charges and expenses and that the request by the Australian liquidators should be acceded to notwithstanding the fact that distribution according to Australian insolvency law would result in different outcomes than if the distribution were to be made in accordance with the *Insolvency Act 1986* (UK).

Section 426, it should be noted, is mirrored by a parallel provision in s 581 of the *Corporations Act 2001* (Cth) with both provisions having their origins in mid-19th century provisions concerned with the bankruptcy of individuals.[10]

Although the appeal was disposed of under s 426, Lords Hoffmann, Scott and Neuberger also discussed whether and, if so, the extent to which the court had an inherent jurisdiction to direct the remission of assets in circumstances where the distribution would be made under principles different from those in the United Kingdom. In doing so, they reviewed the jurisprudence which had developed in the United Kingdom and elsewhere in relation to cross-border insolvency. Although Lord Hoffmann's expansive view of the court's inherent jurisdiction was not supported by Lords Scott and Neuberger, his summary of the history of the jurisprudence is instructive.

Lord Hoffmann noted[11] that prior to the introduction of s 426:

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[7] *Re HIH Insurance Ltd* [2008] 3 All ER 869.
[8] *Re HIH Insurance Ltd* [2008] 3 All ER 869 at 876.
[9] Insolvency Law Review Committee, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8858), 1982.
[10] Note 3 at 48.
[11] *Re HIH Insurance Ltd* [2008] 3 All ER 869 at 876.

> *"... some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives world-wide recognition and it should apply universally to all the bankrupt's assets. "*

He continued:[12]

> *"In the late nineteenth century there developed a judicial practice, based upon the principle of universalism, by which the English winding up of a foreign company was treated as ancillary to a winding up by the court of its domicile."*

After referring to *Re International Tin Council* [13] in which Millett J noted that the statutory obligations imposed upon a liquidator under the English legislation extended to the collection of foreign assets and to dealing with them in accordance with that legislation, Lord Hoffmann observed:

> *"But the judicial practice which developed in such a case was to limit the powers and duties of the liquidator to collecting the English assets and collecting a list of the creditors who sent in proofs."*

Lords Scott and Neuberger, however, took a narrower view of the court's inherent jurisdiction and disagreed with Lord Hoffmann on this point. In Lord Scott's opinion:

> *"The English courts have a statutory obligation in an English winding-up to apply the English statutory scheme and have ... no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme."*

Lord Neuberger was of a similar view:

> *"... the fact that the English court has an inherent power to relieve an ancillary liquidator in this country from the duty of distributing the assets himself, and to order that the assets be remitted to be distributed by a foreign liquidator does not mean that it necessarily follows that those assets can then be distributed other than in accordance with the English insolvency regime."*

However, notwithstanding the fact that Lord Hoffmann was in the minority on that particular point, the following summary[14] by him of England's private international law in relation to cross-border liquidations has been cited with approval in Australia[15]:

> *"The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through*

[12] *Re HIH Insurance Ltd* [2008] 3 All ER 869 at 876.
[13] *Re International Tin Council* [1987] 1 All ER 890.
[14] *Re HIH Insurance Ltd* [2008] 3 All ER 869 at 881.
[15] *Re Akers (as a joint foreign representative of Saad Investments Co Ltd (in official liq) (a company registered in the Cayman Islands)) and Others v Saad Investments Co Ltd (in official liq) (a company registered in the Cayman Islands) and Another* [2010] 118 ALD 498.

> *English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and United Kingdom public policy, cooperate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."*

The principle of modified universalism[16] to which Lord Hoffmann refers is described by Mason in *McPherson's Law of Company Liquidation*[17] as falling between two *"theoretical extremes":* universalism and territorialism. She describes them in the following terms:

> *"Under the unity approach, exclusive jurisdiction is accorded to the court of one place (typically the company's domicile) and all other courts defer to that forum … All matters are dealt with by the one administrator, who collects assets wherever situated and all creditors must submit proofs to the one administration … If there were uniform insolvency laws, then this would appear to be the most efficient approach … Under the strict territorial approach, a jurisdiction does not recognise any extraterritorial dimension to an insolvency administration … There is no recognition of a foreign proceeding".*

As to whether principles such as modified universality have been successful in addressing the problems posed by cross-border insolvencies, Locatelli[18] offers the following assessment:

> *"Although, in recent years, the principles of 'universality' and 'territoriality' adopted by most countries have moved towards a more sophisticated approach through cooperation between countries by means of principles such as 'modified universalism' (applied by US courts) and 'cooperative territorialism', these approaches have not been able to efficiently address these issues".*

Goode puts it more economically in *Principles of Corporate Insolvency*:[19]

> *"While judicial co-operation has worked successfully in a number of cases, judges are bound by their national laws and have only limited room for manoeuvre".*

The Model Law was introduced in 1997 to provide greater procedural certainty and to mandate cooperation between the courts of enacting states

The Model Law seeks to provide greater procedural certainty and, in the words of Rares J in *Re Akers*,[20] *"represents an attempt to impose a universalist approach"*. It is built on four principles: access to the court of an enacting state (the receiving court), recognition of foreign proceedings by a receiving court, the granting of relief by a receiving court to protect assets within its jurisdiction and an obligation placed on the courts and insolvency practitioners of enacting states to cooperate and

[16] Lord Hoffmann attributes the term *"modified universalism"* to American academic Professor Jay Westbrook: *Re HIH Insurance Ltd* [2008] 3 All ER 869 at 876.
[17] R Mason, 'Private International Law in Company Liquidation' in Gronow M and Mason R, *McPherson's Law of Company Liquidation,* Law Book Company, Sydney, 2005 at paragraph 17.80.
[18] Note 5 at 318.
[19] R Goode, *Principles of Corporate Insolvency Law*, Thomson Sweet & Maxwell, London, 2005 at 643.
[20] *Re Akers (as a joint foreign representative of Saad Investments Co Ltd (in official liq) (a company registered in the Cayman Islands)) and Others v Saad Investments Co Ltd (in official liq) (a company registered in the Cayman Islands) and Another* [2010] 118 ALD 498 at 504.

communicate to ensure that a debtor's estate is administered fairly and efficiently with a view to maximising benefits to creditors [21].

The Model Law was made law in Australia by the *Cross-Border Insolvency Act 2008* (Cth), s 6 of which provides:

> *"Subject to this Act, the Model Law, with the modifications set out in this Part, has the force of law in Australia."*

In support of the *Cross-Border Insolvency Act 2008* and Article 25 of the Model Law, the Supreme Court of New South Wales has issued a practice note[22] which states that cooperation between it and a foreign court or foreign representative under Article 25 will generally occur *"within a framework or protocol that has previously been approved by the Court*" and which encourages parties, in drafting a framework or protocol, to have regard to the *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*[23] and to the Draft UNCITRAL Notes.[24]

Article 2 of the Model Law, the English text of which is annexed to the *Cross-Border Insolvency Act*, introduces a number of key concepts. It provides:

> *"For the purposes of the present Law:*
>
> *a) 'Foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;*
> *b) 'Foreign main proceeding' means a foreign proceeding taking place in the State where the debtor has its centre of main interests;*
> *c) 'Foreign non-main proceeding' means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of the present Article;*
> *d) 'Foreign representative' means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceedings;*
> *e) 'Foreign court' means a judicial or other authority competent to control or supervise a foreign proceeding;*
> *f) 'Establishment' means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."*

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[21] United Nations Commission on International Trade Law, *The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective*, 2011 <http://www.uncitral.org> at page 7.
[22] Practice Note SC Eq Div 6 issued on 11 March 2009 <http://www.lawlink.nsw.gov.au/practice_notes>
[23] American Law Institute and the International Insolvency Institute, *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases, 2001 <http://*www.ali.org/doc/Guidelines.pdf>
[24] United Nations Commission on International Trade Law, *Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings*, 2008.

Articles 15, 17 and 20 of the Model Law are central provisions. Article 15 enables a foreign representative to apply to the court of an enacting country for recognition of the foreign proceeding in which the foreign representative was appointed. Article 17 provides that the foreign proceeding "shall" be recognised as a foreign main proceeding *"if it is taking place in the State where the debtor has the centre of its main interests"* and Article 20 provides that *"upon recognition of a foreign proceeding that is a foreign main proceeding"* action against the debtor's estate is stayed.

Cooperation and communication between courts and insolvency representatives are not only authorised by the Model Law, they are mandated by it [25]. Article 25 requires the court of an enacting state to "*cooperate to the maximum extent possible"* with foreign courts or representatives and provides that the court *"is entitled to communicate directly with, or to request information or assistance directly from"* foreign courts or representatives.

This is significant. As Mason notes in *Cross-border Insolvency*,[26] although Australia *"has a longstanding jurisprudence of court cooperation"*, the direct cooperation permitted by Article 25 may *"herald a new era in cooperation".*

Article 26 mirrors Article 25 in relation to bankruptcy trustees and liquidators of enacting states, whilst Article 27 sets out a non-exhaustive list of the forms which such cooperation may take.

The American Law Institute and International Insolvency Institute guidelines for court-to-court communications

Although initially no more than an Appendix to *Principles of Cooperation Among the NAFTA Countries*[27] which was published by the American Law Institute in 2000, *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*[28] was adopted by the International Insolvency Institute in 2001 and addresses in some detail the practical considerations involved in direct communications between courts and between courts and foreign insolvency representatives. In a Foreward to the *Guidelines*, the Chairman of the International Insolvency Institute, E Bruce Leonard, expressed the hope in 2004 that:

> *"The use of the Guidelines in international cases will change international insolvencies and reorganisations for the better forever".*

The Introduction to the *Guidelines* squarely states that a critical issue in the direct communication between judges in different jurisdictions or between a judge in one jurisdiction and an insolvency practitioner in another jurisdiction is that such communications be conducted in a transparent manner:

[25] United Nations Commission on International Trade Law, *The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective*, 2011 <http://www.uncitral.org> at page 41.
[26] R Mason, 'Australia' in LC Ho (ed), *Cross-border Insolvency*, 2nd ed, Globe Law and Business, London, 2009 at paragraph 3.3.
[27] American Law Institute, 'Principles of Cooperation Among the NAFTA Countries' in *Transnational Insolvency: Cooperation Among the NAFTA Countries*, 2000.
[28] American Law Institute and International Insolvency Institute, *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases,* <www.ali.org/doc/Guidelines.pdf>.

> *"Communications by judges directly with judges or administrators in a foreign country … raises issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the procedure is transparent and clearly fair … These Guidelines encourage such communications while channelling them through transparent procedures "*[29].

Thus, Guideline 7 provides, in relation to communications between courts conducted by telephone, video conference call or other electronic means, that counsel for all affected parties should be entitled to participate, that advance notice should be given to all parties and that the communications should be recorded. In similar fashion, Guideline 9 provides that where a court conducts a joint hearing with another court, each court should be able to hear the other simultaneously, that evidence or written materials filed in one court should be transmitted to the other court and that submissions or applications by the representative of a party should be made only to the court in which the representative is appearing, unless the representative is specifically given permission by the other court to make submissions to it.

Guideline 9(e), however, contemplates that direct communication, subsequent to a joint hearing, may take place between the judges involved in the absence of counsel:

> *"(e) Subject to Guideline 7(b)*[30]*, the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts …"*

As the Model Law does not replace the private international law of enacting states or address substantive rights, it is heavily dependent upon the cooperation of the parties including through the use of cross-border agreements

The Draft UNCITRAL Notes released by UNCITRAL in 2008[31] review a number of cases in which courts have cooperated in cross-border insolvencies and proposes and discusses sample clauses which parties may wish to include in cross-border agreements.

As the Draft UNCITRAL Notes acknowledge[32], in the absence of *"formally articulated conflict-of-laws rules specific to solving cross-border issues"*, the successful coordination of cross-border insolvencies relies heavily on the cooperation of the parties, including through the negotiation of cross-border agreements. The Draft UNCITRAL Notes describe cross-border agreements as follows[33]:

> *"Typically, they are designed to assist in the management of those proceedings and are intended to reflect the harmonisation of procedural rather than substantive issues between the jurisdictions involved (although in limited circumstances, substantive issues may be addressed)".*

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[29] American Law Institute and International Insolvency Institute, *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases,* <www.ali.org/doc/Guidelines.pdf> at page 1.
[30] which provides that communications should be recorded and may be transcribed.
[31] United Nations Commission on International Trade Law, *Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings*, 2008.
[32] United Nations Commission on International Trade Law, *Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings*, 2008 at page 53.
[33] United Nations Commission on International Trade Law, *Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings*, 2008 at page 23.

In relation to the question of who should be parties to a cross-border agreement, the Draft UNCITRAL Notes observe that:[34]

> *"Frequently they are entered into by the insolvency representatives, sometimes by the debtor (usually a debtor in possession), and may involve the creditor committee … creditors generally are not parties to an agreement".*

Although it would be impracticable for creditors and other stakeholders to be parties to cross-border agreements, their absence from them is not unimportant as, *"to be effective, a cross-border agreement requires the consent of those parties to be covered by it"*.[35]

A paper entitled *The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective*,[36] an advance copy of which was released by UNCITRAL in July 2011, gives some examples of how this has worked in practice. In relation to Maxwell Communications Corporation plc, for example, the courts of England and New York each proposed that to the parties that a cross-border insolvency agreement be negotiated with a view to coordinating the proceedings. Each court then appointed a facilitator and, through the involvement of the facilitators, a number of issues were resolved[37].

The UNCITRAL paper also refers to the use of video-link facilities being used to coordinate the hearing of proceedings in more than one jurisdiction[38]. In *PSI Net Inc*[39], for example,the judges in the United States of America and Canada conducted proceedings by video-link with each judge being addressed by the representatives appearing before him or her in that jurisdiction, while the judge and representatives in the other jurisdiction were able to watch and listen. Although the judges conferred by telephone after receiving submissions and before making any orders, the proceedings remained separate in a procedural sense.

The Model Law and Guidelines have undoubtedly been of great assistance in facilitating the making of such arrangements and the importance of these should not be underestimated.

Other initiatives

As discussed earlier, the Model Law does not seek to replace the private international rules of enacting states in relation to insolvency or to alter the substantive rights of the parties. Instead, it relies heavily on the cooperation of the parties to put in place cross-border agreements to coordinate the administration of insolvencies in multiple jurisdictions.

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[34] United Nations Commission on International Trade Law, *Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings*, 2008 at pages 26 and 27.
[35] United Nations Commission on International Trade Law, *Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings*, 2008 at page 30.
[36] United Nations Commission on International Trade Law, *The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective*, 2011 <http://www.uncitral.org>.
[37] United Nations Commission on International Trade Law, *The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective*, 2011 <http://www.uncitral.org> at page 43.
[38] United Nations Commission on International Trade Law, *The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective*, 2011 <http://www.uncitral.org> at page 43.
[39] Ontario Superior Court of Justice, Toronto, Case No. 01-CL-4155 (10 July 2001) and the United States Bankruptcy Court for the Southern District of New York, Case No. 01-13213 (10 July 2001)

The EC Regulation[40] takes a different approach which is summarised in the Draft UNCITRAL Notes[41] as follows:

> *"The EC Regulation imposes a mandatory regime for the exercise of jurisdiction to open insolvency proceedings and choice of laws rules, which determine the law that will govern each relevant aspect of insolvency proceedings to which the Regulation applies and recognizes the importance of cooperation between the proceedings".*

Similarly, Committee J of the International Bar Association developed a Cross-Border Insolvency Concordat[42] in the early 1990s which the Draft UNCITRAL Notes describe[43] as being *"based on rules of private international law"*. The Draft UNCITRAL Notes further observe[44] that Principle 8A of the Concordat:

> *"refers the decision on value and admissibility of claims as well as the determination of certain creditors' rights to each forum for the claims filed before it, using an analysis based upon conflicts of laws rules".*

There have also been a number of bilateral and multilateral arrangements including the Montevideo Treaties of 1889 and 1940 involving countries in Latin America, cross-border protocols between the United States of America and Canada based on the Concordat and those which China has negotiated with several nations.[45]

Concluding comments

The adoption of the Model Law in Australia supplemented, rather than replaced, the existing law. Thus, as Murray[46] notes in relation to *Lawrence v Northern Crest Investments Limited (in liq)*[47] in which the Federal Court declared a liquidation in the New Zealand High Court to be a foreign main proceeding:

> *"The liquidator could have asked the NZ High Court to issue a letter of request under s 8 of the NZ Insolvency (Cross Border) Act 2006 to an Australian Court. Under s 581(3) of the Corporations Act, the Federal Court could then have responded by way of ordering examinations and securing assets".*

[40] European Council Regulation (EC) No. 1346/2000 of May 2000 on insolvency proceedings.
[41] United Nations Commission on International Trade Law, *Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings*, 2008 at page 15.
[42] International Bar Association, *Cross-Border Insolvency Concordat*, 1995.
[43] United Nations Commission on International Trade Law, *Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings*, 2008 at 14.
[44] United Nations Commission on International Trade Law, *Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings*, 2008 at footnote 87.
[45] J Spigelman, 'Cross-border Insolvency: Co-operation or Conflict?' (2009) 83 *ALJ* 44 at 49.
[46] M Murray, 'Cross Border' in *Insolvency Case Summaries* (2011) 23(3) Australian Insolvency Journal 46.
[47] *Lawrence v Northern Crest Investments Limited (in liq)* [2011] FCA 672

The Model Law had been adopted in only eighteen countries[48] and, as Spigelman points out,[49] it is of concern that Japan and Korea are the only Asian countries to have adopted it, although India is considering doing so.

Although it has been of great assistance in enabling courts to navigate procedural matters in cross-border insolvencies, one of the most significant drawbacks of the Model Law, as Spigelman notes[50], is that it applies only to individual corporations and does not address the issues presented by multi-national corporate groups. As major multi-national collapses generally involve complex group structures, this is a serious shortcoming.

Further, although the Model Law is to be welcomed as providing a focus on the need for greater coordination in insolvency laws, much of the judicial cooperation which is at its heart was, as Spigelman notes,[51] already occurring, at least between countries with a common law tradition:

> *"Direct communication is expressly permitted by Art 25 of the Model Law, which reflects what has been happening in practice, almost exclusively in jurisdictions of the common law tradition, without formal legislative approval and without the hitherto requisite intermediation of a manifestation of the executive branch of government".*

Ultimately, a truly international approach needs to address the widespread divergence in the private international laws of different countries as they apply to cross-border insolvencies. To achieve that would require the development and widespread adoption of a Model Law which mandates the private international law principles to be used in determining the courts and system of law to applied and which requires the courts of other enacting states to provide assistance. It would be unrealistic to expect that to be achieved in the foreseeable future.

In the meantime, the best that may be hoped for may be that such matters are negotiated between countries on a case by case basis and become the subject of bilateral or multilateral treaties. Spigelman[52] points to the experience of Europe as an example of what can be achieved in this regard and suggests[53] that *"attempting to piggy-back on whatever bilateral or regional negotiations are being undertaken in the trade and investment area may prove to be the most fruitful course"*.

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[48] Australia (2008), British Virgin Islands (2005), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Korea (2006), Romania (2003), Serbia (2004), South Africa (2000) and the United States of America (2005): retrieved from <http://www.uncitral.org> on 16 September 2011.
[49] Note 3 at 46.
[50] Ibid.
[51] Note 3 at 51.
[52] Note 3 at 53.
[53] Note 3 at 55.