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Brooklyn Journal of Corporate, Financial & Commercial Law

Volume 9 | Issue 1 Article 11

2014

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Recommended Citation

Christopher J. Redmond, *Working Methods of UNCITRAL Working Group V (Insolvency) and Choice of Law*, 9 Brook. J. Corp. Fin. & Com. L. (2014).
Available at: https://brooklynworks.brooklaw.edu/bjcfcl/vol9/iss1/11

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WORKING METHODS OF UNCITRAL WORKING GROUP V (INSOLVENCY) AND CHOICE OF LAW

*Christopher J. Redmond**

INTRODUCTION

Choice of law is an ancient problem that humanity has yet to solve. The Roman Empire, as a result of their far-flung holdings, developed a system of equity (*jus gentium*) in dealing with disputes between Roman citizens and foreigners.[1] The original concept utilized by the Romans was a rule of law common to all nations that must be fundamentally valid and just.[2]

Later, an Italian law professor, Bartolus de Saxoferrato, considered the greatest legal scholar on conflict of law issues since the Roman Empire,[3] wrote extensively on choice of law issues and offered suggestions to address this area of law.[4]

In 1925, the Fifth Session of the Hague Conference on Private International Law also addressed and attempted to coordinate issues that included conflict of laws, but the Hague Conference efforts were not successful.[5]

As trade and commerce between businesses have greatly expanded to become truly global over the last decade, uniform choice of law rules in insolvency are needed now more than ever. The coordination of choice of law rules is acknowledged as a necessary component of a modern society, but the issue of how that is accomplished, in what manner and by whom, has been the subject of much ongoing debate.

This article will examine the working methods of UNCITRAL Working Group V (Insolvency Law) as a backdrop for the consideration of the development of choice of law rules, and the process that UNCITRAL has taken historically in developing a definitive body of text on cross-border

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1. Gordon E. Sherman, *Jus Gentium and International Law*, 12 AM. J. INT'L L. 56, 58–60 (1918).

2. *Id*. at 59.

3. *See* Mo Zhang, *Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861, 869 (2009).

4. BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 46–48 (Gunther Handl, Joachim Zekoll, & Peer Zumbansen eds., 2012).

5. Susan Block-Lieb, *1924 and Today*, CREDIT SLIPS (March 7, 2014, 7:25 PM), http://www.creditslips.org/creditslips/2014/03/1924-and-today.html.

insolvency law.[6] This article will also provide a brief summary of certain updates to the Guide to Enactment and Interpretation.

I. WORKING GROUP METHODS OF UNCITRAL

"[S]ubstantive preparatory work on topics on UNCITRAL's work [program] is usually assigned to working groups…which generally hold two sessions per year to report on their progress…to the [UNCITRAL] Commission."[7]

Historically, Working Group V has held a colloquium when considering and addressing proposals for new projects in regard to insolvency law reform.[8] Proposals for new work are submitted by States and Observers (which include NGOs), international organizations, or Secretariat.[9] Working Group V has held five colloquiums to date; the latest colloquium was held in Vienna, Austria in December of 2013 and considered choice of law issues.[10] Colloquiums are held either independently or in conjunction with Working Group V sessions. The Secretariat can extend invitations to attend the colloquium to individuals who are not members of State delegations, or to NGOs that have expertise in the projects to be considered.[11] A colloquium usually lasts for two or three days, and during that time period, presentations are given on topics that are being considered by Working Group V for future work by individuals selected by the Secretariat. Historically, the Working Group presented a number of topics related to insolvency law as to how enterprise groups should be treated in cross border insolvency proceedings and discussed the scope and extent of a proposed project. The audience at the colloquium is invited and encouraged to provide feedback and input on the proposed topic. In addition to background detail on the topic itself, discussion centers on the feasibility of obtaining a workable solution and the importance of undertaking the proposed project.

After the conclusion of the colloquium, the proposed topics for future work are reviewed and considered at the next Working Group V session. After discussion, Working Group V ranks the projects in order of

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6. Throughout the article, I will provide first hand information based upon my experience as a U.S. delegate to UNCITRAL.

7. U.N. Comm'n on Int'l Trade Law, A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Trade Law, para. 16 (Mar. 4, 2013), http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf [hereinafter A Guide to UNCITRAL].

8. *Id.* para. 29.

9. *Id.*

10. *Working Group V*, UNCITRAL, http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html (last visited Nov. 11, 2014).

11. A Guide to UNCITRAL, *supra* note 7, para. 23.

importance and feasibility, with consideration for the Secretariat's capacity to undertake and process that work.

On the final afternoon of the Working Group V session, the Secretariat submits a written report as to the issues addressed at the colloquium and Working Group V meetings, along with the status of any existing work mandated by the UNCITRAL Commission.[12] The Secretariat also reports on the prioritizing of proposed future work to be undertaken by Working Group V.[13] Future work projects must be approved and granted a mandate by the UNCITRAL Commission in order for Working Group V to proceed.[14] After the report of the Secretariat, States and NGOs can express their positions in regard to various work projects under consideration, and after discussion, the UNCITRAL Commission would then announce the scope and extent of any mandate for existing or future work to be addressed by Working Group V.[15]

In general, a decision by Working Group V and the UNCITRAL Commission to grant a mandate must be made by consensus.[16] If a mandate is granted by the UNCITRAL Commission, then Working Group V begins work on that project and continues until a final product is developed. A final product can be a legislative guide, a model law, a best practices guide, convention, or a form or structure that the Working Group determines is appropriate in regard to that particular project.[17]

Once Working Group V determines that a project is complete, Working Group V requests the UNCITRAL Commission to consider and approve of that work.[18] Time is scheduled at the next UNCITRAL Commission session for the Secretariat to present the Working Group V work product and respond to any questions raised by the UNCITRAL Commission.[19] In addition, States and observers may participate and provide any comments, suggestions, additions or modifications to the work product at the UNCITRAL Commission session.[20] Once the UNCITRAL Commission approves the product from Working Group V, the product is either published as a separate document or in an electronic version and becomes an official document endorsed and supported by the United Nations.[21]

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12. *Id.* para. 17.
13. *Id.* para. 23.
14. *See id.* para. 11.
15. *Id.* paras. 28–30.
16. *See* Secretariat, *UNCITRAL Rules of Procedure and Methods of Work*, sec. III, I, 2(b), U.N. Doc. A/CN.9/638/ADD 4 (Oct. 18, 2007).
17. A Guide to UNCITRAL, *supra* note 7, para. 33.
18. *Id.* para. 47.
19. *Id.*
20. *See id.*
21. *Id.* para. 49.

With that brief explanation as to working methods of UNCITRAL, the issue next to be addressed is the historical procedure of how Working Group V addresses the work mandated by the UNCITRAL Commission.

II. WORKING GROUP METHODS OF WORKING GROUP V

At the December 2013 colloquium held in Vienna, Austria, the issue of choice of law was recognized as an area to be considered by Working Group V in connection with its work on a Model Law on Enterprise Groups.[22] Working Group V also reaffirmed in its Working Group session, after the conclusion of the colloquium, that continued work on group enterprises, directors' obligations and duties in a group context, and insolvency aspects associated with the development of micro, small and medium-sized business enterprises should be continued.[23] Working Group V also strongly supported the development of a model law on the recognition of cross-border insolvency judgments.[24] As one can readily recognize, the scope and extent of work to be performed by Working Group V is substantial. In order to understand the process undertaken by Working Group V in the development of such projects, I will utilize a historical example and detail as to how the proposed project once given a mandate for future work by the UNCITRAL Commission came to fruition as a completed text.

A good example of this process is the development of the UNCITRAL Legislative Guide on Insolvency Law. At the thirty-second session in 1999, the UNCITRAL Commission had before it the proposal by Australia on possible future work in the area of insolvency law.[25] The proposal by Australia was for the "[development] of a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes."[26] After discussion, the UNCITRAL Commission granted a mandate to develop a legislative guide.[27] The initial topic undertaken by Working Group V in consideration of a legislative guide on insolvency law was a review of many of the States' current insolvency laws and structure.[28] Generally, as part of its initial review,

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22. U.N. Comm'n on Int'l Trade Law, Working Group V (Insolvency Law), *Report of the Fourth International Insolvency Law Colloquium*, 47th Sess., July 7–18, 2013, U.N. Doc. No. A/CN.9/815.

23. *Id.*

24. *Id.* para. 21.

25. U.N. Comm'n on Int'l Trade Law, *Insolvency Law: Possible Future Work in the Area of Insolvency Law: Proposal by Australia*, Rep. on its 32d Sess., May 17–June 4, 1999, U.N. Doc. A/CN.9/462/Add. 1 (Apr. 13, 1999).

26. *Id.* para. 1.

27. U.N. Comm'n on Int'l Trade Law, *Report of the Working Group on Insolvency Law on the Work of its Twenty-Second Session*, June 12–July 7, para. 140, U.N. Doc. A/CN.9/469 (Jan. 6, 2000) [hereinafter *Twenty-Second Session Working Group Report*].

28. *See id.* para. 2.

Working Group V—in coordination with the Secretariat—reviews existing laws and texts that have been developed and often utilize that information in the consideration and development of a work product. After an extended discussion, Working Group V concluded that no existing structure by any State or any existing text by international organizations was sufficient in and of itself to be adopted as a legislative guide on insolvency law by UNCITRAL.[29] To date, no pre-existing text as a whole has been adopted by UNCITRAL in the development of the work product.

After the first session of Working Group V, members of the Working Group, especially the European delegates, engaged in substantial discussion about the fact that contractual rights of the parties must be respected and that an automatic stay could not be effectuated to extinguish or subordinate that right.[30] The European delegations explained in great detail that the debtor's interest was what remained after the secured creditors liquidated their collateral.[31] At this point in time, many of the insolvency proceedings in Europe were focused on liquidation and not reorganization.[32] Officers and directors in many States were personally liable if the company was insolvent and the debtor failed to institute insolvency proceedings in a timely manner.[33] As a result, at the beginning of its work, there was a substantial impasse as to what product could be developed by Working Group V. A number of States wanted to maintain the existing liability of directors if insolvency proceedings were not filed timely, while other States wanted to allow a flexibility standard that if the directors were attempting to engage in a meaningful restructure and there was a reasonable likelihood that that restructure could be effectuated, then those States wanted to modify the strict liability standard. Ultimately the impasse was resolved with a modified standard being adopted by Working Group V.

At the initiation of a new project, in this case the development of a legislative guide, Working Group V addressed two initial issues by identifying: first, the primary elements that should be considered in regard to the development of that product, and second, the policy issues that need to be decided within those underlying elements. At the colloquium, Working Group V adopted the basic criteria: the primary elements necessary to be included and addressed in the process of developing effective and efficient insolvency law. These primary elements included:

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29. *Id.* para. 133–34.
30. *Id.* para. 66–68.
31. *Id.* para. 57.
32. *See id.* para. 21.
33. U.N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW, PART FOUR: DIRECTORS' OBLIGATIONS IN THE PERIOD APPROACHING INSOLVENCY, para. 7, U.N. Sales No. E.13.V.10 (2013).

> (1) a provision of certainty in the market to promote economic stability and growth; (2) maximization of value and assets; (3) striking a balance between liquidation and reorganization; (4) ensuring equitable treatment of similarly situated creditors; (5) provision for timely, efficient and impartial resolution of insolvency; (6) preservation of the insolvency estate to allow equitable distribution to creditors; (7) ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; (8) recognition of existing creditor rights and establishment of clear rules for ranking of priority claims; and (9) establishment of a framework for cross-border insolvency.[34]

Working Group V then had the task of taking those primary elements, analyzing the current state of the law that existed throughout the world, and determining what changes were necessary.[35] Subsequently, Working Group V addressed each area that needed to be reviewed by detailing the various alternatives available to States in addressing these issues and consequently, arrived at recommendations as to how that area should be addressed in the legislative guide.

When dealing with a number of different continents, cultures, political environments and legal regimes, and civil and common law, there are two key issues that need to be addressed. Those issues include: (1) what are the primary components of an effective and efficient insolvency law, and (2) what are the policy considerations that needed to be addressed and decided. In other words, what are the building blocks that are needed to develop a Legislative Guide on insolvency. In the development of the Legislative Guide, the Working Group engaged in extensive discussions over a period of time until it reached a major breakthrough in which, by consensus, Working Group V agreed to the concept of an automatic stay and a broad definition of what constituted property of the bankruptcy estate.[36]

As a result, Working Group V decided that reorganization was preferred over liquidation and the Legislative Guide should be developed so that the reorganization of a distressed company could be effectuated.[37]

Working Group V is a relatively close-knit group that respects each other and carefully listens to the various interventions made both by States and Observers. Although it may be viewed as idealistic, Working Group V

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34. *See* U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, at v, U.N. Sales No. E.05.V.10 (2005) [hereinafter UNCITRAL LEGISLATIVE GUIDE].

35. *Id.* at iii.

36. *Twenty-Second Session Working Group Report*, *supra* note 27, paras. 67–68.

37. *Id.* para. 49.

seeks—and has always sought—to produce a product that is well thought out, well reasoned, and a product that provides a global resolution accepted by the international community.

Choice of law is one of the most complex issues facing Working Group V—a group composed of a number of delegations, some of which have experienced insolvency experts, and others from various working groups. [38] Working Group V must be able to carefully analyze and interpret basic concepts involved in addressing choice of law rules. This analysis should include practical examples and applications of what needs to be addressed on a cross-border basis, particularly with an audience of mixed backgrounds and levels of expertise. Although the disparity may seem like a difficult and complex issue to address, this composite mix is a benefit to Working Group V. On a number of occasions during the development of the Legislative Guide, one delegation would raise its flag to convey that they did not understand the issues being addressed and sought clarification of the recommendations being made. These interventions were extremely helpful and led to a readily understandable Legislative Guide —fulfilling Working Group V's goal of creating a text (whether in the form of a legislative guide, model law, or convention) that is understandable and ascertainable by the parties reading it, especially the legislators considering insolvency reform.

The initial challenge in addressing choice of law issues is to provide an explanation of the issues being addressed and the alternatives that can occur. This needs to be set forth in a pragmatic, realistic viewpoint as opposed to an academic exercise that may not be understandable or discernable by member States.

Once the issues are laid out and the alternatives detailed, then the complex issues and the alternative policy considerations can be discussed and debated. Working Group V, to its credit, has been able to reach a consensus on complex and difficult issues on a substantial number of texts. During the development of the Legislative Guide, Working Group V addressed choice of law issues. This was accomplished by expert groups first addressing the issue and then coordinating a joint experts meeting between representatives of UNCITRAL and the Hague Conference on Private International Law. During a three-day expert meeting, drafting occurred which resulted in the Secretariat presenting the drafts to Working Group V. Afterward, discussion and modifications were adopted in the form set forth in the Legislative Guide.[39] Notwithstanding the complexity of many issues addressed, Working Group V has been able to reach consensus, and since 1996, has developed the following texts:

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38. *Id.* paras. 6–9.
39. UNCITRAL LEGISLATIVE GUIDE, *supra* note 34, at iii.

- UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation;
- Legislative Guide on Insolvency Law;
- Part Three of the Legislative Guide: Treatment of Enterprise Groups in Insolvency;
- Part Four of the Legislative Guide: Directors' Obligations in the Period Approaching Insolvency;
- UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective; and
- Practice Guide on Cross-Border Insolvency Cooperation.[40]

III. A PATH FORWARD

The issue, then, is how choice of law issues can be addressed by Working Group V in its work on group enterprise. The issue should be addressed in a four-step process.

The first step calls for a comprehensive explanation on why choice of law rules on international cross-border insolvency proceedings are necessary. Specifically, as part of the first step, Working Group V must establish the basis of why choice of law issues are important and how those issues can positively affect trade and commerce.

The basis for this work has been well established in the various papers on this issue. Working Group V has already acknowledged a need for a coherent and clear set of rules regarding choice of law issues in-group enterprise cross-border proceedings.

Once Working Group V has affirmed the importance and necessity of rules in regard to choice of law issues, the second step is to identify the problems with the current structure: why does the current structure not work and why are changes needed. These questions need to be clearly explained, detailed, and discussed, and Working Group V needs to arrive at a point that step two is also recognized and accepted.

The third step, which is the most complicated, is to address alternative resolutions available. The alternatives must be explained in a clear, concise and detailed fashion so that Working Group V can understand the issues that need to be addressed in order to make policy decisions on the rules regarding choice of law issues.

This step, as noted, will be the most complex: to clearly explain the alternatives available so that a reasonable discussion can be undertaken to effectuate a policy determination as to which of the alternatives will provide transparency, predictability, and agreeability by consensus.

The fourth step, which is based upon the first three, is to develop rules in regard to choice of law issues. While this fourth step may seem the most

40. UNCITRAL, *supra* note 10.

difficult, if the first three steps are followed and appropriate determinations made, the fourth step is really an issue of drafting.

IV. THE CONSULTATION PROCESS

It is important to understand that prior to each of the Working Group V sessions, extensive consultation is taken by States with their respective governmental units in regard to the positions that they are authorized to take during the upcoming Working Group V sessions. In these sessions, a large number of issues are addressed. Those issues where consensus is not met are noted for future consideration. In the interim, consultation by NGOs and States, often involving experts, takes place again. States obtain and make policy decisions in regard to issues previously addressed, as well as raise issues that have not yet been considered by Working Group V. The Secretariat also has the ability to—and on a number of occasions has—convened expert groups to address or further quantify issues that may have not yet been addressed by Working Group V.[41]

From one Working Group V session to another, the Secretariat carefully tracks what the Working Group has agreed to by consensus and what the Working Group has considered or proposed.[42]

After a Working Group meeting, the various States and NGOs engage in discussions on the issues to be addressed with the various constituencies, which are the States. Based upon those discussions, States—through the various organizations in their respective States—obtains authority from their respective governments in as to what can or cannot be agreed to. The States address the issue again at the next Working Group V meeting and, the process repeats; often there is substantial discussion between various States to try to harmonize and coordinate issues in between the working group sessions. After the conclusion of the Working Group V meetings, the updated recommendations are discussed with individual countries for input.

It should be noted that over the course of the last decade there has been substantial recognition regarding texts on insolvency reform prepared by the European Union and UNCITRAL.

In order to further illustrate the complexity involved with choice of law issues, at the final Working Group V session—in which the Guide to Enactment and Interpretation was brought to a conclusion—a proposal was made by the United States delegation.[43] The United States proposed a statement declaring that the debtor's "center of main interests" (COMI) was the jurisdiction in which the laws of that jurisdiction should be recognized

41. A Guide to UNCITRAL, *supra* note 7, paras. 23–24.

42. *Id.*

43. U.N. Comm. on Int'l Trade Law, Working Group V, *Proposal by the Delegation of the United States of America for Preparation of a Model Law or Model Provision on Selected International Insolvency Law Issues*, 38th Sess., Apr. 19–23, 2010, U.N. Doc. A/CN.9/WG.V/WP.93/Add. 1 [hereinafter *United States Proposal*].

in regard to the overall insolvency proceedings, with consideration for substantial exceptions.[44] A number of delegations intervened and conveyed that, because there were so many exceptions, a general rule could not be stated and that attempting to undertake such a process would substantially delay the completion of this product.[45] As a result, the United States delegation withdrew its proposal.

V. UPDATES TO THE GUIDE TO ENACTMENT

Legislation based on the Model Law has been adopted in twenty-one nations.[46] The Model Law is "a suggested pattern for lawmakers to consider" and States have the flexibility to depart from its text.[47] As a result, there are differences in the way States interpret and implement the Model Law. Along with the Model Law, UNCITRAL has provided a Guide to Enactment. The Guide to Enactment is primarily designed to assist governments and legislators preparing the necessary enacting legislation, but it also provides guidance to those charged with interpretation and application of the Model Law.[48]

In 2010, the United States delegation proposed to the UNCITRAL Commission that it commence work on reviewing and updating both the Model Law on Cross-Border Insolvency and the related Guide to Enactment.[49] Work on both of the projects, using the methods set forth in this Article, was completed at the Working Group V session in New York during the week of April 15–19, 2013.[50] On July 18, 2013, the UNCITRAL Commission approved the UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation.[51]

The 2013 Update to the Guide to Enactment ("2013 Update") provides additional guidance on several issues raised by judicial decisions across different States that have enacted legislation based on the Model Law.[52] A few of the primary issues clarified by the 2013 Update are discussed below.

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44. *Id*.

45. U.N. Comm'n on Int'l Trade Law, Working Group V, *Proposal for a definition of "centre of main interests" (articles 2(b) and 16(3) of the UNITRAL Model Law on Cross-Border Insolvency) by the delegations of Mexico, Spain and the Union Internationale des Avocats (UIA)*, 40th Sess., Oct. 31–Nov.4, 2011, U.N. Doc. A/CN.9/WG.V/WP.101.

46. U.N. COMM. ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. SALES NO. E.14.V.2 (1997). .

47. *Id.*

48. *Id.* paras. 17–18.

49. *United States Proposal*, *supra* note 43.

50. U.N. Comm'n on Int'l Trade Law, Working Group V (Insolvency Law), Rep. on its 43th Sess., April 15–19, 2013, U.N. Doc. A/CN.9/766 (Apr. 26, 2013).

51. MODEL LAW, *supra* note 47, para. 18.

52. All of the decisions cited in this section may be found at *Case Law on UNITRAL Texts*, UNCITRAL, http://www.uncitral.org/uncitral/en/case_law.html.

A. "INSOLVENCY"

The Model Law does not define the term "insolvency". However, the 2013 Update makes clear that the Model Law only applies to a debtor that is insolvent or in severe financial distress.[53] Generally, a debtor is considered insolvent or in severe financial distress if the debtor is unable to pay its debts as they mature or if the debtor's liabilities exceed the value of its assets.[54]

B. COLLECTIVE PROCEEDINGS

In order for a foreign proceeding to qualify for relief under the Model Law, it must be a collective proceeding.[55] This is because the purpose of the Model Law is "to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding."[56]

The UNCITRAL Model Law on Cross Border Insolvency, Article 2: Definitions defines a Foreign Proceeding as, "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."[57] In *In re Stanford International Bank Limited*, an English court held that a receivership of the U.S. Securities and Exchange Commission does not qualify as a collective proceeding.[58] The English court found that the receiver did not act on behalf of all creditors.[59] The court found that the receivership did not take into account all assets and all liabilities.[60] Rather, the order appointing the receiver stated that the receiver ought to protect the investors' interests and regulate the business of the debtor, rather than to reorganize the corporation or realize assets for the benefit of all creditors.[61] The English court also set forth that there is no procedure on providing uniform structure and distribution to creditors such as an insolvency or bankruptcy code.[62]

The 2013 Update suggests that when evaluating whether a proceeding is collective for purposes of the Model Law, the key consideration is "whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions,

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53. MODEL LAW, *supra* note 47, para. 48.
54. *Id.* para. 49.
55. *Id.* para. 69.
56. *Id.*
57. *Id*. at 37.
58. *In re* Stanford Int'l Bank, [2009] EWHC (Ch) 1441 [85].
59. *Id.* para. 84.
60. *Id.*
61. *Id.*
62. *Id*.

and to local exclusions relating to the rights of secured creditors."[63] Additionally, the 2013 Update notes that a proceeding should not fail the "collective" test simply because a class of creditors' rights is unaffected by the proceeding.[64]

C. FACTORS CONSIDERED IN DETERMINING DEBTOR'S CENTER OF MAIN INTERESTS ("COMI")

As noted by the 2013 Update, "[t]he concept of a debtor's centre of main interests is fundamental to the operation of the Model Law."[65] Proceedings commenced in the debtor's COMI are afforded "greater deference and, more immediate, automatic relief."[66] Article 16 of the Model Law establishes a presumption that the debtor's registered office is presumed to be the debtor's COMI.[67] However, that presumption may be rebutted where the COMI is in a different location than the place of registration.[68] The 2013 Update states that the factors to be considered in determining a debtor's COMI are: "(a) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors."[69]

When these two factors do not provide a clear answer as to a debtor's COMI, a court may consider other relevant factors including:

> the location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.[70]

63. MODEL LAW, *supra* note 47, para. 70.
64. *Id.*
65. *Id.* para. 144.
66. *Id.*
67. *Id.* para. 3.
68. *Id.* para. 145.
69. *Id.*
70. *Id.* para. 147.

D. RELEVANT TIME PERIOD FOR DETERMINING CENTER OF MAIN INTERESTS ("COMI")

Under the Model Law, a foreign main proceeding is defined as a "foreign proceeding taking place in the State where the debtor has the center of its main interests."[71] The Model Law does not expressly set forth a date for determining the center of main interests of debtors.

In *In re Fairfield Sentry Ltd.*, a shareholder of the debtor argued that the bankruptcy court should have looked at the debtor's entire operational history in determining where its center of main interests was located.[72] The liquidator argued that the center of main interests should be considered at the filing of the chapter 15 petition.[73] The Second Circuit affirmed the bankruptcy court's holding that the appropriate date for determining a debtor's center of main interests was the date that the Chapter 15 petition was filed.[74] In its analysis of the issue, the Second Circuit noted that most courts in the United States examined a debtor's COMIs as of the time the Chapter 15 petition was filed.[75] The Second Circuit noted that recent European case law may refer to a broader time frame for considering a debtor's COMI, but pointed out that the European Union's regulation enacting the Model Law differs from the United States' version of the Model Law.[76]

The 2013 Update provided clarification on the issue by expressly stating that under the Model Law, the appropriate date for determining a debtor's center of main interests is the date of commencement of the original insolvency proceedings.[77] The 2013 Update notes that "taking the date of commencement to determine centre of main interest provides a test that can be applied with certainty to all insolvency proceedings."[78]

E. PUBLIC POLICY EXCEPTION

Article 6 of the Model Law provides, "[n]othing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."[79] The Model Law does not define "public policy," as that term may differ from State to State.[80]

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71. *Id.* art. 2(b).
72. *In re* Fairfield Sentry Ltd., 714 F.3d 127, 133 (2d Cir. 2013).
73. *Id.*
74. *Id.* at 132. The United States implemented the Model Law as chapter 15 of its Bankruptcy Code. *See id.*
75. *Id.*
76. *Id*. at 136.
77. MODEL LAW, *supra* note 47, para. 159.
78. *Id.*
79. *Id.* art. 6.
80. *Id.* art. 101.

In *In re Gold & Honey, Ltd*, a U.S. court refused to recognize Israeli proceedings on several grounds, including public policy.[81] In that case, after insolvency proceedings were commenced in the United States (and thus, after the automatic stay was in place), a receivership of the debtor was ordered in Israel.[82] The U.S. court declined to recognize the Israeli receivership proceeding because, among other things, affording recognition to the proceeding "would reward and legitimize [the] violation of both the automatic stay and [subsequent orders of the court] regarding the stay."[83] The U.S. court found that the public policy exception had been meet where recognition of the Israeli proceeding "would severely hinder United States bankruptcy courts' abilities to carry out two of the most fundamental policies and purposes of the automatic stay—namely preventing one creditor from obtaining an advantage over other creditors, and providing for the efficient and orderly distribution of a debtor's assets to all creditors in accordance with their relative priorities."[84]

The 2013 Update emphasized that "the purpose of the expression 'manifestly,' used also in many other international legal texts as a qualifier of the expression 'public policy,' is to emphasize that public policy exceptions should be interpreted restrictively and that Article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance to the enacting state."[85]

CONCLUSION

The author certainly endorses the development of model rules on choice of law, particularly a model law for group enterprises in international cross-border insolvency proceedings. As a result of the complexity of the issues involved, this process must be afforded sufficient time for input, discussion, and proper reflection, and requires the coordination of the various organizations and States involved so that the ultimate decision can be effectuated on a consensual basis.

During my initial sessions as a delegate to UNCITRAL in 1999, I believed that UNCITRAL could effectuate and develop substantial and meaningful text in which international cross-border insolvency reform would be addressed and proposed. At that point in time I had various solutions that I thought were appropriate, but quickly determined after attending several sessions of Working Group V meetings that you do not start with a solution and work your way backward, but rather you have to start at the beginning, address the problem, and let the process then proceed toward a solution.

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81. *In re* Gold & Honey, Ltd., 410 B.R. 357, 373 (Bankr. E.D.N.Y. 2009).
82. *Id.* at 362.
83. *Id.* at 371.
84. *Id.* at 372.
85. MODEL LAW, *supra* note 47, para. 104.

As noted earlier, the Romans tried to address and resolve this issue, a noted Italian professor further addressed this issue, and the Hague Conference addressed this issue—and none were able to clearly craft a resolution.

The question often asked is whether "this is the right time to address these issues." Such was an issue at the first UNCITRAL colloquium as to whether or not the development of a model law on cross-border insolvency would be feasible, and ascertainable, and whether a consensus could be achieved. The clear consensus was that it could, and that it in fact has occurred. In 2000, the colloquium to determine whether a legislative guide could be developed established a basic infrastructure for the primary elements to be addressed. That determination allowed, after a number of years of substantial discussion and careful analysis, for a legislative guide to be promulgated that became the international standard on insolvency reform recognized both by The World Bank and the International Monetary Fund. The UNCITRAL colloquium in 2013 determined that, while this is a complex and difficult subject, now is the appropriate time for choice of law issues in the context of group enterprises to be considered. A resolution would substantially benefit the international community and provide transparency, predictability, and aid in effectuating case law to support the same.