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Insolvency law

Developments in insolvency law: adoption of the UNCITRAL Model Law on Cross-Border Insolvency; use of cross-border protocols and court-to-court communication guidelines; and case law on interpretation of "centre of main interests" and "establishment" in the European Union

Note by the Secretariat

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I. Introduction

1. This note reports on developments in the area of cross-border insolvency law, including with respect to the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, the use of cross-border protocols and guidelines on court-to-court communications in cross-border cases, and interpretation of the terms "centre of main interests" and "establishment" in cases in the European Union under the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (ECR). A brief report on the current activities of international organizations in the area of insolvency law is set forth in A/CN.9/580/Add.1.

II. Developments in cross-border insolvency

(a) Adoption of the UNCITRAL Model Law on Cross-Border Insolvency

2. Legislation based on the Model Law has now been adopted by Eritrea; Mexico;[1] within Serbia and Montenegro, Montenegro;[2] Japan;[3] South Africa;[4] Romania;[5] Poland;[6] and the British Virgin Islands.[7] The United Kingdom[8] has enacted legislation enabling the Model Law to be implemented by regulation. A number of countries have draft legislation based upon the Model Law under consideration, including the United States of America, Argentina and Pakistan, while other countries have recommended adoption of such legislation, including Australia, New Zealand and Canada. The Spanish Insolvency Act 22/2003, which came into force in 2004, includes international insolvency provisions inspired by the Model Law as well as provisions based on the ECR.

3. While some of the legislation adopting the Model Law has enacted the text largely unchanged, some changes, of varying degrees of significance, have been made. The following summary of those changes is provided by way of illustration, but since it is based upon consideration of much of the legislation in translation, it may not accurately reflect the exact provisions of the original legislation in each case.

(i) Scope of the legislation—article 1

4. As foreshadowed in article 1 (2) of the Model Law, countries have excluded certain types of entities from the application of the provisions of the Model Law. Examples include: entities such as banking and insurance institutions (e.g. Romania, Poland); financial and investment institutions, commodity exchange members, clearing houses, brokerage companies and traders (e.g. Romania); persons who hold or have held prescribed financial services licences of a designated type (e.g. British Virgin Islands); and consumers (e.g. Mexico). Reflecting the scope of its insolvency law, one country has limited the provisions to proceedings concerning "merchants" (Mexico).

(ii) "Centre of main interests"—articles 2 and 16(3)

5. One example adds to the presumption of article 16 (3) concerning "centre of main interests" the additional possibility of the centre of main interests being the professional domicile of a legal person undertaking an economic activity or independent profession (Romania).

(iii) Application to commence and participate in proceedings—articles 11 and 12

6. In one example (British Virgin Islands), an application under article 11 to commence local proceedings and participation in proceedings regarding the debtor under article 12 both require the foreign proceedings to have been recognized.

(iv) Notification of foreign creditors—article 14

7. One law (British Virgin Islands), provides for additional time to be given to foreign creditors with respect to notice and submission of claims.

(v) Application for recognition—article 15

8. In most examples, applications for recognition can be made, in accordance with article 15, by the foreign representative. In one case, the debtor may also make such an application (Japan).

(vi) Decision to recognize—article 17

9. A number of examples have omitted the requirement under article 17(3) that courts should decide upon an application for recognition at the earliest possible time (e.g. Japan, Mexico, Poland).

(vii) Subsequent information—article 18

10. A number of countries have extended the obligation to inform the court to cover "any" changes, not only "substantial" changes, as required by article 18, in the status of the recognized foreign proceedings or the status of the foreign representative's appointment (e.g. Poland, South Africa).

(viii) Interim relief and relief available on recognition—articles 19 and 20

11. One law has added a requirement that the insolvency representative must notify the debtor as soon as possible or within a time specified by the court where an order for interim relief is made (British Virgin Islands). Several countries have slightly amended the relief available upon recognition to align article 20(1) with domestic law. In those cases, the legislation provides that the stay does not apply to commencement or continuation of individual actions, but only to enforcement or execution against the debtor's assets (e.g. Japan, Mexico).

12. In one example, relief is not available automatically on recognition as provided by article 20, but rather upon application to the court (e.g. Japan).

13. In a further example, exercise of the right to alienate, encumber or dispose of the debtor's assets is suspended from the time of recognition, except where the trader carries out acts, operations and payments in the ordinary course of business (e.g. Romania). Such acts can be the subject of a request for relief by the foreign representative following recognition. The same legislation also provides that a creditor holding a claim guaranteed by a mortgage, pledge or other real movable guarantee or possessory lien can seek relief from the stay.

(ix) Cooperation and direct communication between courts—articles 25, 26 and 27

14. One country (Japan) has not adopted article 25, and limits article 26 to cooperation between foreign and local representatives. Article 27, suggesting forms of cooperation, also has been omitted from a few examples (e.g. Japan, Poland), although the Polish law does indicate that specified information should be conveyed or sought. A further variation (Poland) provides for the judge and court to communicate directly with the foreign court and representative, but requires the person administering the proceedings under the local law to communicate with the foreign court or representative through the judge, rather than directly, as permitted by article 26 (2) of the Model Law. One law (British Virgin Islands) specifies that the right to communicate directly (article 25 (2)) be subject to the "rights of parties to notice and participation at hearings".

(x) Coordination—articles 28-30

15. In at least two laws, the provisions of chapter V of the Model Law dealing with concurrent proceedings have been varied or omitted (e.g. Japan, Poland). In one example (Japan), a single proceeding model is adopted, so that there will be either recognition of a foreign proceeding or a domestic proceeding, but not both. Where a domestic proceeding has already commenced, an application for recognition of a foreign proceeding involving the same debtor will be dismissed, unless it is a foreign main proceeding and meets certain other conditions concerning the interests of creditors. If the foreign proceeding is recognized, the domestic proceedings will be stayed. In another example (Romania), the opening of local proceedings following the recognition of foreign main proceedings requires an establishment, rather than the presence of assets referred to in article 28 of the Model Law.

(xi) Reciprocity

16. Although rejected as an approach during negotiation of the Model Law, a number of countries have adopted provisions applying the Model Law on a reciprocal basis. The nature of these reciprocity provisions varies. In some examples, the relevant provision states the need for reciprocity (e.g. Mexico) without any indicator as to what might satisfy that requirement or provides that the court should establish the existence of reciprocity (e.g. Argentina). In another example, the legislation provides the Model Law will only apply where a country has been officially designated, a process requiring approval by the Parliament (South Africa). To date, it appears that no countries have yet been designated under that procedure. A similar provision (British Virgin Islands) requires designation by notice in an official publication. Another example, (Romania) specifies that there must be reciprocity of recognition of foreign judgements.

(xii) Other proposals

17. New Zealand has taken a decision to enact the Model Law and introduce an additional scheme that would allow a more extensive form of coordination with specified countries than provided for under the Model Law. This scheme is based upon designating specific types of insolvency proceedings under the law of particular countries, which will be entitled, among other things, to automatic recognition and relief upon the foreign representative giving notice to a specific

public officer. Local proceedings could not be commenced in New Zealand (other than in exceptional cases with leave of the court), and the foreign representative would have the same powers as a liquidator under New Zealand insolvency legislation.

(b) Cross-border protocols

18. Coordination and harmonization of international insolvency proceedings has been greatly facilitated in recent years by the practices and procedures developed by insolvency professionals and courts, starting with individual cases and the need to address particular issues faced by the parties. Agreements or "protocols" were negotiated by the parties and approved by the courts in the jurisdictions involved. These cross-border insolvency protocols might, for example, settle a particular dispute arising from the different laws in concurrent cross-border proceedings, create a legal framework for the general conduct of the case or coordinate the administration of an insolvent estate in one State with an administration in another State.

19. The earliest reported cross-border insolvency protocol was developed in *Maxwell Communication plc* (December 1991/January 1992),[9] which involved two primary insolvency proceedings initiated by a single debtor, one in the United States and the other in the United Kingdom, and the appointment of two different and separate insolvency representatives in the two different jurisdictions, each charged with a similar responsibility. The United States and English judges independently raised with their respective counsel the idea that a protocol between the two administrations could resolve conflicts and facilitate the exchange of information. Under the protocol, two goals were set to guide the insolvency representatives: maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. The parties agreed essentially that the United States court would defer to the United Kingdom proceedings, once it was determined that certain criteria were present. Specificities included: that some existing management would be retained in the interests of maintaining the debtor's going concern value, but the United Kingdom insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors; the United Kingdom insolvency representatives should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States court; the United Kingdom insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to undertake "lesser" transactions. Many issues were purposely left out of the protocol to be resolved during the course of proceedings. Some of those issues, such as distribution matters, were later included in an extension of the protocol.

20. Following *Maxwell*, a more modest protocol was developed between courts in Canada and the United States in *Re Olympia & York Developments Limited* (1993)[10] and between courts in the Bahamas and the United States in *Re Commodore Business Machines* (December 1994).[11]

21. Following the successful use of cross-border insolvency protocols in a number of prominent cross-border cases, the International Bar Association (IBA) developed

the Cross-Border Insolvency Concordat (formally adopted by the Council of the IBA in May 1996) to serve as a model for future cross-border insolvency protocols.

22. The Concordat provides non-statutory guidelines that the parties or the courts could adopt as practical solutions to cross-border issues arising from insolvency proceedings in different States. It was drafted with the expectation that it would be modified to fit the circumstances of any particular cross-border insolvency case, as well as being a "living document" subject to revision based on experience. Protocols developed after adoption of the Concordat have used it to varying degrees, ranging from limited agreements accomplishing specific, narrow purposes to far-reaching agreements establishing broad cooperative frameworks in line with the principles of the Concordat.

23. The Concordat comprises ten general principles, each followed by a Rationale, which provides further information on the use of the particular principle.[12]

Principle 1

24. There should be a single primary administrative forum for a cross-border insolvency (although the Rationale recognizes that there may be ancillary/secondary proceedings).

Principle 2

25. The single main forum will coordinate the administration and collection of assets, and administer the filing of claims and distribution. (See UNCITRAL Model Law Articles 13(2), 14(3), 21(1)(e) & (2), 32).

Principle 3

26. This largely concerns rights of insolvency representatives and creditors where there is more than one proceeding, including the right to receive notice of and appear in proceedings and have access to information. (See UNCITRAL Model Law Articles 5, 9, 10, 12, 13, 14, 21(1)(d), 22(3)).

Principle 4

27. The principle addresses the situation where there is no main proceeding, but essentially two competing proceedings in different jurisdictions and focuses on issues of coordination. The principle recommends use of a protocol and contains universal distribution rules. (See UNCITRAL Model Law Article 13(2)).

Principle 5

28. The ranking of claims in a secondary proceeding is respected for secured and privileged claims.

Principle 6

29. An insolvency representative may use the administrative rules of the foreign State, although those rules are not available in the domestic State.

Principle 7

30. Similar to Principle 6, this principle allows an insolvency representative to use the avoidance provisions of the foreign State. The intention of these principles is to provide flexibility in the administration of the insolvency.

Principle 8

31. This principle concerns international choice of law principles concerning verification and admission of claims, application of substantive law and application of avoidance provisions of the forum.

Principle 9

32. Proceedings with the goal of reorganization should be possible, even if not available in one of the relevant jurisdictions, if those proceedings can be effected in a non-discriminatory manner.

Principle 10

33. A State should not give effect to acts of another jurisdiction that invalidate a "valid pre-insolvency transaction".

34. With increasing use, protocols have become more and more comprehensive and procedures have been streamlined, improved and standardized. In jurisdictions that have become accustomed to using protocols, they have greatly facilitated the conduct of cases and preservation of the value of the insolvency estate. Protocols seek to harmonize procedural rather than substantive issues between jurisdictions (like the Model Law, protocols tend to include some statement respecting the honour and integrity of the respective courts) and typically address coordination of:

(i) Hearings in the States involved;

(ii) Filing of claims;

(iii) Procedures dealing with the financing or sale of assets;

(iv) Recovery of debts for the benefit of creditors and equality of treatment among unsecured creditors; and

(v) Reorganization plans in the different jurisdictions.

35. Not all of the detail that would fall under these general categories is unique to protocols. As noted above, providing foreign creditors with the same rights as local creditors, which is a feature of most protocols, is also addressed by Principle 3(c) of the Concordat and by Article 13(1) of the Model Law. Similarly, the *Everfresh*, *Nakash* and *Solv-Ex* protocols (discussed below) all permit the foreign representative direct access to the court in the other State, as does Article 9 of the Model Law.

36. There is no prescribed format for a typical cross-border insolvency protocol. Since protocols are specific to individual cases and designed to facilitate solutions to particular problems, the content will vary from case to case, and generally will not be intended to apply for the duration of the entire case without amendment or modification. As the dynamics in a multinational case change over the course of the

case, additional issues may arise which may require provisions to be added to a protocol.

37. The first protocol developed after drafting of the Concordat was finalized (and modelled on the Concordat principles) was in a case involving the United States and Canada, *Everfresh Beverages Inc.* (December 1995).[13] A United States company with Canadian operations filed for reorganization proceedings in both countries at the same time. The protocol explicitly addressed a broad range of cross-border insolvency issues such as choice of law, choice of forum, claims resolution and avoidance actions. Creditors were given, for example, the express right to file claims in either proceeding. The protocol followed many of the principles of the Concordat very closely, using as a starting point Principle 4, which addresses the situation where there is no main proceeding, but essentially two competing proceedings in different jurisdictions. The protocol was finalized approximately one month after proceedings began and was used to hold the first cross-border joint hearing to coordinate the proceedings. It has been estimated that there was a 40 per cent enhancement of preservation of value of the insolvency estate as a result of the use of the protocol and the ensuing cooperation among the parties.[14]

38. In *Re Nakash* (May 1996),[15] the protocol involved the United States and Israel. It required express statutory authorization in Israel and direct court involvement generally in its negotiation. It focused on enhanced coordination of court proceedings and cooperation between the judiciaries, as well as between the parties (previous protocols had focused on the parties). Unlike previous cases involving cross-border insolvency protocols, this case did not involve parallel insolvency proceedings for the same debtor. The relevant conflict and central issue in the case that the protocol sought to resolve was between the pursuit of a judgment against the debtor in Israel and the automatic stay arising from the debtor's insolvency proceedings (pursuant to Chapter 11) in the United States, which should have prevented pursuit of the judgment. The debtor was not a signatory to the protocol and opposed its approval and implementation.

39. The protocol in *Tee-Comm. Electronics Inc* (June 1997),[16] a case involving the United States and Canada, may be characterized as a specific-purpose protocol with a narrow focus. It established a framework under which the administrators in the two jurisdictions would jointly market the debtors' assets, so as to maximize the value of the estate. Accordingly, it addressed the sale of those assets, which was the key issue at the outset of the case, but no other matters, such as entitlement to and distribution of proceeds.

40. In *Re AIOC Corporation* (April 1998),[17] a liquidation protocol was developed between Switzerland and the United States. The difficulties in the case arose not only because of the differences between the Swiss and United States insolvency laws, but also because of the inability of the Swiss and United States insolvency representatives to abstain from their statutory responsibilities to administer the respective liquidations. The parties agreed upon a protocol as a means of providing joint liquidation of resources in a manner consistent with the insolvency laws of both countries. The management of this via the protocol is one of the key features of the case. The protocol is based upon the Concordat, but focused generally on marshalling resources, and specifically on procedures for administering the reconciliation of claims.

41. In *Re Solv-Ex Canada Limited and Solv-Ex Corporation* (January 1998),[18] involving the United States and Canada, a number of simultaneous joint hearings were held during the proceedings. Contrary rulings by the two courts had effectively deadlocked proceedings. Following negotiations between the parties, simultaneous proceedings, connected by telephone conference call, were arranged to approve the sale of the debtors' assets. The courts reached identical conclusions authorizing the sale, and encouraged the parties to negotiate a cross-border insolvency protocol to govern further proceedings in the case. Procedural matters agreed between the parties included that identical materials would be filed in both jurisdictions; the presiding judges could communicate with one another, without counsel present, to (a) agree on guidelines for the hearings, and, subsequently, (b) determine whether they could make consistent rulings. The courts subsequently approved the protocol.

42. More recent cross-border cases between the United States and Canada have seen the development of more comprehensive forms of protocols.

43. In *Loewen Group Inc.* (June 1999),[19] the debtor, a large multinational company, filed for insolvency proceedings in both jurisdictions and immediately presented both courts with a fully developed protocol establishing procedures for coordination and cooperation. The debtor had quickly identified cross-border coordination of court proceedings as vitally important to its reorganization plans, and took the initiative of constructing a draft protocol that was approved as a "first day order" in both proceedings. The protocol provided that: the two courts could communicate with each other and conduct joint hearings, and set out rules for such hearings; creditors and other interested parties could appear in either court; the jurisdiction of each court over insolvency representatives from the other jurisdiction was limited to the particular matters in which the foreign insolvency representative appeared before it; and any stay of proceedings would be coordinated between the two jurisdictions.

44. *Livent Inc.* (June 1999)[20] was the first case in which joint cross-border hearings were conducted via a closed circuit satellite TV/video-conferencing facility. Two hearings were held. The first hearing was conducted to approve a cross border protocol for the settlement of creditor claims against the debtor. The second hearing was to approve the sale of all or substantially all of the debtor's assets. The protocol expressly provided for such hearings, and allowed the two judges some discretion to discuss and resolve procedural and technical issues relating to the joint hearing.

45. *Philip Services Corporation* (June 1999)[21] is noted as being the first "cross-border pre-pack".[22] Prior to the instigation of insolvency proceedings, the debtor negotiated a reorganization plan with its creditors over several months. It was intended that, following court approval, the plan would be implemented in both jurisdictions. As in the *Loewen Group* case, a fully developed protocol was presented to and approved by the courts as an initial order. The case has been cited as an example of a protocol providing for broad and general harmonization and coordination of cross-border proceedings, in line with the principles of the Concordat (as opposed to the very specific protocol *Tee-Comm Electronics* (see above, para. 39)). The broad goals of the protocol included: promoting orderly, efficient, fair and open administration; honouring the respective courts' independence and integrity; promoting international cooperation and respect for comity; and implementing a framework of general principles to address

administrative issues arising from the cross border nature of the proceedings. To achieve these goals, the protocol addressed, among other things, court-to-court coordination and cooperation, the retention and compensation of professionals and joint recognition of stays of proceedings. Under the protocol, the courts also agreed to cooperate, wherever feasible, in the coordination of claims processes, voting procedures and plan confirmation procedures.

46. *Inverworld Inc* (October 1999),[23] involved the United States, the United Kingdom and the Cayman Islands. This was a complicated case in which insolvency proceedings were filed for the debtor and several subsidiaries in the three States. To avoid the ensuing conflicts, various parties created protocols that were agreed by courts in each of the jurisdictions. The protocol arrangements included: dismissal of the United Kingdom proceedings, upon certain conditions regarding the treatment of United Kingdom creditors; strict division of outstanding issues between the other two courts; and each court was to take the other court's actions as binding, preventing parallel litigation and leading to a coordinated worldwide settlement.

47. The protocol in *Manhattan Investment Fund* (April 2000),[24] a case involving the United States and the British Virgin Islands, listed a number of objectives including: coordinating the identification, collection and distribution of the debtor's assets to maximize the value of such assets for the benefit of the debtor's creditors and activities and the sharing of information (including certain privileged communications) between the respective insolvency representatives to minimize costs and to avoid duplication of effort.

48. The increased use of cross-border insolvency protocols has enabled a high level of cross-border cooperation and coordination to be achieved for the benefit of all stakeholders of the businesses involved and the experience gained is likely to continue to be built upon in future cross-border cases. They are complementary to the UNCITRAL Model Law, as the Model Law provides a legislative basis for cross-border cooperation and it is the role of mechanisms such as protocols to tailor the scope and nature of the cooperation to the circumstances of the particular case.

(c) Court-to-court communications

49. The *Guidelines Applicable to Court-to-Court Communications In Cross-Border Cases* (2000) were developed as part of the American Law Institute's (ALI) Transnational Insolvency Project begun in 1994 to develop cooperative procedures for use in corporate insolvency cases involving companies with assets or creditors in two or more of the State-parties of NAFTA—Canada, Mexico and the United States. The focus of the Project was to develop approaches that could be implemented by insolvency practitioners and the courts. The Guidelines are largely based on actual cross-border cases involving cross-border insolvency protocols and are intended to encourage communication between courts to ensure timely cooperation and coordination in cross-border insolvency cases as they develop. The Guidelines clearly state that local domestic rules, practices and ethics must be fully observed at all times. They are not mandatory, and are meant to be adapted and modified to fit the circumstances of individual cases. A key objective of the Guidelines is to reduce the time frames set by traditional means of communication between international courts, such as Letters Rogatory or Letters of Request (which can impose significant delay and disrupt the achievement of a successful cross-border insolvency administration), by encouraging the use of modern communication technologies.

They are intended to be adopted in any case following appropriate notice to the parties in accordance with local procedures (all related issues, such as the parties entitled to notice are determined by the rules of each jurisdiction and are not addressed in the Guidelines). The Guidelines have been translated into a number of different languages, with additional translations currently being developed, and are available online.[25]

50. The Guidelines have been increasingly used in recent years, both through adoption by courts as a formal procedure, and ad hoc application in specific cross-border insolvency cases.

(i) Use by courts

51. The introduction to the Guidelines states that a court intending to employ the Guidelines (with or without modifications) should adopt them formally before applying them. It also states that a court might wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by the other court in a substantially similar form, to ensure that judges, counsel and parties are subject to the same standards of conduct.

52. By early 2004, the Guidelines had been endorsed in a preface signed by judges from Argentina, Canada, Japan, the Republic of Korea, New Zealand, Slovenia, South Africa, Thailand, the United Kingdom and the United States. The Supreme Court of British Columbia, Canada and the Commercial Division of the Ontario Superior Court of Justice, Canada, have adopted the Guidelines (as has the Commercial List Users' Committee of the Ontario Superior Court of Justice).

(ii) Use in cross-border protocols between Canada and the United States

53. The Guidelines have now been adopted and approved in several cross-border cases between Canada and the United States.

54. The Guidelines were first formally adopted in the cross-border insolvency case, *Matlack Systems Inc*.[26] In accordance with the procedural suggestions referred to above, the Guidelines were approved by the Canadian court on the basis that they would not be effective until approved by the United States court. The United States court subsequently approved a cross-border insolvency protocol, which specifically incorporated the Guidelines.

55. In *Re PSINet*,[27] the Guidelines were included, verbatim, in the protocol negotiated in that case to provide a framework for joint hearings between the two jurisdictions.

56. The proceedings in *Re Systech Retail Systems Corp*.[28] featured a joint hearing between a United States court and a Canadian court held in accordance with the Guidelines, which resolved and coordinated a number of cross-border issues in the case.

57. The growing importance placed by North American courts on international judicial communication and cooperation in cross-border insolvency cases is reflected in the statements made by a United States Court of Appeals in *Stonington Partners Inc.*[29] The case concerned concurrent insolvency proceedings in Belgium and the United States and a conflict between the two jurisdictions as to the ranking of claims. The parties unsuccessfully attempted to frame a protocol. The United

States appeals court "strongly" recommended that the lower United States court and its Belgian counterpart make an effort to reach an agreement as to how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign laws. In its decision, the Third Circuit Court of Appeals strongly emphasized the advantages of court-to-court communications and cooperation in cross-border insolvency cases to facilitate the administration of justice.

(d) Developments in interpretation of the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (ECR)

58. A number of cases interpreting various articles of the ECR may be relevant to interpretation of analogous provisions of the Model Law. These include, in particular, cases on "centre of main interest" and "establishment". While it is clear that the jurisprudence is, at this stage, somewhat unsettled, the Commission may wish to request the secretariat to continue monitoring the decisions of courts of the European Union as they may prove to be of assistance to interpretation of the Model Law.

59. The following brief summary is provided for information and reflects only a selection of decisions on relevant issues. A number of cases are not yet fully reported or available for consideration.

(i) Interpretation of "centre of main interests" (COMI)

60. The Model Law does not define the term "centre of main interests", but article 16(3) contains a rebuttable presumption that it will be the debtor's registered office or, in the case of an individual, its habitual residence. The ECR Article 3(1) contains a similar presumption regarding the registered office and Recital 13 indicates that the COMI is the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.

61. A number of cases to date in the European Union have referred to ECR Article 3, particularly with respect to what constitutes the COMI of a debtor.[30]

62. *Enron Directo Sociedad Limitada* (United Kingdom, July 2002).[31] A creditor of ENRON Spain sought to commence main proceedings in the United Kingdom. The United Kingdom court accepted evidence that, although the registered office and the company's main assets were in Spain, the head office was in the United Kingdom. This was on the basis that all of the principal executive, strategic and administrative decisions in relation to the finances and activities of the company were conducted in the United Kingdom. The court also found that the main creditors of the company knew it was administered from the United Kingdom.

63. The case of *Cirio Del Monte*[32] (Italy, 2003) also relegates the significance of the registered office in determining COMI. The Italian court declared all of the parent debtor's European and foreign-registered subsidiaries insolvent, and found that the COMI of all the subsidiaries was in Italy, as this was where the decision-making, business and operations of the subsidiaries was centred.

64. *Geveran Trading Co. Ltd. v Kjell Tore Skjevesland* (United Kingdom, November 2002)[33] emphasized that the important test for determining COMI was where a debtor conducted the administration of its interests on a regular basis and

where third parties, i.e. creditors, perceived a debtor's COMI to be. With respect to individuals, the court was of the view that a COMI ought to be the place where the debtor could be contacted—if an individual debtor wasn't a professional, its COMI would normally be its place of residence; if it were a professional debtor, the COMI would be its place of "professional domicile".

65. *BRAC Budget Rent-A-Car International Inc* (United Kingdom, February 2003).[34] The United Kingdom court was of the view that the place of registration of a company was of limited importance and that EU insolvency proceedings could be opened for a company registered outside the EU, if the company's COMI was in the EU. The case concerned a company registered in the United States. The court held that the company's COMI was in the United Kingdom, as this was where the company was administered, so that the ECR applied to the insolvency. Relevant findings of fact were that, while the company had for several years been registered in the United Kingdom as a foreign company, it had never traded in the United States, its operations were almost entirely conducted in the United Kingdom and almost all of its employees worked there. The court relied on ECR Recital 13. The court also stated that the Virgos and Schmit Report on the Convention on Insolvency Proceedings[35] could be used to interpret the ECR, as "the Convention covered the same ground as the Regulation and in substantially the same terms". However, the court found the report was essentially neutral on the relevant point.

66. *Re: Daisytek-ISA Ltd* (judgements in United Kingdom, Germany, France 2003).[36] According to the United Kingdom court, the perception of third parties, i.e. creditors, as to the location of a company's COMI was an important determinant of COMI (based upon the words "ascertainable by third parties" in Recital 13). The United Kingdom court ruled that German and French subsidiaries of a United Kingdom company had their COMI in the United Kingdom, as most of the subsidiaries' important creditors were aware that many important functions were carried out at the registered office of the parent company. Both the French and German courts initially made rulings contrary to that of the earlier United Kingdom decision and initiated local proceedings. In both jurisdictions, these decisions were later reversed.

67. *Eurofood/Parmalat* (Ireland, March 2004; Italy, February 2004).[37] This ongoing case involves conflicting decisions by different courts in two Member States. While the Italian courts found that the company, a subsidiary of the Parmalat group, had its COMI in Italy, the Irish courts came to the opposite conclusion that the company's COMI was in Ireland. The Irish court based its decision on the following findings: the company was registered in Ireland; it conducted the administration of its business interests lawfully and regularly in Ireland; and its creditors believed they were transacting with an Irish company. Arguments made by counsel for Parmalat included that the company was a wholly-owned subsidiary, solely formed to provide finance for other members of the corporate group; company policy was decided in Italy; and the company had no employees in Ireland. The Irish court made a strong comment regarding the need to respect the corporate veil, while noting the normality of subsidiaries following group policy.

68. *Interexx* (Netherlands, April 2004).[38] The court had to decide where the location of the debtor's COMI was. The debtor, a United Kingdom company, claimed its COMI was in Cardiff, the location of its registered office. However, the court found that Cardiff was the central place of registration for companies, and

could not be a basis for determining COMI; the debtor was registered as an extra-territorial organization in the United Kingdom; and the company management, who held all the shares in the company, were resident in the Netherlands.

69. *Hettlage* (Germany, May 2004).[39] The court held that, if all essential parts of the subsidiary's organization and business activities were performed by the parent company, the COMI of a foreign subsidiary was the registered office of its parent company and that main proceedings for the subsidiary should therefore take place in the parent's jurisdiction. The court found that the German parent company performed numerous services for the Austrian-registered subsidiary, including purchasing, accounting, IT, advertising, marketing and staff administration.

70. *Ci4Net.Com Inc* (United Kingdom, May 2004).[40] The court was of the view that the presumption that the debtor's COMI was its place of incorporation was not necessarily strong, and the place of incorporation was only one factor to be taken into consideration. A creditor sought to have two group companies put into insolvency proceedings in the United Kingdom, despite their being incorporated in the United States and Jersey respectively. The court found that the COMI of both companies was in the United Kingdom.

71. *Parmalat Hungary/Slovakia* (Hungary, June 2004).[41] This was another case where the court found a split between the debtor's COMI and place of registration. The company concerned was the Slovakian-registered subsidiary of a Hungarian parent. The Hungarian court found that the main decisions and financial affairs of the subsidiary were managed in Hungary and this could be ascertained by third parties.

72. *Aim Underwriting Agencies (Ireland) Limited* (United Kingdom, July 2004).[42] The court found the COMI of a United Kingdom-owned Irish-registered company to be in the United Kingdom. Relevant facts were that the company was incorporated in Ireland to take advantage of the Irish regulatory regime; it was controlled from London; finance and administrative support came from the parent company; and the parent company was the only known creditor and was aware of how the company was run.

73. It is apparent from the cases to date that the presumption in the ECR that the debtor's registered office will be its COMI is by no means conclusive. In accordance with Recital 13 of the ECR, the place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties is also to be considered. Other factors taken into account include the location of the company's headquarters, its operations and employees and its decision-making mechanism, as well as the rights and expectations of creditors.

74. Once the COMI is determined and main proceedings are opened, article 16(1) of the ECR provides for automatic recognition of those proceedings in the EU. The majority of cases on COMI have led to local main proceedings being opened, while in only a very few cases have the courts found that they did not have jurisdiction. The provision for automatic recognition, when combined with an interpretation of COMI which takes into account a range of different factors, may lead to situations such as those encountered in *Eurofoods/Parmalat* and *Daisytek* where more than one jurisdiction has expectations of being the COMI of a particular debtor. This outcome has the potential to reduce the certainty and predictability surrounding the definition of COMI and thus the extent to which it can be readily ascertained by

third parties, so that they will know which domestic insolvency law will apply should a company become insolvent. It might also allow, as some commentators have suggested, the forum shopping that the Regulation was intended to prevent.

75. The Irish court in *Eurofoods*/*Parmalat* has made a reference to the European Court of Justice under Article 234 of the E.C. Treaty, with a series of specific questions regarding the interpretation of ECR Article 3.

(ii) Establishment

76. "Establishment" is defined in Article 2(f) of the Model Law and Article 2(h) of the ECR. The definitions are the same except that the Model Law concludes the definition with the additional words, "or services".

77. *Telia v Hillcourt* (United Kingdom, October 2002).[43] The court refused an application for insolvency proceedings to be brought against the Swedish debtor in the United Kingdom on the basis that a United Kingdom subsidiary of the debtor had an establishment in the United Kingdom, which was therefore an establishment of the Swedish parent debtor. The court held that the mere presence of a subsidiary was in itself insufficient to constitute an establishment and that it had no jurisdiction to commence proceedings against the debtor.

78. *Automold* (Germany, January 2004).[44] The debtor was incorporated in Germany, but was the subject of United Kingdom insolvency proceedings. The German court held that the existence of a registered office in the State was sufficient evidence of an establishment, and therefore secondary proceedings could be initiated. In support of this conclusion, it ruled that the opening of foreign main proceedings did not prevent the opening of secondary proceedings in the place where the debtor had its registered office.

79. The limited conclusion that might be reached is that the presence of a subsidiary in a State does not necessarily constitute an establishment and that a registered office might be evidence of an establishment. Since these issues are closely related to determination of the COMI, particularly with regard to the presumption concerning location of the debtor's registered office, greater clarity might result from the reference to the European Court of Justice referred to above.

Notes

[1] Ley de Concursos Mercantiles, D.O. 12 de Mayo de 2000 (Mex.).

[2] Law on Business Organization Insolvency, February 2002.

[3] Law relating to Recognition and Assistance for Foreign Insolvency Proceedings (Law No. 129 of 2000).

[4] Cross-Border Insolvency Act, 42 (2000), art. 34 (S. Afr.).

[5] Law No. 637 of 7 December 2002 on Regulating Private International Law Relations in the Field of Insolvency.

[6] Law on Insolvency and Restructuring of 28 February 2003.

[7] Insolvency Act, 2003. The Act, which came into force in August 2004, includes provisions on cross-border insolvency (Part XVIII); this Part has not yet entered into force. Part XIX Orders in Aid of Foreign Proceedings, which has entered into force, allows applications from foreign representatives for various types of relief to aid the foreign proceedings and specifies the matters to be taken into account by the court in ordering that relief. This Part includes provisions similar to those included in articles 5, 7 and 10 of the Model Law.

[8] Insolvency Act 2000.

[9] Between the United States and the United Kingdom. United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of Justice, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991). The text of this and the other protocols discussed in this Note can be found at www.iiiglobal.org.

[10] Between Ontario Court of Justice, Toronto and United States Bankruptcy Court for the Southern District of New York (Reasons for Decision of the Ontario Court of Justice: (1993), 20 C.B.R. (3d) 165).

[11] Between the United States Bankruptcy Court for the Southern District of New York and the Supreme Court of the Commonwealth of the Bahamas, 8 December 1994.

[12] The text of the Concordat can be found at www.iiiglobal.org/international/projects/concordat.pdf.

[13] Ontario Court of Justice; Toronto, 15 May 1996.

[14] Justice J. M. Farley, *A Judicial Perspective on International Cooperation in Insolvency Cases*, 17 Am. Bankr. Inst. J. 12, March 1998.

[15] United States Bankruptcy Court for the Southern District of New York, Case No. 94 B 44840, 23 May 1996, and District Court of Jerusalem, Case No. 1595/87, 23 May 1996.

[16] Between Ontario Court of Justice and United States Bankruptcy Court for the District of Delaware, 27 June 1997.

[17] Between the United States and Switzerland: United States Bankruptcy Court for the Southern District Court of New York, Case Nos. 96 B 41895 and 96 B 41896, 3 April 1998).

[18] Between Alberta Court of Queen's Bench, Case No. 9701-10022, 28 January 1998, and United States Bankruptcy Court for the District of New Mexico, Case No. 11-97-14362-MA, 28 January 1998).

[19] Between United States Bankruptcy Court for the District of Delaware, Case No. 99-1244, 30 June 1999, and Ontario Superior Court of Justice, Toronto, Case No. 99-CL-3384, 1 June 1999.

[20] Between United States Bankruptcy Court for the Southern District of New York, Case No. 98-B-48312, and Ontario Superior Court of Justice, Toronto, Case No. 98-CL-3162, 11 June 1999).

[21] Between United States Bankruptcy Court for the District of Delaware, Case No. 99-B-02385, 28 June 1999, and Ontario Superior Court of Justice, Toronto, Case No. 99-CL-3442, 25 June 1999.

[22] A process available in some jurisdictions, where a reorganization plan is negotiated in voluntary negotiations prior to commencement of insolvency proceedings and the plan is subsequently approved by the court.

[23] Between United States District Court for the Western District of Texas, Case No. SA99-C0822FB, 22 October 1999, and U.K. High Court of Justice, Chancery Division (1999), and the Grand Court of the Cayman Island (1999).

[24] Between United States Bankruptcy Court for the Southern District of New York, Case No. 00-10922BRL, April 2000, and High Court of Justice of the British Virgin Islands, Case No. 19 of April 2000, and Supreme Court of Bermuda, Case No. 2000/37, April 2000.

[25] See International Insolvency Institute www.iiiglobal.org/international/guidelines.html. The Guidelines are currently available in Chinese, Croatian, English, French, German, Italian, Japanese, Korean, Portuguese, Russian, Spanish and Swedish.

[26] (2001), 26 C. B. R. (4th) 45 (Ont. S. C. J.) and United States Bankruptcy Court for the District of Delaware, Case No. 01-01114 (MFW), 24 May 2001.

[27] (2001), 28 C. B. R. (4th) 95.

[28] Ontario Superior Court of Justice, Court file No. 03-CL-4836.

[29] United States Court of Appeal for the Third Circuit, November 2002, 310 F.3d118; 40 Bankr. Ct. Dec. 113.

[30] For further information on these and other relevant cases see www.eir-database.com.

[31] High Court, Chancery Division, July 2002.

[32] Tribunale Roma, 26 November 2003 (Cirio Finance Luxembourg S.A.).

[33] English High Court [2003 BCC 391].

[34] High Court of Justice, Chancery Division, Companies Court (England) of 7 February 2003 EWHC (Ch) 128 - 0042/2003.

[35] Report on the Convention on Insolvency Proceedings by Professor Miguel Virgos and Mr. Etienne Schmit, issued by the authors as a Guide to the 1995 Convention. Although the report was never finalized or approved by the EC Ministers of Justice, it is regarded as an unofficial guide to interpretation.

[36] Court of Appeal of Versailles, 4 September 2003 - 03/05038; High Court, Leeds, England, 16 May 2003 [2003] All ER (D) 312; Düsseldorf Regional Court, 6 June 2003, I-3 W 53/04.

[37] Supreme Court of Ireland, 147/04, 27 July 2004; Tribunale Parma, 30 February 2004.

[38] Court of Appeal, The Hague, 8 April 2003.

[39] District Court of Munich of 4 May 2004 - 1501 IE 1276/04.

[40] High Court of Justice, Chancery Division (England) of 20 May 2004 - Nos. 556 and 557 of 2004.

[41] Municipal Court of Fejer/Székesfehérvár, Hungary, 14 June 2004.

[42] UK High Court of 2 July 2004 (unreported).

[43] High Court of Justice, Chancery Division (England) [2002] EWDC 2377 (Ch).

[44] District Court of Cologne, Germany, 23 January 2004, 71 IN 1/04.