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IMPLEMENTING STRATEGIES FOR THE MODEL LAW ON CROSS-BORDER INSOLVENCY: THE DIVERGENCE IN ASIA-PACIFIC AND LESSONS FOR UNCITRAL

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ABSTRACT

The UNCITRAL Model Law on Cross-Border Insolvency (*"*Model Law*"*) was conceived with the aim of providing a framework for States to obtain consistency in the recognition of foreign insolvency proceedings and granting relief in aid of the foreign courts. The Model Law has achieved moderate success internationally and four states in the Asia-Pacific, namely Australia, Singapore, Japan and Korea, have enacted legislation based on the Model Law. Scholars agree on the importance of consistent implementation of the Model Law in managing cross-border insolvency to achieve quick, certain, and predictable outcomes.

However, the Model Law's aims have not been completely met and existing accounts have pointed out that there is a lack of complete harmonization for two reasons. First, States have not fully implemented the Model Law in their domestic law. Second, the judiciary in the States have not interpreted their legislation enacting the Model Law consistently. This lack of harmony is reflected in the fact that UNCITRAL recently felt the need to promulgate a supplemental Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

In this Article, we examine the divergent implementation strategies of the Model Law in Australia, Singapore, Japan, and Korea, and explain the reasons for the divergence. In the case of Japan and Korea, legal origins have been put

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forward as a reason for the divergence; as these two jurisdictions are not based on common law, they require greater local modification to assure the Model Law will fit into their legal systems. However, we argue that legal origins are incomplete reasons for the lack of uniformity. Instead, we argue that where States, like Australia and Singapore, are shifting from a moderately territorialist approach with cross-border insolvency to the modified universalist approach as envisaged by the Model Law, they are more likely to implement the Model Law in full. Where States start from an exclusively territorialist approach (such as Japan and Korea), they are likely to recognize foreign insolvency proceedings as a broad signal of their international commitment towards adopting global norms, but would demand changes to allow for some room to depart from all of the consequences of recognition of foreign proceedings, even in situations where there may be no real impediment for the Model Law to be implemented. However, insofar as Korea is concerned, there are signs that judicial attitudes are changing as the judiciary sees the benefits of the Model Law in cooperation and communication, and there may be a greater chance of implementation.

Our study illustrates the limitations of achieving the objectives of the Model Law. We argue that when determining the strategies for uniform implementation of UNCITRAL, in t*he context of "soft law,"* we should take into account the importance of signalling effect and path dependency to the countries, which will have implications for other jurisdictions considering the adoption of the Model Law or the supplementary Model Law on insolvency-related judgments.

INTRODUCTION

With the rise of multi-state enterprises and the rising complexities in resolving cross-border insolvencies, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (Model Law)[1] was conceived in 1997 with the aim of providing a framework for countries to adopt so as to obtain consistency in the recognition of foreign insolvency proceedings and granting relief in aid of the foreign courts, giving foreign creditors or foreign representatives access to local courts and cooperation between courts in countries where the debtor's assets are located. The objective of the Model Law is facilitating, to the maximum extent possible, the optimal management of cross-border insolvency, so as to benefit debtors, creditors and other stakeholders, as well as the economies in which these stakeholders function. The Model Law has achieved moderate success internationally, with major common law jurisdictions including the United Kingdom (UK),[2] the United States (US),[3] Australia[4] and more recently, Singapore,[5] having changed their domestic laws on cross-border insolvency cooperation based on the Model Law provisions.[6] Japan[7] and Korea[8] have also

[1] G.A. Res. A/RES/52/158, United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (Jan. 30, 1998).

[2] Cross-Border Insolvency Regulations (CBIR) 2006, SI 2006/1030, (UK), introduced via the Insolvency Act 2000, ch. 39, §14 (UK), http://www.legislation.gov.uk/ukpga/2000/39/pdfs/ukpga_20000039_en.pdf.

[3] Bankruptcy Code, 11 U.S.C §§1501 – 1532 (2012).

[4] Cross-Border Insolvency Act, 2008 (Austl.) (where § 6 states that the Model Law, subject to some modifications, has the force of law in Australia).

[5] Companies Act 2006, ch.50, Sch. 10 (Sing.), (effective May 2017). The 2017 reforms to the Companies Act which incorporate, among others, the Model Law, draw on the recommendations made by Singapore's Insolvency Law Review Committee (ILRC) in its report in 2013, but more directly on those made in the subsequent report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (Restructuring Committee) in 2016. See INSOLVENCY LAW REVIEW COMMITTEE, REPORT OF THE INSOLVENCY LAW REVIEW COMMITTEE: FINAL REPORT (Ministry of Law, 2013), https://app.mlaw.gov.sg/files/news/announcements/2013/10/ReportoftheInsolvencyLawReviewCommittee.pdf , (2013 Report) (last visited October 11, 2019); COMMITTEE TO STRENGTHEN SINGAPORE AS AN INTERNATIONAL CENTRE FOR DEBT RESTRUCTURING, REPORT OF THE COMMITTEE (Ministry of Law, 2016), https://app.mlaw.gov.sg/files/news/public-consultations/2016/04/Final%20DR%20Report.pdf , (2016 Report) (last visited October 11, 2019).

[6] As of July 2018, 44 States have adopted the Model Law: UNCITRAL, Overview of the Status of the UNCITRAL Conventions and Model Laws (1997) (2018), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/overview-status-table_2.pdf (last visited October 11, 2019).

[7] Law on Recognition of and Assistance in Foreign Insolvency Proceedings Law, No. 129 of 2000 (Japan). An unofficial English translation by Junichi Matsushita and Stacy Steele of the Law Relating to Recognition and Assistance for Foreign Insolvency Proceedings is available at https://www.iiiglobal.org/sites/default/files/12-_Japanese_insolvency_law_129_of_2000.pdf (last visited October 11, 2019).

[8] Debtor Rehabilitation and Bankruptcy Act (Act No. 7428, March 2005, as amended) (S. Korea)

enacted legislation that is based on the Model Law, albeit with adaptations and modifications.

The goals of the Model Law are certainty, predictability, and speed in obtaining recognition of foreign insolvency proceedings and coordination of those proceedings, so as to protect the debtor's assets for maximum distribution to the creditors.[9] By having a uniform framework, the Model Law "provides a well-understood framework for foreign parties and reduces the need for foreign representatives to have to seek advice on domestic law,"[10] thereby reducing transaction costs. However, despite the ostensible adoption of the Model Law among the participating States, the academic literature has documented that there is no complete harmonization of insolvency assistance and enhanced cooperation for several reasons.[11] First, as the Model Law is "soft law" (does not operate by way of a treaty), States have not implemented all of the Model Law provisions consistently in their domestic law, even though the Guide to the Enactment and Interpretation of the UNCITRAL Model Law on Cross-border Insolvency (Guide) has recommended that there should be as few deviations as possible.[12] Second, despite the existence of the Guide, the courts in the adopting States have not interpreted the legislation enacting the Model Law consistently.[13] The divergence of the implementation strategies of the Model Law raises the question of whether the Model Law promotes the goals of

(DRBA). An English translation by the Korean Ministry of Government is available at http://www.moleg.go.kr/english/korLawEng?pstSeq=52645 (last visited October 11, 2019).

[9] Jay L. Westbrook, An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency, 87 AM. BANKR. L.J. 247, 250 (2013) (identifying certainty and speed as goals); see also UNCITRAL, GUIDE TO ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (2013), para. 8 (pointing out the drawbacks of the regime without a Model Law).

[10] UNCITRAL, '11th Multinational Judicial Colloquium UNCITRAL-INSOL-World Bank', (Mar. 21-22, 2015), Report, http://www.uncitral.org/pdf/english/news/EleventhJC.pdf. (last visited October 11, 2019), para. 33.

[11] E.g., see generally, S. Chandra Mohan, *Cross-border Insolvency Problems: Is the UNCITRAL Model* Law the Answer?, (21), 3 INTERNATIONAL INSOLVENCY REVIEW. 199-223 (2012); LOOK CHAN HO, CROSS BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW, 324 (Globe Law and Business, 4th ed. 2017).

[12] UNCITRAL, GUIDE TO ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (2013) (Guide), para 20. The Guide contains the background and explanatory statement to the Model Law. The original Guide was issued by UNCITRAL in 1997, in conjunction with the adoption of the Model Law, and the Guide was revised in 2013. See generally, Look Chan Ho, The Revised UNCITRAL Model Law Enactment Guide – A Welcome Product?, J. I. B. L. R. 325 (2014).

[13] But see the Judicial Perspectives document that was developed by UNCITRAL in response to requests from participants at biennial UNCITRAL/INSOL/World Bank multinational judicial colloquia, for more information on the application and interpretation of the Model Law - https://www.uncitral.org/pdf/english/texts/insolven/Judicial-Perspective-2013-e.pdf (last visited October 11, 2019). The principal author is the New Zealand judge, Paul Heath, and it is intended to assist judges on questions arising on an application for recognition under the Model Law. It has since been revised.

achieving a quick, certain, and predictable outcome in cross-border insolvency proceedings.[14]

In this paper, we examine the extent to which the Model Law has been enacted and implemented in four economically significant Asia-Pacific jurisdictions: Australia, Singapore, Korea and Japan, with the former two being common law countries and the latter two being civil law countries. In making the comparison, we take into account the theory of "functional equivalents" in comparative law which holds that a rule which takes a positive legal form in one system may be expressed in other legal systems in a different fashion.[15] Further, we examine how the domestic legislation implementing the Model Law has been interpreted in Australia, Singapore and Korea.[16] We seek to assess whether the Model Law's goals of speed, certainty and predictability are met; the reasons behind the divergent implementation and interpretation of the Model Law and the future of the jurisprudence on the Model Law.

Various theories have been put forth to explain the divergence in approaches respecting the enactment and interpretation of the Model Law. At a general level, one can argue the differences merely reflect the fact that insolvency policies and procedures differ substantially between States; Lord Millett observed that "no branch of the law is moulded more by considerations of national economic policy and commercial philosophy."[17] More specifically, in respect to the adoption of the Model Law by civil law jurisdictions in Asia, scholars such as Yamatomo have argued that the reasons for having a different strategy to implement the Model Law in Korea and Japan lie in the different legal origins. Korea and Japan follow the civil law, distinct from the common law tradition.[18]

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[14] G.A. Res. A/RES/52/158, United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (Jan. 30, 1998). (Model Law). The Guide has recommended that as few deviations be made to the Model Law as possible, so as to increase the uniformity and transparency on cross-border insolvency and obtain cooperation from the other States, at para. 22.

[15] KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., Clarendon Press 2d ed.1992).

[16] For Japan, the Case Law on UNCITRAL Text (CLOUT), which contains summaries of cases on the Model Law, has very few English translation of the decisions on the legislation based on the Model Law in Japan (four): http://www.uncitral.org/clout/index.jspx (last visited Sept. 15, 2019); these decisions are not relevant for the purposes of this article. Checks with Japanese practitioners indicate that there is no major Japanese case law on the legislation implementing the Model Law. For Korea, we relied on decisions translated in CLOUT as well as the English translation found on the website of the Supreme Court of Korea: Supreme Court Order, [2010] 2009Ma1600,
https://www.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=559&pageIndex=1&mode=6&searchWord= (last visited Jan.1, 2019).

[17] Peter Millet, Cross-Border Insolvency: The Judicial Approach, 6 INT. INSOLV. REV. 99, 109 (1997).

[18] Kazuhiko Yamamoto, New Japanese Legislation on Cross-border Insolvency as Compared with the UNCITRAL Model Law, INT. INSOLV. REV. 67, at 68-69 (2002) (arguing that in the case of Japan, the possibility

As attractive as the legal origin explanation appears, there are at least two issues with this explanation. First, while there may be provisions in the Model Law that would pose difficulty for civil law countries to adopt unequivocally, such as those provisions relating to the conferment of judicial discretion, there is no suggestion in the scholarly literature on Japanese or Korean jurisprudence that the reasons for not adopting the provisions lie in the constraints found in civil law traditions. In fact, the evidence shows the contrary. For example, Korea and Japan's decision not to adopt the Model Law's automatic stay following the recognition of foreign main proceedings does not lie in the constraints found in their civil law traditions.[19] Further, Korea has not adopted, in full, the judicial cooperation and coordination in the Korean Debtor Rehabilitation and Bankruptcy Act in 2006 (DRBA), the legislation that implements the Model Law, and yet the recent Memorandum of Understanding entered into by the Korean courts with the Singapore and New York courts, both in common law countries, signal the willingness to cooperate.

Drawing from the four jurisdictions, however, we argue that legal origins provide only a partial explanation for the divergence in implementation. Instead, the explanation is based on the divergence in the two dichotomies in approaching cross-border insolvency adopted by the States: universality and territoriality.[20] The universalist principle is premised on the view that only the courts of the bankrupt's "home jurisdiction" have control of, and may administer, the bankrupt debtor's assets and that there should only be one governing law. In contrast, the territorialist principle is one where each country has jurisdiction over the portion of the bankrupt debtor's assets within its territory only. Thus, there will be multiple proceedings if the bankrupt debtor's assets are located in multiple jurisdictions, and there is no obligation to recognize proceedings in the other jurisdictions. There are also many combinations and variations between the two dichotomies in practice.[21] It is beyond the scope of this article to discuss the advantages and disadvantages of either approach.[22] Mervorach has argued that territorialist approaches by States are explained by certain universal biases (such as preserving the status quo and aversion to perceived loss of sovereignty

of giving greater discretion to judges in the manner envisaged by the common law may cause confusion).

[19] See Section I(B)(5) below.

[20] Memorandum from Jay L. Westbrook to the United States National Bankruptcy Review Commission (July 29, 1998), Re: UNCITRAL Model Law on Cross-Border Insolvency, available at http://govinfo.library.unt.edu/nbrc/report/e1.pdf (last visited October 11, 2019).

[21] Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post-Universalist Approach, 84 CORNELL L. REV. 696 (1999).

[22] See generally IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 13 (Oxford University Press 2d ed. 2005).

and control over local assets) and not by the expected utility of such approaches.[23] Recognising that neither the pure version of universalist nor territorialist principle is ideal, nor in the interests of management of multi-national insolvencies, the Model Law adopts a "modified universalist" principle.[24] It allows for the opening of more than one set of insolvency proceedings, particularly in States where the debtor has a business presence, and strives for maximum cooperation and coordination among the various proceedings.

To this end, Model Law, which is confined to procedural issues in cross-border insolvency but is otherwise neutral as to the choice of law, provides for four main elements in relation to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.[25] The access provisions allow the foreign insolvency representative a right of access to the local court. The recognition provisions enable the court to recognize foreign proceedings either as a "foreign main proceeding" or a "foreign non-main proceeding." The relief provisions allow relief to be available to assist in a foreign insolvency proceeding. The extent of the relief depends on whether the foreign proceedings are "foreign main proceeding," which allows the automatic stay of actions against the debtor and its assets, or whether it is a "foreign non-main proceeding," where more limited relief is available and is largely discretionary. The cooperation provisions permit cooperation and direct communication between the local court and the foreign court or foreign insolvency representatives. They also establish the coordination that is required for the management of concurrent proceedings, the aim of which is to "foster decisions that would best achieve the objectives of both proceedings."[26]

We argue that where States start from the position of having moderately territorialist approaches towards cross-border insolvency, they are more likely to adopt, wholesale, the moderately universalist approach found in the Model Law.[27] However, where States start from the position of an exclusively territorialist approach, even in the presence of external pressure from

[23] Mevorach, infra note 27, ch. 2.

[24] See JAY L. WESTBROOK, National Regulation of Multinational Default, in ECONOMIC LAW AND JUSTICE IN TIMES OF GLOBALISATION: FESTSCHRIFT FOR CARL BAUDENBACHER (Mario Monti et al. eds., Nomos Verlagsgesellschaft 2007).

[25] Guide, para. 24.

[26] Guide, para. 42.

[27] See generally on the Model Law and the evolving norm of 'modified universalism' in Irit Mevorach, Modified Universalism as Customary International Law, 96 TEX. L. REV.1403, 1405 (2018), though she concedes that the status of the principle is 'somewhat amorphous' and see also IRIT MEVORACH, THE FUTURE OF CROSS-BORDER INSOLVENCY LAW: OVERCOMING BIASES AND CLOSING GAPS (Oxford ed., OUP, 2018).

international organisations on them to modernise their insolvency laws, they are more likely to adopt a version of the Model Law that signals their commitment to international norms (such as broadly agreeing to give effect to the recognition of foreign insolvency proceedings). At the same time, they impose more modifications, carve-outs or exceptions to give effect to path dependency. These deviations limit the accessible, quick and predictable outcomes of cases involving relief in the country concerning cross-border insolvency. Thus, there are limits to convergence due to choices of the jurisdictions that are determined to signal their intentions to the international community.

We contribute to the existing literature on the following academic debates in the following ways. First, drawing from political science and law, there exists a line of literature that explains factors in harmonization of international financial architecture, by emphasising the role of domestic regulatory preferences.[28] For example, in the context of the Asian financial crisis of 1997, Walter argues that the convergence to G-7 international financial standards in a number of Asian states is a function of domestic politics. However, there is substantial "mock compliance" where private-sector compliance costs are high and third party monitoring costs are low in the areas of corporate governance.[29] Our research suggests the regulatory preferences involved in the signaling effect of adopting the Model Law remains significant in Asia-Pacific.

Second, we seek to extend the scope of the comparative study of cross-border insolvency and restructuring law to see how the initial choices of territorialist approaches can have lasting effects, demonstrating the limits of harmonization efforts.

Further, our study is relevant to Asian and other jurisdictions, such as China, where debates are taking place as to whether to adopt the Model Law.[30] Our study is particularly timely given the fact that UNCITRAL has felt the need to promulgate a supplemental Model Law on Recognition and Enforcement of Insolvency-Related Judgments.[31] The lessons learned from the experience of the

[28] See generally DAVID ANDREW SINGER, REGULATING CAPITAL : SETTING STANDARDS FOR THE INTERNATIONAL FINANCIAL SYSTEM (Cornell University Press, 2007); See also ANDREW WALTER GOVERNING FINANCE : EAST ASIA'S ADOPTION OF INTERNATIONAL STANDARDS (Cornell University Press, 2008).

[29] Id. at 3.

[30] See e.g., Rebecca Parry and Nan Gao, *The Future Direction of China's Cross*-Border Insolvency Laws, Related Issues and Potential Problems, 27 INTERNATIONAL INSOLVENCY REVIEW 5 (2018).

[31] See https://uncitral.un.org/en/texts/insolvency/modellaw/mlij(last visited October 11, 2019). UNCITRAL has noted that according to the UK Supreme Court in Rubin [2012] UKSC 46, [2013] 1 AC 236, long standing common law rules for the recognition of foreign insolvency judgments remained undisturbed by the UK's adoption of the Model Law. The case had brought to light problems of a global nature and it was noted that the Model Law did not provide an explicit solution. This had led to significant uncertainty and might have

implementation of the Model Law will be relevant to the other supplemental Model Laws.

The rest of the article is divided as follows. Section I explains the background and the judicial approaches towards cross-border insolvency that lead to the enactment of the Model Law. It then explains how the Model Laws have been enacted and interpreted in four jurisdictions in the Asia-Pacific, highlighting the key issues of divergence. Section II explains the reasons for the divergence in the implementation strategies. The article finally concludes with implications for UNCITRAL.

I. DIVERGENCE OF ENACTMENT AND INTERPRETATION OF THE MODEL LAW IN THE ASIA PACIFIC REGION

A. Model Law and Existing Insolvency Framework in the Asia Pacific Region

As mentioned in the Introduction, the Model Law is "soft law" and States are free to implement the Model Law in the way that they think fit, including determining how the Model Law fits into the States' domestic insolvency framework. Article 7 of the Model Law suggests that the Model Laws are only intended to provide threshold levels of assistance and that States are free to supplement them by providing additional assistance to a foreign insolvency representative.[32] In its Guide, UNCITRAL explains that the purpose of the Model Law is not to displace provisions in national legislation to the extent that they provide assistance that is additional to, or different from, the type of assistance dealt with in the Model Law.[33]

1. What happened in Australia and Singapore?

Australia was one of the early adopters of the Model Law, which supplements common law and the existing aid and auxiliary provisions in the Corporations Act 2001.[34]

a chilling effect on the prospects of the Model Law gaining international acceptance. Therefore, it was considered by UNCITRAL to be an opportune time to tackle the recognition and enforcement of these types of judgements - see UNCITRAL, Working Group V (Insolvency Law), Recognition and enforcement of foreign insolvency-derived judgements, U.N. Doc. A/CN.9/WG.V/WP.126 (Oct. 6, 2014); and UNCITRAL, Working Group V (Insolvency Law), Background information on topics comprising the current mandate of Working Group V and topics for future work, U.N. Doc. A/CN.9/WG.V/WP.117 (Oct. 8, 2013).

[32] Model Law, art. 7.

[33] Guide, para. 105.

[34] Corporations Act, 2001, §§ 580-581 (Austl.).

The legislation that implemented the Model Law, with suitable modifications to take into account local conditions, was the Cross Border Insolvency Act 2008.[35] This Act was promoted on the basis that implementation by Australia of the Model Law would support development of a well-understood, uniform, internationally recognized framework for administering cross-border insolvencies. While Australia already had some laws that dealt with cross-border insolvency cases, they were not be well suited to dealing with the manifold consequences and complexities of cross-border insolvencies.[36] An international model law was "more likely to attract support and cooperation from other countries than the current mechanisms of the law which have been adopted unilaterally."[37]

The responsible body in Australia, the Treasury, as part of the Corporate Law Economic Review Program (CLERP) considered the possibility of having a single comprehensive Cross Border Insolvency Regime. Instead, it suggested enacting the Model Law as a standalone statute, albeit making appropriate adjustments to other insolvency law provisions. The Treasury acknowledged the advantages of having the whole law in the one place but adopted the view that these considerations were outweighed by other factors.[38] For instance, the Model Law was styled and arranged somewhat differently than other Australian statutes and therefore did not dove-tail easily with existing Acts. The new law would be drafted as a coherent whole and therefore would be more useful to the courts. It was also suggested that a separate standalone statute would have greater international visibility.

In the case of Singapore, the decision to adopt the Model Law was founded on the 2016 Report of the Committee on Singapore as an International Centre for Debt Restructuring[39] and the 2013 Insolvency Law Review Committee

[35] Australian cross-border insolvency law has been comprehensively covered by Professor Rosalind Mason in a series of scholarly articles including the following: Cross-border insolvency and legal transnationalisation, 21 INTERNATIONAL INSOLVENCY REVIEW 105 (2012); Cross-Border Insolvency Bill 2007: The UNCITRCAL Model Law Enters the Parliamentary Stage Yet Australia Still Awaits the Final Act, 15 INSOLVENCY L. J. 212 (2007); Local proceedings in a Multi-State Liquidation: Issues of Jurisdiction, 30 MELBOURNE UNIVERSITY L. REV. 145 (2006). See also, Anil Hargovan, The Cross-Border Insolvency Act 2008 (Cth) – Issues and Implications, 22 AUSTL. J. OF CORP. L. 188 (2008).

[36] See Corporate Law Economic Reform Program (CLERP) Proposals for Reform Paper No 8: Cross-Border Insolvency - Promoting International Cooperation and Coordination, Commonwealth of Australia 2002, at 14.

[37] Id.

[38] See generally, Gerard McCormack and Anil Hargovan, Australia and International Insolvency Paradigm, 37 SYDNEY L. REV. 389 (2015).

[39] COMMITTEE TO STRENGTHEN SINGAPORE AS AN INTERNATIONAL CENTRE FOR DEBT RESTRUCTURING, REPORT OF THE COMMITTEE (MINISTRY OF LAW) (2016), https://app.mlaw.gov.sg/files/news/public-

Report.[40] The 2016 Report referenced the provision of a clear and internationally recognized framework for resolving cross-border insolvencies[41] while the 2013 Report referred to a firmer and more predictable platform for cross-border cooperation in insolvency matters. The 2013 Report said that the "increased certainty and cooperation will in many cases lead to a greater predictability of process and outcome, which in many cases may possibly help lower the risks and costs of international financing, reduce the overall cost of insolvency litigation, and reduce the overall costs of obtaining recoveries or dividends from the cross-border insolvency process. It may also influence foreign investment in Singapore favourably."[42] The 2016 Report further referred to the fact that the Model Law was the international benchmark and there was (then) no multilateral convention on cross-border insolvency that could appropriately be adopted for this purpose.[43] The enactment of the Model Law was a prominent and outward-facing international milestone even though the Singapore courts have in recent years been particularly active in pushing forward the boundaries of judicial cooperation in cross border insolvencies and restructurings.[44]

2. What happened in Korea and Japan?

Prior to the enactment of their respective legislation based on the Model Law, Korea and Japan had each been regarded as taking a 'territorialist' approach towards cross-border insolvency. Since the relevant legislation came into force, there has been a move towards a more 'modified universalist' approach. However, as may be seen in the Section below, significant divergences still exist in the implementation and judicial interpretation.

In Korea, prior to the Asian financial crisis of 1997, the insolvency legislation which applied (the Corporate Reorganization Act, the Composition

consultations/2016/04/Final%20DR%20Report.pdf (last visited October 11, 2019).

[40] INSOLVENCY LAW REVIEW COMMITTEE, REPORT OF THE INSOLVENCY LAW REVIEW COMMITTEE: FINAL REPORT (MINISTRY OF LAW) (2013), https://app.mlaw.gov.sg/files/news/announcements/2013/10/ReportoftheInsolvencyLawReviewCommittee.pdf (last visited October 11, 2019).

[41] Supra, n 39, para. 3.27.

[42] p. 234 of the 2013 Report.

[43] The Model Law on Recognition and Enforcement of Insolvency-Related Judgments was not yet promulgated in 2016; it was promulgated in 2018.

[44] E.g., Re Opti-Medix Ltd, [2016] SGHC 108 (Sing.), where the court acknowledged that in cross-border insolvency, there has been a general movement away from the traditional, territorial focus on the interests of the local creditors, towards recognition that universal cooperation between jurisdictions was a necessary part of the contemporary world. As a consequence of a greater sensitivity for universalist notions in insolvency, there was also a greater readiness to go beyond traditional bases for recognising foreign insolvency proceedings. See also another decision of the Singapore High Court in Re Gulf Pacific Shipping Ltd, [2016] SGHC 287 (Sing.).

Act and the Bankruptcy Act) was not significant and there were hardly any reorganisation proceedings.[45] Financial institutions were reluctant to address insolvency or restructure non-performing loans, preferring to keep them in their books. However, when the Asian financial crisis struck in 1997, many companies, including financial institutions, were badly hit and applied for judicial proceedings to restructure.[46] The crisis demonstrated that the non-performing loans on the books of the financial institutions were highly toxic, almost leading to the institutions' destruction. As a result, many international organisations, including the International Monetary Fund and the World Bank, put pressure on Korea to implement whole-sale insolvency reforms.[47] Partly pursuant to international pressure, the Debtor Rehabilitation and Bankruptcy Bill was tabled before the National Assembly in 2003 and 2004, but passed in 2005, with the effective date of March 1, 2006. The DRBA would become the single integrated legislation on insolvency and replaced former Corporate Reorganization Act, the Composition Act and the Civil Enforcement Act.

The Corporate Reorganizations Act (which was repealed by the DRBA) was described by commentators[48] and the Korean Supreme Court[49] as distinctly territorial. For example, Article 4 of the Company Reorganization Act provided that reorganization proceedings commenced in a foreign country have no effect on property in Korea.[50]

Oh has summarized the effect of the former Korean legislation:

> The corporate reorganization procedure and the bankruptcy procedure are effective on property in Korea ([Bankruptcy Act] Art. 3, [Corporate Reorganization Act)] Art. 6). Any foreign judgment on bankruptcy and any corporate reorganization procedure commenced by a foreign court cannot be applied to properties placed in Korea

[45] See Soogeun Oh, An Overview of the New Korean Insolvency Law, 16-5 NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE 1 (2007) (Table 1 setting out the proceedings brought 1990 to 1997 which averages less than 80 a year).

[46] Id. (Table 1 showing that the cases for reorganization and increased sharply in 1997 and 1998 to 132 and 148).

[47] TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, Korea: Legal Restructuring of the Market and State, in BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS, 211-246 (Stanford University Press, 2009).

[48] E.g., see HALLIDAY AND CARRUTHERS, supra note 47.

[49] Korean Supreme Court Order of Mar. 25, 2010, 2009Ma1600 (Supreme Court of Korea), English translation available at https://www.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=559&pageIndex=1&mode=6&searchWord= (visited Jan. 1, 2019).

[50] Id.

([Bankruptcy Act] Art. 3, [Corporate Reorganization Act)] Art. 6.[51]

With the onset of the Asian financial crisis of 1997, various international organisations including the International Monetary Fund and the World Bank, put pressure on Korea to implement whole-sale insolvency reforms, including the automatic stay upon application for commencement of insolvency proceedings.[52] As part of the reform, Part V of DRBA included provisions that provide for the recognition and support of foreign insolvency cases in Korean courts and Korean insolvency proceedings in foreign courts, and appointment of an international administrator or trustee.[53]

However, instead of closely following the language of the Model Law, the DRBA used its own wording and, in the process, made a number of modifications to the Model Law, which are detailed in the Section below. These key modifications include: (1) the lack of an automatic stay with the recognition of the foreign bankruptcy proceedings found in Article 20 of the Model Law, (2) modifying the provisions relating to judicial communication and cooperation in Article 25 of the Model Law; and (3) modifying the application of the hotchpot rule in Article 32 of the Model Law. However, developments in the last five years indicate that the issues relating to (2) and (3) may be more apparent than real.[54]

In Japan, the enactment of the Law on Recognition of and Assistance for Foreign Insolvency Proceedings (Recognition Law) occurred in the wake of wide-ranging corporate and personal insolvency reforms following a prolonged recession in the 1990s.[55] In 1996, a Bankruptcy Law Committee was set up in the Legislative Council to amend the laws relating to civil rehabilitation proceedings for small and medium size enterprises dealing with personal insolvency and create a new legal framework for cross-border insolvency. The Recognition Law, which was based on the Model Law, was tabled in 2000. The other important reform was the Corporate Reorganisation Law which was amended shortly thereafter in 2002 and took effect in 2003. Prior to the Recognition Law, Japanese insolvency laws were described as "distinctly territorial".[56] The administrator of the proceedings in Japan had no right to

[51] Soogeun Oh, supra note 45.

[52] HALLIDAY AND CARRUTHERS, supra note 47.

[53] Id.

[54] See discussion in Section I (B) below.

[55] For Japan, see Stacey Steele, Insolvency Law in Japan, in INSOLVENCY LAW IN EAST ASIA 13 (Roman Tomasic ed., Ashgate Publishing 2006). See generally Yamamoto, supra note 18; Junichi Matsushita, Comprehensive Reform of Japanese Personal Insolvency Law, 7 THEORETICAL INQ. L. 555 (2006).

[56] Raj Bhala, International Dimensions of Japanese Insolvency Law, 19 MONETARY AND ECON. STUD.

manage and dispose of the debtor company's assets located in a foreign country and vice versa. While Matsushita has pointed out that the Japanese courts have modified the strict territorial principle in cases where the purpose of the foreign administrator was to preserve the debtor company's assets located in Japan, any such modifications are "modest".[57] Bhala has commented that even with the apparent relaxation of the strict territorialist principle, the Japanese courts only allow the foreign trustee to preserve the assets in Japan where there is no Japanese creditor seeking to attach the same assets.[58]

The Recognition Law was described as being ahead of its time when enacted since there were few jurisdictions which had enacted the Model Law in 2000.[59] While Japan based its legislation on the Model Law, it did not follow the language of the Model Law strictly and made a number of modifications. With striking similarity to Korea, the main differences are the lack of an automatic stay and other consequences (including the lack of automatic turning over of assets to the insolvency representative) with the recognition of the foreign bankruptcy proceedings; modifying the provisions on judicial communication and cooperation; and the priority given to the local proceedings. The key areas of divergence are discussed below.

B. Key Issues and Divergence in the Application of Model Law

In this Section, we highlight the key issues arising under the Model Law and how States have diverged in the enactment and interpretation of the Model Law. We argue that due to the differences in the way that the Model Law has been adopted, States have signaled the recognition of giving effect to foreign insolvency proceedings. However, the details differ and these differences raise the broader question of whether the objectives of certainty and predictability have been achieved. The details differ in the following ways: (1) giving greater leeway for the domestic court to refuse recognition of the foreign proceedings; (2) not implementing specific provisions of the Model Law on the ground that the local law is unsettled or unclear or that there is no equivalent; and (3) limiting

131, 166 (2001).

[57] Junichi Matsushita, Present and Future Status of Japanese International Insolvency Law, 33 TEX. INT'L L.J. 71, 75-77 (1998).

[58] Bhala, supra note 56, at 163.

[59] See references to notes 10 and 11 in Sohsuke Takahashi, The Reality of the Japanese Legal System for Cross-Border Insolvency: Driven by Fear of Universalism (Mar. 14, 2011) (unpublished comment) (on file with International Insolvency Institute). Only Japan, South Africa and Mexico adopted the Model Law in 2000. No other country had adopted the Model Law prior to 2000. See STATUS: UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited Sep. 17, 2019).

the effects of recognition.

1. Reciprocity and Public Policy Exception

A central issue in the context of the Model Law is the possibility of a requirement of reciprocity – in other words, Country X should recognize foreign proceedings in Country Y only if Country Y recognizes proceedings from Country X. Reciprocity conditions are part of the insolvency laws in some countries. A glaring example is Article 5 of China's Enterprise Bankruptcy Law.[60] But such conditions limit the effectiveness of the Model Law and adversely affect the capacity of a country to project itself as outward facing and progressive. A reciprocity requirement might be applied by a court on an ad hoc basis when considering the recognition of foreign proceedings – as the approach is in China. Alternatively, it might be carried out by a government agency that is given the task of designating certain countries as having fulfilled reciprocity conditions.[61]

The majority of the countries that have adopted the Model Law have not insisted on the reciprocity requirement.[62] When Singapore was considering the adoption of the Model Law, the arguments for and against imposing a reciprocity requirement were hotly debated. The Insolvency Law Review Committee noted that many of the advantages flowing from the Model Law, such as "equality of treatment for local creditors, the ease of recovering assets from foreign jurisdictions and more efficient treatment of international insolvencies involving local businesses may come only if other countries also enact the Model Law or an equivalent thereof."[63] The committee noted that the Model Law had not yet achieved widespread international adoption. Nevertheless, the committee decided not to recommend any reciprocity obligation[64] and its reasons for adopting this viewpoint seem sound.

While there is consensus among the majority of the countries that reciprocity

[60] See generally Emily Lee, Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters Between Hong Kong and Mainland China, 63 AM. J. COMP. L. 439 (2015).

[61] South Africa took this approach when adopting the Model Law, but in fact, no countries have been so designated. Consequently, the Model Law is a dead letter as far as South Africa is concerned. See Cross-Border Insolvency Act 42 of 2000 § 2 (S. Afr.). See generally Alastair Smith & Andre Boraine, Crossing Borders into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law, 10 AM. BANKR. INST. L. REV. 135 (2002).

[62] For a discussion of the countries that have versions of the reciprocity requirement, such as South Africa, Mexico and Romania, see generally Keith D. Yamauchi, Should Reciprocity be Part of the UNCITRAL Model Cross-border Insolvency Law, 16 INT'L INSOLVENCY REV.145 (2007).

[63] 2013 Report, supra note 5, at 236.

[64] 2013 Report, supra note 5, at 236-38.

is unnecessary, the Model Law contains certain elements that protect local creditors and local public policy. In relation to the latter, there is greater divergence in the implementation of the public policy rider and consequently, the courts' interpretation thereof. Under the Model Law, a local court may refuse assistance in relation to foreign insolvency proceedings where assistance would be "manifestly contrary to the public policy" of the local State.[65] The use of the word 'manifestly', however, suggests that "the public policy exception should be interpreted restrictively" and only invoked where a case involves matters "considered to be of fundamental importance".[66] There are suggestions in the English case - Cherkasov v Olegovich, the Official Receiver of Dalnyaya Step LLC[67] – that the public policy exception may be used in cases where there is a breach of natural justice or procedural fairness. In this case, it was argued that Russian foreign insolvency proceedings were part of an asset-stripping exercise by instrumentalities of the Russian State to sideline political opponents. Rose J said:[68] 'It is true that Article 6 is to be read restrictively and will only be relevant in a very small number of cases. But this case falls clearly within that small class.' The mere fact that the priorities of the foreign law in liquidating the company are different from English law is not sufficient to invoke English public policy.[69]

Australia has adopted Article 6 of the Model Law and the provision was unsuccessfully invoked in Re Legend International Holdings[70] to try to avoid recognition of a US Chapter 11 reorganisation. The court pointed out that courts are "slow" to invoke public policy.[71]

Other States have implemented Article 6 slightly differently. In Singapore, Article 6 of the Model Law was adopted but without the word 'manifestly.' Japan's[72] and South Korea's[73] legislative provisions also did not include the

[65] Model Law, supra note 1, at art. 6.

[66] FLETCHER, supra note 22, at 462.

[67] [2017] EWHC 756 (Ch), [2017] All ER (D) 11 (May).

[68] UNCITRAL itself has recognized, the "notion of public policy is grounded on national law and may differ from State to State" – Guide, supra note 12, at para. 101.

[69] Re Agrokor [2017] EWHC 2791 (Ch), para. 131.

[70] [2016] VSC 308.

[71] Id. at para 52.

[72] Article 21(3) of the Japanese Law on Recognition of and Assistance in Foreign Insolvency Proceedings (2001) allows a court to refuse recognition of a foreign proceeding considered to be contrary to the public order or good public morals in Japan. See SHIN ABE, Japan, in CROSS BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW, 324 (Look Chan Ho ed., Globe Law and Business 4th ed. 2017). There is no mention of 'manifestly' in the Japanese legislation adopting the Model Law.

[73] See DRBA Article 632(2) (providing that the court may dismiss the petition for recognition if the foreign bankruptcy proceeding is contrary to the public policy of the Republic of Korea). See CHIYONG RIM,

word 'manifestly.' This would appear to allow the courts in these States more room to avoid giving effect to foreign insolvency proceedings. For example, Re Zetta Jets Pte Ltd, the Singapore High Court held that:

> This would seem to mean that recognition may be denied if recognition is merely contrary to public policy, without being manifestly so… What flows from the omission being deliberate is that the standard of exclusion on public policy grounds in Singapore is lower than that in jurisdictions where the Model Law has been enacted unmodified.[74]

In that case, it was held that foreign insolvency proceedings instituted in breach of an injunction order granted in Singapore could not be recognized in Singapore on the ground that it was contrary to public policy.

In addition to Article 6, there are other provisions in the Model Law that may be utilised to reflect the public policy choices such as protecting local creditors and enforcing or denying the enforcement of foreign revenue debts. In particular, Article 21(2) of the Model Law allows recognition of the foreign proceeding to be modified, including in cases where the debtor's property is handed over to the foreign representative. The court needs to be satisfied that the local creditors are "adequately protected" and similarly, under Article 22(1), the court in granting, modifying or denying relief, must be satisfied that the interests of the creditors and other interested persons are "adequately protected". However, "local creditors" and "adequate protection" are not defined in the Model Law and are left to the courts' interpretation. In Australia, in Akers v Deputy Commissioner of Taxation,[75] the Full Federal Court held that Articles 21 and 22 operated to prevent the assets from being handed over for distribution in the foreign main proceeding unless the local creditor (in this case, the Australian tax authorities) was able to recover the amount equal to the pari passu claim of the taxation debt as an unsecured creditor in the foreign main proceeding. Under the relevant foreign law, the Australian foreign revenue debt could not be proved in the main proceedings. This order created a form of 'mini-Australian liquidation', which enables the tax authorities to recover such amounts as if the debtor had been wound up in Australia.[76]

In Japan, in a departure from Article 21(2) of the Model Law, Article 31 of the Recognition Law provides that before the court allows the turning over of

South Korea, in CROSS BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW, 585 (Look Chan Ho ed., Globe Law and Business 4th ed. 2017).

74 Re Zetta Jets Pte Ltd [2018] SGHC 16, at paras. 21, 23.

75 (2014) 223 FCR 8.

76 Gerard McCormack & Anil Hargovan, supra note 38, at 395-96.

the assets to a foreign country, the court must be satisfied that "there is no likelihood of the interests of creditors in Japan being unreasonably prejudiced".[77] This gives rise to two possible interpretations: the first, argued by Yamatomo, means that the provision is intended to protect the local creditors in the same way as the Model Law.[78] An alternative interpretation raised by Anderson is that such an approach (which refers to unreasonable prejudice) attracts the risk that courts may take into account the relative positions of the local creditors in the foreign proceedings and not grant the order of turning over the assets to the foreign representative because the local creditors would have fared better in local proceedings.[79] In this regard, it is noted that Article 35 of the Recognition Law requires the permission of the court before the debtor's assets can be turned over to the foreign representative (which is not dissimilar to the Model Law[80] where such consequences may occur upon recognition of foreign non-main proceedings).

Article 6, as well as Article 21(2), are examples where the local adoption of these provisions gives rise to uncertainty and lack of predictability of outcomes to foreign representatives seeking recognition or assistance.

2. Proceedings to Which the Model Law Applies

The Model Law applies to "collective judicial or administrative 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."[81] The so-called "court" may not, strictly speaking, be a court as described since the Model Law refers to a judicial or other authority that can control or supervise proceedings.[82]

The definition of collective insolvency proceedings covers both 'debtor-in-

[77] Law on Recognition of and Assistance in Foreign Insolvency Proceedings (Recognition Law) at art. 31(2), translated in Matsushita and Steele, supra note 7. See also Kent Anderson, Testing the Model Soft Law Approach to International Harmonisation: A Case Study Examining the UNCITRAL Model Law on Cross-border Insolvency, 23 AUST. YBIL 1, 12 (2004); ABE, supra note 72, at 328.

[78] Yamamoto, supra note 18, at 87.

[79] See Anderson, supra note 77 at 12, citing Jay Lawrence Westbrook, Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation, 76 AM. BANKR. L.J. 1, 24-26 (2002). See generally Lionel Meehan, Cross border insolvency law: Reform and recent developments in light of the JAL corporate reorganisation filing, 22 JBFLP 40 (2011) (arguing that this issue is largely untested in Japan).

[80] Model Law, supra note 1, at art. 21(1)(e).

[81] Model Law, supra note 1, at art. 2(a). Re Chow Cho Poon (Private) Ltd [2011] NSWSC 300, [2011] 249 FLR 315, at para. 35.

[82] Model Law, supra note 1, at art. 2(e).

possession' restructuring regimes such as Chapter 11 of the US Bankruptcy Code of 1978 and manager displacing regimes like voluntary administration in Australia and judicial management in Singapore.[83]

There are at least two issues with the general definition, and different implementing States have tweaked the basic Model Law definition in different ways in their adoption. There are issues surrounding 'non-insolvency' winding up. The laws in many countries contain provisions under which the affairs of a company may be wound up, its assets distributed, and its legal existence brought to an end even though the company may not be in any way insolvent. The winding up may be ordered on general public interest grounds, or on the basis that it is just and equitable to do so, e.g. in situations where the company is a small tightly-knit company and there are squabbles between the principals behind the company.

It has been held in Australia that a winding-up order based on the just and equitable ground, can be regarded as a foreign proceeding within the Model Law because the power to wind up under this ground can be seen as part of a law relating to insolvency.[84] Similarly, it has been held that an Australian members' voluntary winding up, essentially a solvent liquidation, could be recognized under the US version of the Model Law, Chapter 15 of the US Bankruptcy Code, with appropriate assistance given.[85]

These decisions might be justified on the basis that the foreign law under which the winding up is ordered is characterized as a law relating to winding up. Such characterization occurs even though the particular provisions under which winding up was ordered are not necessarily confined only to insolvency situations.[86]

The second general point is that the different decisions may owe something to the different ways in which the Model Law has been adopted in different countries. For instance, schemes of arrangement have been adopted in Singapore and Australia, where they have been used extensively in recent years as debt

[83] In 19 Entertainment Ltd [2016] EWHC 1545 (Ch), US Chapter 11 bankruptcy reorganisation proceedings were recognized in the UK under the Model Law and CBIR as relevant foreign proceedings. It has also been held in Re New Paragon Investments Ltd [2012] BCC 371 that a creditors' voluntary liquidation in Hong Kong was entitled to recognition in the UK under the Model Law and CBIR. The court held that "'foreign proceeding' included an extrajudicial or administrative proceeding provided it related to liquidation."

[84] Re Chow Cho Poon (Private) Ltd [2011] NSWSC 300; [2011] 249 FLR 315, at para. 51.

[85] In re Betcorp Ltd (2009) 400 B.R. 266.

[86] See Guide, supra note 12, at para. 48: "Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls [within] the Model Law only if the debtor is insolvent or in severe financial distress"; see also 1997 Guide, supra note 12, at para. 71.

restructuring tools.[87] The scheme of arrangement needs approval from a majority in number representing 75% in value of the class of members or creditors concerned voting at relevant class meetings. There are essentially three stages to the process with two separate court applications and the need to obtain court approval for the scheme. These separate steps, and the necessity of obtaining court sanction, are the reasons why at one point, the scheme procedure was thought to be costly and cumbersome and was little used. While the separate steps remain, judicial decisions have smoothed over some of the potential pitfalls such as disagreements over class composition and the need for multiple classes.[88]

Schemes are not an insolvency procedure per se. Rather, they are a corporate law procedure. Therefore, they do not necessarily carry any insolvency 'stigma'.

In Japan, Article 2 of the Model Law, as implemented in the Japanese legislation, defines 'foreign insolvency proceedings' as proceedings outside Japan that correspond or are equivalent to, among others, a bankruptcy proceeding, a civil rehabilitation proceeding, and a corporate reorganisation proceeding; in other words, they are equivalent to those under the Japanese insolvency laws. A Japanese commentator has argued that what amounts to an equivalent proceeding under Japanese insolvency law would be the subject of judicial interpretation, as the Japanese legislation does not explain the specific characteristics of foreign insolvency law.[89] In Korea, Article 628 of Debtor Rehabilitation and Bankruptcy Act (DRBA), which incorporates Article 2 of the Model Law, specifically refers to, among others, rehabilitation proceedings, bankruptcy proceedings, and other similar proceedings for which petitions are filed with a foreign court (including the corresponding authorities).[90] Schemes of arrangement are likely to be regarded as proceedings similar to rehabilitation proceedings.

[87] Jason Harris, Class warfare in debt restructuring: Does Australia need cross-class cram down for *creditors' schemes of arrangement?*, 36 U. OF QUEENSLAND L. J. 73 (2017). See generally CHRISTIAN PILKINGTON, SCHEMES OF ARRANGEMENT IN CORPORATE RESTRUCTURING (Sweet & Maxwell 2d ed. 2017); GEOFF O'DEA ET AL., SCHEMES OF ARRANGEMENT: LAW AND PRACTICE (Oxford University Press, 2012); JENNIFER PAYNE, SCHEMES OF ARRANGEMENT: THEORY, STRUCTURE AND OPERATION (Cambridge University Press, 2014).

[88] Sovereign Life Assurance Co v. Dodd [1892] 2 QB 573, 583 (a scheme class confined to those "persons whose rights are not so dissimilar to make it impossible for them to consult together with a view to their common interest"). See generally Harris, supra note 87.

[89] See also ABE, supra note 72, at 322-333.

[90] See also RIM, supra note 73, at 582-583.

3. Treatment of Foreign Creditors

Article 13 of the Model Law provides that foreign creditors have the same right as domestic creditors to institute and participate in insolvency proceedings. The common law does not discriminate on its face against foreign creditors. In Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc),[91] Lord Hoffmann observed that: "The … common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove."[92]

Nevertheless, it is worthwhile to make this point expressly since it provides clarity and transparency for foreign creditors and insolvency representatives. There is also a general provision in the Model Law that foreign creditors should not be ranked lower than the class of general non-preference domestic claims.[93]

However, it may be that foreign creditors, such as foreign preferential creditors, find that their claims do not have the same status in the foreign forum as they do in their home country and many States exclude foreign revenue claims totally from recognition in insolvency proceedings. Indeed, UNCITRAL, in the Guide, acknowledges national sensitivities in this regard by giving States the leeway to continue the exclusion of foreign revenue claims.[94] The US[95], Australia[96] and Singapore have made use of this 'opt-out'. They have not used

[91] [2006] UKPC 26, [2007] 1 AC 508 (appeal from The Isle of Man).

[92] Id. at para. 16.

[93] Model Law, supra note 1, at art. 13(2).

[94] Guide, supra note 12, at para. 118-20.. See the discussion in FLETCHER, supra note 22, at 477.

[95] US Bankruptcy Code, § 1513(b)(2)(B) (2012) provides that the admissibility and priority of a foreign tax claim is governed by any applicable tax treaty of the US, under the conditions and circumstances specified therein. The implementation of the Model Law in the US does not change US law on the (non)admissibility of foreign revenue claims. Some of the reasons for the exclusion were articulated by in British Columbia v. Gilbertson, 597 F.2d 1161, 1165 (9th Cir. 1979). It was suggested that requiring countries to enforce foreign tax claims would require some analysis of the tax claim, and could be embarrassing to the foreign State. US courts may not be able to understand and evaluate foreign tax claims and enforcing such claims would 'have the effect of furthering the governmental interests of a foreign country, something which our courts customarily refuse to do'. For a general discussion see generally Jonathan M. Weiss, Tax Claims in Transnational Insolvencies: A *"Revenue Rule" Approach*, 30 VA. TAX REV. 261 (2010).

[96] Cross-Border Insolvency Act 2008 s 12 (Austl.). From December 1, 2012, however the position is more nuanced following Australia's ratification of the OECD Convention on Mutual Administrative Assistance in Tax Matters. The Australian Commissioner of Taxation is obliged to assist in the recovery of tax claims from a large number of foreign jurisdictions that are party to this Convention and, subject to certain conditions, the Commissioner is empowered to recover the foreign tax claim as if it were its own – see also AUSTRALIAN TAXATION OFFICE, PRACTICE STATEMENT LAW ADMINISTRATION 2011/13 CROSS BORDER RECOVERY OF TAXATION DEBTS (2011).

the Model Law as an opportunity to amend general domestic law and make foreign tax claims enforceable.

In Japan, while Article 13 of the Model Law is enacted in the Japanese legislation,[97] the legislation does not specifically address the issue of foreign tax and social security claims.[98] The position is similar to Korea where foreign creditors and domestic creditors are able to commence and participate in the local proceedings, but the implementing legislation is silent on foreign tax and social security claims.[99] This gives rise to some uncertainty for foreign creditors seeking to commence or participate in the insolvency proceedings in Japan and Korea.

Certainly, foreign creditors are often disadvantaged by the opening of insolvency proceedings. These proceedings may be taking place in a faraway country according to a procedure and in a language with which they are not familiar. Foreign creditors may not be aware of the time limits for lodging claims, or the proofs that must be submitted. It may require a translation of the claim into one of the official languages of the state where the proceedings have been opened, as well as the services of a foreign lawyer or other professional, and costs may render it uneconomical to submit a claim. "Due to high costs, creditors may choose to forgo a debt, especially when it involves a small amount of money. This problem mainly affects small and medium-sized businesses as well as private individuals."[100]

Article 14 of the Model Law contains certain concrete measures to alleviate the disadvantage that foreign-based creditors may suffer in practice. They must be notified individually of the proceedings, unless the court considers that some other form of notification would be more appropriate, or where the notification to local creditors is by advertisement of something equivalent. When notice of a right to lodge a claim is given to foreign creditors, the notification must indicate a reasonable time period for filing claims and set out a place for filing. These provisions are rather limited, however, and certainly they do not establish a comprehensive procedural framework.

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[97] Law on Recognition of and Assistance in Foreign Insolvency Proceedings (Recognition Law) at art. 3, translated in Matsushita and Steele, supra note 7. See ABE, supra note 72, at 325.

[98] See ABE, supra note 72, at 325.

[99] See RIM, supra note 73, at 588.

[100] European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, at 16-17, COM (2012) 743 final (Dec. 12, 2012).

4. Extent of Application of Foreign Law

A controversial issue in the context of Model Law is what sort of relief may be available to a foreign insolvency representative, and whether this includes the application of provisions of the relevant foreign law – an extra-territorial application of the foreign law in the recognizing State. The Model Law is somewhat ambiguous in Article 21(1)(g) on the granting of any additional relief that may be available under the laws of the recognizing State. This provision is more or less faithfully reproduced in some implementing States including Singapore, which refers to the grant of any additional relief that may be available to a Singapore insolvency office holder.[101]

Transactional avoidance is dealt with in Article 23 of the Model Law which gives a foreign representative the standing to invoke local laws on transactional avoidance. Article 23 has been implemented in this way in Singapore[102] and Australia.[103]

The Australian and Singapore versions of the Model Law do not address specifically whether foreign law may be applied to decide the appropriate form of relief to grant to a foreign insolvency office holder. Nevertheless, it seems to limit the type of relief that may be granted to that available to an office holder in local proceedings, and this approach appears to exclude the application of foreign law.

Korea and Japan have not implemented Article 23 of the Model Law explicitly, because the law on transaction avoidance is complicated and remains unsettled in the two countries.[104] Insofar as Article 21(1)(g) of the Model Law is concerned as to the reliefs, in Korea, Article 636 of DRBA, (which is based on Article 21 of the Model Law), the court has taken the view that recognition of a foreign discharge must be based on the local laws of civil procedure.[105] The foreign discharge cannot be recognized by obtaining recognition and relief under DRBA.[106] In Japan, Article 26(1) of the Recognition Law allows for the court to

[101] Companies Act 2006, supra note 5, at art. 21(1)(g), Sch. 10 (Sing.).

[102] Companies Act 2006, supra note 5, at art. 23, Sch. 10 (Sing.).

[103] Cross-Border Insolvency Act 2008 s 17 (Austl.).

[104] See RIM, supra note 73; Yamamoto, supra note 18, at 88; and ABE, supra note 72 at 328.

[105] MIN HAN, Recognition of Insolvency Effects of a Foreign Insolvency Proceeding: Focusing on the Effect of Discharge, in TRADE DEVELOPMENT THROUGH HARMONIZATION OF COMMERCIAL LAW 353 (Muruga Perumal Ramaswamy & Joao Ribeiro eds., New Zealand Association for Comparative Law, 2015) (citing Supreme Court decision dated March 20, 2010 (case no: 2009MA1600)).

[106] While the judicial position in Japan is not clear, the prevailing scholarly view is that recognition of a foreign discharge should be effected by recognition of a foreign judgment under the domestic law of Japan and not by the legislation based on the Model Law. See Id.

grant a "disposition" with regard to the debtor's assets and business to give effect to the recognition and assistance proceedings, but it is assumed that disposition is limited to what is permitted under the civil code or civil procedure code.

In more recent developments, UNCITRAL has attributed its decision to adopt a new Model Law on the Recognition and Enforcement of Insolvency-related judgments to the chilling effect of Rubin and the 2010 Korean decision, Gohap.[107] In Gohap, the Supreme Court of Korea held that the US Bankruptcy Court order approving a rehabilitation plan, which purported to discharge a Korean law-governed debt, could not be recognized under the DRBA provisions relating to recognition of foreign insolvency proceedings.[108] However, the discharge resulting from the US Bankruptcy Court order could be recognized as an ordinary foreign judgment if the standard conditions under Korean law for recognition of such judgments were satisfied.[109]

It remains to be seen however whether States will take the approach of adopting a new corpus of rules on insolvency-related judgments or merely clarifying that their existing Model Law implementation provisions allow the recognition and enforcement of insolvency-related judgments and indeed the application of foreign law. The new Model Law states that it is not intended to replace legislation in States that have enacted the Cross-Border Insolvency Model Law or to limit the application of that legislation.[110]

5. Effects of Recognition and Automatic Stay

Article 20 of the Model Law provides for automatic effects upon recognition of a foreign main proceeding, such as an automatic stay. While the common law countries of Australia[111] and Singapore[112] have implemented Article 20, Japan and Korea have not done so. In Japan, there is no distinction between foreign main proceedings and foreign non-main proceedings. The Japanese version of

[107] See UNCITRAL, Working Group V (Insolvency Law), Recognition and enforcement of foreign insolvency-related judgements: draft guide to enactment of the model law, U.N. Doc. A/CN.9/WG.V/WP.151, at para. 2, note 1 (Sept. 20, 2017).

[108] Supreme Court [S. Ct.], 2009Ma1600, Mar. 25, 2010 (S. Kor.)., English translation available at https://www.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=559&pageIndex=1&mode=6&searchWord=.

[109] See Kwang Yun Suk, South Korea, Recognition and Enforcement of Foreign Judgments in Asia (Asian Business Law Institute, 2017), available at https://abli.asia/Projects/Foreign-Judgments-Project

[110] See, UNICITRAL, Judgments Model Law, 3-4 (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/interim_mlij.pdf). Recital 2 of the preamble and Article X.

[111] Cross-Border Insolvency Act 2008, § 16 (Austl.)

[112] Companies Act, 2006, art. 20, Sch. 10 (Sing.).

the Model Law provides that the court has the discretion to grant relief upon or after issuing a recognition order.[113] Yamatomo has explained the decision not to allow an automatic effect on the ground that to do so would result in the recognising court being so prudent in deciding on recognition that it would delay the process of recognition.[114] However, he argues that Japanese law "permits the court to recognize a foreign non-main proceeding along the line of the [M]odel [L]aw scheme, and, [furthermore], to stay a local proceeding based on recognition of a foreign main proceeding under several conditions".[115]

Similar to Japan, Korea has not adopted the automatic stay upon recognition of the foreign bankruptcy proceedings.[116] For relief to be obtained in connection with the foreign bankruptcy proceeding, the foreign representative has to file a petition for relief under Article 635 of the Debtor Rehabilitation and Bankruptcy Act (provisional relief prior to recognition of the foreign bankruptcy proceeding) and/or Article 636 (relief granted upon such recognition). This reflects the Korean position that an automatic stay does not follow a bankruptcy petition.[117] The reliefs prior to recognition that can be applied for by the foreign insolvency representative include the suspension of a lawsuit relating to the debtor's business or property, prohibition of suspension of compulsory execution, and prohibition of repayment or disposition of the debtor's property by the debtor.[118]

Oh has argued that Korea departs from the automatic stay provisions in the Model Law because the country aimed to ensure specialisation of its courts in handling cross-border insolvencies. Thus, the foreign insolvency representative has to first apply to the Seoul Central District Court for recognition, which has expertise on cross-border insolvency cases, before it can apply to any other district court that has jurisdiction.[119] In contrast, under Article 11 of the Model Law, the foreign insolvency representative can apply for domestic insolvency proceeding before the recognition of the foreign proceeding. Rim has reported that as of the end of November 2016, Korean courts only recognized six foreign

[113] Law on Recognition of and Assistance in Foreign Insolvency Proceedings, art. 25. ABE, supra note 72, at 328.

[114] YAMAMOTO supra note 18, at 83.

[115] Id.

[116] Article 633 of the DRBA provides that an order for recognition of a foreign bankruptcy proceeding shall not affect the commencement or the continuation of local proceedings. See RIM, supra note 73, at 586-587.

[117] See RIM, supra note 73, at 587. See also Soogeun Oh, An Overview of the New Korean Insolvency Law, 16 NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE 751, 779 (2007).

[118] See Korean Debtor Rehabilitation and Bankruptcy Act, 2006, (Ref. No. 26166) Art. 635. Soogeun Oh, An Overview of the New Korean Insolvency Law, supra, id, 779.

[119] See Id.

bankruptcy proceedings.[120]

A related point is the coordination of concurrent proceedings. Article 28 of the Model Law allows the commencement of concurrent local proceedings even after the recognition of the foreign main proceedings. Article 29 provides for the coordination of the orders made between the two sets of proceedings. The Model Law also allows for the recognition and the local proceedings to proceed in parallel. However, the Japanese Recognition Law departs from Articles 28 and 29 because while it does not prohibit the commencement of proceedings, only one proceeding is allowed to commence at a time, and priority is given to the local proceeding with a stay on the recognition proceeding, unless certain exceptions apply.[121] In Korea, there are also differences between the Model Law and domestic legislation on how concurrent proceedings are managed; the recognition of the foreign proceeding is a pre-requisite to the foreign insolvency representative commencing domestic proceedings in Korea,[122] and it is not possible to commence the domestic proceedings until recognition is obtained. The explanation is to ensure that the Seoul District Court has the expertise and should hear the recognition case first.[123]

6. Judicial Communication and Cooperation

While Singapore and Australia have adopted Article 25 of the Model Law,[124] this is an area where the civil law countries have diverged "in the books".[125] Japan has not adopted Article 25, which provides for court to court communication and cooperation. Yamatomo has argued that express enactment

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[120] RIM, supra note 73, at 584.

[121] Law on Recognition of and Assistance in Foreign Insolvency Proceedings 129 of 2000, Arts. 57-60, (Japan). The conditions are where the foreign proceeding is a "foreign main proceeding", recognition of the foreign proceeding will be of benefit to the general interests of creditors (including creditors outside Japan) and the interests of local creditors will not be unjustly harmed by the recognition of the foreign proceeding.

[122] See Korean Debtor Rehabilitation and Bankruptcy Act, 2006, (Ref. No. 26166) Art. 634.

[123] See Soogeun Oh, An Overview of the New Korean Insolvency Law, 16 Norton Journal of Bankruptcy Law and Practice 5 art. 5, 19 (2007).

[124] The development of international judicial cooperation between courts may also take place in the form of bilateral arrangements. For example, in September 2018, Singapore has signed two Memoranda of Understanding with the US Bankruptcy Court for the District of Delaware and for the South District of New York to effect judicial cooperation between Singapore and with each of these courts. See SUPREME COURT, GREATER EXCELLENCE IN CROSS-BORDER INSOLVENCY, available at https://www.supremecourt.gov.sg/news/media-releases/towards-greater-excellence-in-cross-border-insolvency (last visited October 11, 2019). For the position in Australia, see JACKSON, SHERYL; MASON, ROSALIND, DEVELOPMENTS IN COURT TO COURT COMMUNICATIONS IN INTERNATIONAL INSOLVENCY CASES, 37 37(2) UNSW LAW JOURNAL 507, 512-519 (2014).

[125] See Companies Act, 2006, ch.50, Sch. 10, art 25 (Sing.); see also Cross-Border Insolvency Act, 2008, § 6 (Austl.)

of this provision is not necessary. It has been pointed out that there is already inherent power of the courts to cooperate.[126] Certainly in Japan, in practice, there appears to be evidence of assistance and cooperation with foreign courts. A study by Anderson Mori and Tomotsune provides that, as of April 2017, the Tokyo District Court had provided relief in 15 cases either through administration orders (appointment of a trustee to administer the Japanese assets of a foreign company) or stay orders (prohibiting enforcement by creditors against Japanese assets so as to facilitate foreign restructurings).[127] In the same study, the authors have argued that while Japan does not have the equivalent of Article 25, the Tokyo District Court "has generally provided assistance to foreign trustees and debtors-in-possession (DIPs) immediately after the recognition of the relevant foreign proceeding. This is because debtors are generally able to hold prior consultation with the Tokyo District Court, which enables the court carefully to review cases in advance."[128]

In Korea, Article 641 of the DRBA adopts Model Law Article 25 but limits the cooperation of the court with a foreign court or a representative of a foreign insolvency proceeding. Other persons, such as an examiner, do not have power to communicate with the foreign court or a foreign representative.[129] Rim has argued that the South Korean courts are more likely to communicate and exchange information via the foreign representative than through direct communication because of the differences in legal systems and language issues.[130] However, such an impediment may not actually be borne out in practice. In recent years, it has been reported that the Korean judges cooperated with New Jersey judges by participating in a conference call during a recent cross-border insolvency case involving a Korean shipping company.[131]

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[126] See generally SHIN ABE, Japan, in CROSS BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW, 324 (Look Chan Ho ed., Globe Law and Business 2nd ed. 2009).

[127] See YURI IDE & ATSUSHI NISHITANI, LEGAL FRAMEWORK OF CROSS-BORDER INSOLVENCY IN JAPAN, 3-4 (Anderson Mori & Tomotsune, May 2017), available at https://www.amt-law.com/asset/en/pdf/bulletins11_pdf/170531.pdf (last visited October 11, 2019). Similarly, Shin Abe reports that there are 15 cases as at 2017; see ABE, supra note 72, at 330. Cf. Irit Mevorach, On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency, 12(4) EBOR 517, 546-549 (2011), which only records three cases from Japan granting relief as at 2010.

[128] SEE IDE & NISHITANI, LEGAL FRAMEWORK OF CROSS-BORDER INSOLVENCY IN JAPAN, 3-4 (ANDERSON MORI & TOMOTSUNE, MAY 2017), HTTPS://WWW.AMT-LAW.COM/ASSET/EN/PDF/BULLETINS11_PDF/170531.PDF (LAST VISITED JAN. 1, 2019).

[129] RIM, supra note 73, at 595.

[130] Id.

[131] Allen & Overy has reported the cooperation between the Korean court and the New Jersey court in dealing with a cross-border insolvency in 2017. See ALLEN & OVERY, RESTRUCTURING ACROSS BORDERS, 9 (December 2017), http://www.allenovery.com/expertise/practices/restructuring/Pages/Korea-corporate-restructuring.aspx (last visited Jan. 1, 2019).

Moreover, Korea has entered into a Memoranda of Understanding regarding judicial cooperation. In April and May 2018 respectively, the Seoul Bankruptcy Court has separately executed a Memorandum with the US Bankruptcy Court for the Southern District of New York[132] and Singapore insolvency cases[133]

7. The Hotchpot Rule or Rule of Payment in Concurrent Proceedings

Article 32 of the Model Law ensures that outside of secured claims and rights in rem, a creditor who has received partial payment in respect to a foreign proceeding may not receive a payment on the same claim in the local proceeding regarding the same debtor, without bringing into the hotchpot his foreign payment. The rationale of the rule has variously been described as founded on the pari passu principle,[134] or to prevent the distortion of the policy of distribution that applies to insolvency.[135] The rule prevents creditors from gaining more favourable treatment, as compared with other creditors in the same class, in insolvency proceedings in different jurisdictions. Singapore[136] and Australia[137] have adopted Article 32 of the Model Law. In particular, for Australia, the rule is not controversial as it has been long established in the common law.[138] The exclusion of secured claims and rights in rem is also consistent with the common law because secured creditors claim primarily from their rights in rem, and it is the value from their rights in rem that satisfy their claims. If their claims are not satisfied from their rights in rem, they look to repayment of the balance as unsecured creditors.

In Korea and Japan, legislation is based on Article 32 of the Model Law but there are significant departures. In Japan, secured creditors are subject to the hotchpot rule under the Corporate Reorganization Law,[139] and a creditor in a local proceeding may receive the dividend after deducting the amounts collected from the foreign proceedings.[140] There are two further differences between the

[132] Memorandum of Understanding Between the Soeul Bankruptcy Court and the United States Bankruptcy Court for SDNY, 1-2 (http://www.nysb.uscourts.gov/sites/default/files/MOU_SDNYBK_SBC.pdf) (last visited October 11, 2019)

[133] SUPREME COURT, GREATER EXCELLENCE IN CROSS-BORDER INSOLVENCY 4-6, supra, n 124.

[134] See Banco de Portugal v. Waddell (1880) 5 App Cas 161 ; Cleaver v. Delta American Reinsurance [2001] UKPC 6.

[135] LOOK CHAN HO, Insolvency Policy and the Pari Passu Principle, in CROSS-BORDER INSOLVENCY PRINCIPLES AND PRACTICE, 288-290 (Sweet & Maxwell, 2016).

[136] See Companies Act, 2006, art. 32, Sch. 10 (Sing.).

[137] See Cross-Border Insolvency Act, 2008, § 6 (Austl.)

[138] For Australia, see Re Harris, Goodwin & Co (1887) 5 QLJ (NC) 94; for UK, see Cleaver v. Delta American Reinsurance Co [2001] UKPC 6, [2001] 2 AC 328.

[139] Corporate Reorganization Act, Law no. 154 of 2002, art. 137 (Japan).

[140] ABE, supra note 72, at 329.

Japanese legislation and the Model Law as identified by Japanese scholars. First, payments outside foreign insolvency proceedings are subject to the rule, including payments in execution proceedings or voluntary payments by debtors. This differs from the Model Law, which only affects payments in foreign insolvency proceedings. The rationale was described as aiming for 'high-grade cooperation and more equal treatment of creditors'.[141] Second, the Japanese legislation is confined only to payments after the commencement of local proceedings, though it has been argued that this may not be significant in practice.[142] However, the outcomes may not differ significantly from the common law position in Australia or Singapore. In relation to the former, at common law, the hotchpot rule does not capture payments that are made outside the foreign proceedings, [143] though it is possible that under the domestic insolvency laws, such payments may be set aside on the ground of unfair preference. In relation to the latter, at common law, payments made before the commencement of local proceedings do not fall within the hotchpot rule.[144]

Korea enacted Article 642 of the DRBA, which differs from Article 32 of the Model Law in two material respects. First, Article 642 of the DRBA captures payments not only in respect of foreign proceedings but also judgment execution proceedings and foreclosure proceedings.[145] Second, Article 642 is silent on the exclusion of secured claims, which indicate that secured claims fall within Article 642. The rationale for this view is that secured debts are subject to the rehabilitation proceedings in Korea.[146] Min Han has taken a different view and argued that payment recovered from collateral outside of Korea should not be affected by Article 642.[147]Article 642 has been described as giving rise to

[141] YAMAMOTO supra note 18, at 95.

[142] Id.

[143] The hotchpot rules applies in respect of a creditor who has received full or partial satisfaction of debt through an attachment that is subsequent to the opening of a UK insolvency process rather than by means of an existing security interest. See Re Somes, Ex P De Lemos (1896) 3 mans 131. (available on Heinonline.com in "Reports of Cases in Bankruptcy and Companies' Winding-up"). On the other hand, a creditor who has completed an attachment before the opening of English insolvency proceedings is in a position akin to that of a secured creditor and may keep what she has received . See Cleaver v. Dealta American Reinsurance [2001] UKPC 6, [2001] 2 AC 328; and see generally the discussion in CROSS-BORDER INSOLVENCY 511-514 (Richard Sheldon ed., Bloomsbury Professional 4th ed. 2015).

[144] See Cleaver v. Delta American Reinsurance [2001] UKPC 6; [2001] 2 AC 328 (citing Banco de Portugal v. Wardell (1880) 5 App Cas 161 and noting that, on the facts of that case: "had the Portuguese creditors received their dividend before the commencement of the English liquidation, they would not have been required to bring it into the hotchpot as a condition of proving in England" (para 25).

[145] See RIM, supra note 73, at 595-596.

[146] See RIM, supra note 73, at 595.

[147] Id. Min Han, The Hotchpot Rule in Korean Insolvency Proceedings, 7 J KOREAN L 445, 445-468 (2008).

complex problems.[148] For payments that are made without concurrent foreign proceedings, some other mechanism within Korean law will need to be invoked to achieve equality of payments among the creditors within the same class.

II. REASONS FOR THE DIVERGENCE IN IMPLEMENTATION STRATEGIES

A. Legal Origins

Scholars have long argued that convergence towards a set of international norms may be based on historical and other legacies. Pistor argues that the colonial legacies may produce convergence in the resolution of problems that are based around legal families such as common law or civil law.[149] Halliday and Carruthers argue that such convergence may then be reinforced by the US dominance of both the legal regulation and the rule of law discourse and narrative.[150] Scholars have pointed out that the Model Law is based on an American ideal of modified universalism.[151] The English common law reflected the principle of universality (at least insofar as regarding its own insolvency proceedings),[152] and it could be expected that the countries which follow the Anglo-American model (such as Singapore and Australia) will be more ready to adopt solutions provided by the Model Law.

The argument based on legal origins has some support in the literature. As mentioned in the Introduction above, Yamatomo argues that civil law countries find it difficult to adopt whole-sale provisions of the Model Law. He argues that evidence can be seen in the provisions on communication and cooperation, where civil law judges will have difficulty dealing with the discretion given to judges.[153] However, Anderson has argued that such an explanation is not

[148] See RIM, supra note 73, at 595-596.

[149] Katharina Pistor, The Standardisation of Law and Its Effect on Developing Economies, 50(1) AM. J. COMP. L. 97 (2001).

[150] TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS 10 (Stanford University Press, 2009).

[151] The earlier law contained in US Bankruptcy Code s 304 as originally enacted (allowing for foreign insolvency representative to file ancillary proceedings to seek assistance in the US). See 11 U.S.C § 304 (1978). The provision has since been repealed by Bankruptcy Abuse Prevention and Consumer Protection Act. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, sec. 102(g)(3), § 1325(a), 119 Stat. 23, 33 (codified as amended at 11 U.S.C. § 1325(a)(7)).

[152] See Cambridge Gas Transport v. Official Committee of Unsecured Creditors of Navigator Holdings, supra note 91, at paras. 16-17. Endorsements of universalism. See also Re HIH casualty and General Insurance; McMahon v. McGrath [2008] 1 WLR 852, 856-857.

[153] YAMAMOTO supra note 18, at 69. See also James Spigelman, Cross-Border Insolvency: Co-operation or Conflict?, 83(1) ALJ 44, 64 (2009) (pointing out that common law judges can rely on the inherent jurisdiction of the court in the way that civil law judges may not be able to do so). See generally Raj Bhala, International

convincing, considering the fact that other civil law countries have adopted these Model Law provisions without such qualification.[154] Further, more recent developments have shown that the civil law courts are taking more proactive steps in entering into judicial cooperation.[155]

At first sight, the theory based on legal origins appears to be attractive, but it does not provide a complete account of the divergence. There are a number of examples to demonstrate this point. For instance, common law countries, as highlighted in Section I, the public policy rider in Singapore is enacted differently from Australia and is now subject to different interpretations. In Singapore, the High Court has taken the view that the standard to invoke the public policy ground is lower.[156] The choices made by Korea and Japan in the examples discussed in Section I are not founded in civil law traditions. Three examples are highlighted. First, Korea and Japan did not adopt an automatic stay consequent upon the recognition of foreign insolvency proceedings. The reason is not the inability of civil law to produce the consequences of an automatic stay, but rather for reasons linked closely to the path dependence. The then existing Korean and Japanese law prior to the Model Law did not provide for such stays and neither did the reforms to their laws as a consequence of the Asian financial crisis (in the case of Japan) or the prolonged downturn of the economy (in the case of Japan).[157]

Second, Korea and Japan also give priority to local proceedings where there are concurrent foreign and recognition proceedings. Korea limits the ability of the insolvency representative to file the local proceedings before recognition; Japan stays the recognition of foreign proceedings to give priority to local proceedings unless certain exceptions apply.[158] Japan also requires separate court approval for the assets to be turned over to the insolvency representative.[159] There is no suggestion in the academic literature that Korea and Japan's failure to follow the framework of the Model Law was due to inherent difficulty based on the civil law traditions or any precedent.

Third, where Korean and Japanese law is silent, as it is on tax and social security claims and transaction avoidance claims, the legislation under the

Dimensions of Japanese Insolvency Law, MONETARY AND ECONOMIC STUDIES 131 (2001).

154 ANDERSON, supra note 77, at 13-14.

155 Supra Section I(B)(6).

156 See Re Zetta Jets Pte Ltd, supra note 74.

157 See Id.

158 See discussion in note 121 and accompanying next.

159 See note 80 and accompanying text.

respective jurisdiction chooses not to explicitly adopt the Model Law position.[160] This suggests that where Korea and Japan do not have an explicit solution in their domestic law, they prefer a wait and see approach, rather than to adopt the uniformity and harmonization of the Model Law.

B. Signalling Effect

We present an alternative theory. We argue that where States are considering shifting from a moderately territorialist approach towards cross-border insolvency to the modified universalism approach as envisaged by the Model Law, they are more likely to implement the Model Law in full. However, where States start from exclusively territorialist approaches towards embracing cross-border insolvency, they are likely to be more circumspect and require more exceptions or carve-outs from the Model Law to allow for room to avoid having to give full effect to the recognition of the foreign insolvency proceedings.

We draw a parallel example to deviations from international standards that are driven by multilateral organizations, despite states' ostensible adoption of these standards. Post-Asian financial crisis of 1997, based on the studies in Indonesia, Thailand, South Korea, and Malaysia, Andrew Walter has pointed out that there is substantial "mock" compliance with G7-led project on international financial regulation (relating to banking and securities regulation, corporate governance, disclosures and policy transparency). Such cosmetic or mock compliance arises from, among others, path dependence and the enduring concentration of family owned companies. These make compliance very costly for the private actors.[161]

In this regard, we turn to our case studies. Singapore and Australia, prior to the adoption of the Model Law, were moving towards a modified universalist approach towards cross-border insolvency. In Singapore, prior to the adoption of the Model Law in May 2017, there was no comprehensive legislation on dealing with cross-border insolvency. The Companies Act then provided for a 'ring fencing' rule. If a company registered in Singapore as a foreign company was the subject of a Singapore secondary liquidation, then assets collected in the course of the Singapore proceedings should be set aside for the payment of debts incurred in Singapore, before being remitted to the foreign liquidator in the foreign insolvency proceedings.[162] However, apart from the legislative

[160] Section I (B)(4).

[161] See generally WALTER, supra, n 28.

[162] Companies Act 2006, § 377(3)(c) (Sing.) (prior to the amendment in 2017); see Beluga Chatering GmbH (in liquidation) v. Beluga Projects (Singapore) Pte Ltd [2014] 2 SLR 815.

provisions which constrain the remission of assets of an insolvent foreign company, more recent case law has demonstrated the courts' willingness to provide other forms of assistance at common law in respect of foreign insolvency proceedings. In the unreported judgment of Aero Inventory (UK) Ltd, Re[163] cited in Beluga, the Singapore High Court recognized an administration order made by the English High Court and held that the administrators of an English company would have the same power over the company's property and assets in Singapore as they had under English law. A similar order was made recently in respect of the recognition of the administration order made against All Leisure Holidays.[164] Further examples are given by (then) Chief Justice Chan Sek Keong on the Singapore courts giving effect to modified universalism, in the form of recognition of foreign proceedings.[165] In Re Opti-Medix, the High Court expressed the view that:

> In cross-border insolvency, there has been a general movement away from the traditional, territorial focus on the interests of the local creditors, towards recognition that universal cooperation between jurisdictions is a necessary part of the contemporary world. Under a [u]niversalist approach, one court takes the lead while other courts assist in administering the liquidation. This is the most conductive to the orderly conduct of business and resolution of business failures across jurisdictions.[166]

In Australia, prior to the enactment of the Model Law, and apart from the common law, Australia had (and still has) the following provisions that are relevant to cross-border insolvency: Corporations Act 2001, sections 580-581 (the aid and auxiliary provisions), section 583 (the winding up of foreign companies provisions) and section 601CL (the ancillary liquidation provision).[167] These aid and auxiliary, and ancillary liquidation provisions, reflect a modified universalist approach towards cross-border insolvency, though the Model Law made further moves in that direction.[168] For example, in the aid and auxiliary provisions, a distinction is drawn between prescribed and

[163] See Beluga Chatering GmbH (in liquidation) v. Beluga Projects (Singapore) Pte Ltd [2014] 2 SLR 815, para. 88.

[164] ANDREW CHAN ET AL., Singapore, in CROSS BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 500 (Look Chan Ho ed., Globe Law and Business, 4th ed. 2017). Cf. Singapore Insolvency Law Review Committee arguing that there is some reported authority to show that recognition at common law is limited (2013 Report, p. 230).

[165] See generally Sek Keong Chan, Cross-Border Insolvency Issues Affecting Singapore, 23 SACLJ 413 (2011).

[166] [2016] 4 SLR 312, para. 17.

[167] McCormack and Hargovan, supra note 38.

[168] See Rosalind Mason, Implications of the UNCITRAL Model Law for Australian Cross-Border Insolvencies, 8(2) INT. INSOLV. REV 83, 107 (1999).

non-prescribed countries, with the former requiring that aid of auxiliary provisions to the foreign courts is mandatory, and in the latter, such aid is discretionary. Insofar as the ancillary liquidation provisions are concerned, section 601CL(14) contemplates a universalist approach towards cross-border insolvency in that the Australian court appoints an Australian liquidator of the foreign company on the application of the foreign liquidator. Section 601(15) requires the Australian liquidator to recover and realize the property of the foreign company in Australia, and to pay the net amount so recovered and realized to the foreign liquidator. Section 601(15) does not provide for ring fencing of the local assets, in the way that section 377(c) of the Singapore Companies Act previously required, and there is some ambiguity as to whether the court will order a full remission of the assets abroad pursuant to section 601(15) if the foreign scheme of distribution differs from the Australian scheme.[169]

Thus, in Singapore and Australia, albeit in different degrees, the courts have been receptive to more universalist principles in the management of international insolvencies, and are likely to be influenced by the criticisms of the territoriality principles.

However, Korea and Japan have started from the position of being exclusively territorialist in nature.[170] Both jurisdictions adopt the legislation based on the Model Law partly in response to domestic and international criticism on their treatment of cross-border insolvency post-crises. While both jurisdictions have adopted legislation based on the Model Law and allow for the recognition of foreign insolvency proceedings, pre-existing outcomes under existing legislation remains preserved in a number of ways. We argue that the recognition of foreign insolvency proceedings sends an important signal of adhering to global norms of modified universalism in the wake of the crises and yet simultaneously allows both jurisdictions to avoid having to commit to allowing full effects of recognition otherwise found in the Model Law. However, once we go deeper on the detailed impact of the adoption of the Model Law in different jurisdictions, we are see significant divergences.

The reasons are as follows. Korea's wide ranging bankruptcy reforms were brought closer to international standards, including having in place reorganisation proceedings, in the aftermath of the Asian financial crisis of 1997, due to pressure from the IMF and World Bank. However, as Korea adopted

169 See McCormack and Hargovan, supra note 38, at 401.

170 See supra Section I(A) above.

many of the bankruptcy reforms, it did not adopt several other reforms, such as an automatic stay on debt collection upon application for bankruptcy. This choice was heavily resisted. Thus, it was not surprising that Korea resisted having the automatic stay from the Model Law and has limited a number of consequences that will otherwise follow from the recognition. Thus, in Korea, the reforms on substantive bankruptcy law deal more with signalling as opposed to full functional reform; the same can be said for the Model Law.[171] However, judicial attitudes sometimes change, as evidenced in Korea's recent Memorandum of Understanding with foreign courts.

Likewise, in Japan, the Recognition Law gives effect to the recognition of foreign insolvency proceedings, but provides various ways for which the judiciary could avoid giving full effect to the consequences of the recognition.

The differences between Korea and Japan on one hand, and Australia and Singapore on the other hand, relating to the hotchpot rule or rule of payment in concurrent proceedings, also reflect the resistance of the civil law countries to being brought in line with the common law position. As discussed in Section I(B)(7), some of the differences are founded in regulatory philosophy. Both Korea and Japan recognize the payments made pursuant to the secured claims on the grounds of equality of treatment of creditors but such payments are typically excluded at common law. There are also differences in what kinds of payments are caught by the rule, such as payments outside the foreign insolvency proceedings (as is the case in Japan but not in Australia or Singapore). While the differences may not have been presented as significant impediments in practice, they nevertheless illustrate the limitations of securing harmonization.

Finally, there is a preference by Korea and Japan to remain silent and not explicitly deal with certain areas of law in their respective legislation where the legal provisions are unclear. Korea and Japan chose not to adopt the solutions in the Model Law, such as those relating to the possible application of foreign law on tax and social security claims,[172] and the application of foreign law on transaction avoidance.[173] This indicates that these countries prefer a wait and see approach.

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171 See also HALLIDAY and CARRUTHERS, at 238.

172 See notes 98-99above.

173 See note 104above.

CONCLUSION AND IMPLICATIONS FOR UNCITRAL

The drafters of the Model Law hoped that the Model Law would simplify and harmonize insolvency processes world-wide. However, the differences in the way that the Model Law has been implemented in domestic legislation and interpreted by local courts demonstrate persistent divergences, even though courts and practitioners broadly apply what appears to be general principles. These divergences have led UNCITRAL to formulate a recent supplemental Model Law addressing the recognition and enforcement of insolvency-related judgments.[174]

In certain cases, the differences are substantive in nature. Drawing from the implementation of the Model Law in Australia, Singapore, Japan, and Korea, the differences as to how public policy carve-outs from the operation of the Model Law (both at a general level and in respect to the discrete issues such as protection of local creditors and treatment of foreign creditors) are implemented and interpreted act as an impediment to reaching uniformity. The scope of the implementing laws on proceedings that are subject to the Model Law also differs, depending on the legislative tweaks impacting what are regarded as laws relating to insolvency/ collective proceedings. The effects of the recognition of foreign insolvency proceedings differs as well, with Japan and Korea departing from the basic Model Law norms.

In other cases, the Model Law is ambiguous on important terms, which is likely the result of compromise among the drafters. The kinds of relief available to foreign insolvency representatives and the potential application of foreign law in the recognising State, including the availability of transaction avoidance remedies, are left to be interpreted by the recognising courts. The variations oorm the implementation of the hotchpot rule in Japan and Korea may also result in uncertainty as to how these provisions will work in practice.

Yet, there are cases where the differences in the implementation in the Model Law may not have much substantive impact. Japan and Korea's more limited provisions on cooperation and court-to-court communication have not precluded such cooperation in practice. However, the question still remains as to why they have chosen not to adopt the strategies of adopting the Model Law in full, which would address the issue of certainty and predictability.

We argue that the differences result not only from the difference in legal

[174] See generally Adrian Walters, Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-border Insolvency Law, 93 AM. BANKR. L.J. 47 (2019).

origins of the States but also from the intentions of the States in signalling their intention of compliance. This may impact the practical realizability of the UNCITRAL's initiatives to facilitate cross-border insolvency of enterprise groups,[175] as well as the recent enhancement of recognition and enforcement of insolvency-related judgments. As globalisation becomes more pervasive and economically significant countries have groups of companies with 'member' companies incorporated in different jurisdictions, management of cross-border insolvency that benefits debtors, creditors and other stakeholders has become a priority. Thus, States have moved away from an exclusively territorialist approach and toward modified universalist and judicial approaches that also reflect such convergence.[176] While the Model Law represents a kind of modified universalism, participating countries which traditionally have adopted a more exclusively territorialist approach towards cross-border insolvency are more likely to require local carve-outs and modifications to be convinced that implementation of the Model Law will work in their best interest. Finally, we should also mention that there are larger political factors that may also influence States in the manner in which they adopt the Model Law. For example, even though the common law approach in Canada prior to the adoption of the Model Law has been one of modified universalism,[177] Canada chose to make significant changes in its implementation of the Model Law,[178] notably by allowing for recognition of a greater number of cases than the strict Model Law provisions.would permit.[179] Such cases are likely to emanate from the United States.[180]

[175]See UNCITRAL Model Law on Enterprise Group Insolvency available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlegi_-_advance_pre-published_version_-_e.pdf (date last visited, October 11, 2019

[176] E.g., Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Pl [2006] UKPC 26, [2007] 1 AC 508 (per Lord Hoffmann), above; see Chan (former Chief Justice of Singapore), supra, note 165. Cf. Rubin v. Eurofinance SA [2013] 1 AC 236, para. 129, where the court declined to uphold a new basis for recognition in relation to insolvency proceedings, preferring to rely instead on traditional bases for the recognition and enforcement of foreign judgment.

[177] See Janis Sarra, Northern Light*s, Canada's Version of the UNCITRAL Model Law on Cross*-border Insolvency, 16 INT. INSOLV. REV. 19 (2007).

[178] Statutes of Canada, C-47 (2015)

[179] The definition of foreign non-main proceedings in Chapter 47 differs from the Model Law such that the Canadian provisions define foreign non-main proceedings as a foreign proceeding other than a foreign main proceeding, which is much wider than the Model Law which requires the debtor company to have the establishment within the jurisdiction of the non-main proceedings.

[180] See NEIL HANNAN, CROSS-BORDER INSOLVENCY: THE ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW (Springer 2017) (pointing out the differences in the enactment of five common law countries: US, UK, Australia, New Zealand and Canada), at 17-18.