Foreign Law and Public Policy in the UNCITRAL Model Law on Cross-Border Insolvency: A Transatlantic Perspective

Gerard McCormack*

Introduction

1 The UNCITRAL Model Law on Cross Border Insolvency (“Model Law”) aims to achieve greater efficiencies in the administration of international insolvency cases. The Model Law has attained a measure of international acceptance with the United States and United Kingdom among the implementing States as well as Canada and Australia.1 In the United States, the Model Law has taken the form of a new Chapter 15 of the United States Bankruptcy Code. According to a congressional report, Chapter 15:

“largely tracks the language of the Model Law with appropriate United States references.”

2 The legislative history emphasises the international origins of the Model Law and the need for a consistent interpretation with that in other countries. But the legislative record also indicates significant rewriting to “comport with United States procedural terminology” and the expression of concepts “more clearly in United States vernacular”.2 There are also some substantive variations. For instance, while Article 7 of the Model Law provides that nothing in this law limits the power of a court to provide additional assistance to a foreign representative

---

*Gerard McCormack is Professor at the Leeds Law School, Leeds, United Kingdom.

1 But a somewhat different view, see S. Chandra Mohan, “Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?” (2012) 21 International Insolvency Review 199, who suggests that the belief that the adoption by the United States and the United Kingdom “might encourage adoption by a wider circle of countries” has simply not materialised. For the current list of adoptions see the UNCITRAL website: <www.uncitral.org/>.


3 Idem.
under other laws of the enacting State, the United States provision is subtly different. Section 1507 limits the grant of additional relief to situations where recognition has already been granted. It does not allow relief where the grounds for relief under Chapter 15 have not been met. In the *Bear Stearns* case, it was held that there is no residual common law discretion and that Chapter 15 is the sole gateway for a United States court to provide assistance to a foreign court.

This article will address how United States interpretations of the Model Law provisions differ from those in the United Kingdom where the Model Law has been implemented through the Cross Border Insolvency Regulations 2006 (“CBIR”). It will focus on the availability of relief consequent on recognition under Chapter 15 and, in particular, whether the application of foreign insolvency law is permitted. It will also consider the public policy qualification in the Model Law on recognition and relief. But first, it is appropriate to consider the philosophy of the Model Law and its relationship to provisions of national law.

**The Model Law Philosophy and its Relationship to National Law Provisions**

4 The underlying philosophy of the Model Law was expounded by the United States court in *ABC Learning Centres Ltd.* It said:

“The Model Law reflects a universalism approach to transnational insolvency. It treats the multinational bankruptcy as a single process in the foreign main proceeding, with other courts assisting in that single proceeding. In contrast, under a territorialism approach a debtor must initiate insolvency actions in each country where its property is found. This approach is the so-called ‘grab’ rule where each country seizes assets and distributes them according to each country’s insolvency proceedings.”

5 The court suggested that Chapter 15 also embraced the universalism approach with the ancillary nature of Chapter 15 proceedings emphasising the United States policy of acting in:

---


5 Chapter 15 has been described as consisting of as “a series of carefully crafted compromises” and recognising a residual common law discretion would undermine these compromises and run counter to the spirit of the legislation – see Judge L. Clark, “Centre of Main Interests” Finally Becomes the Center of Main Interest in the Case Law” (2008) 43 *Texas International Law Journal Forum* 14, at 17.

6 SI 2006/1030. Regulation 2 provides that “(1) The UNCITRAL Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to these Regulations (which contains the UNCITRAL Model Law with certain modifications to adapt it for application in Great Britain).”

“aid of the main proceedings, in preference to a system of full bankruptcies… in each state where assets are found.”

6 A Chapter 15 court in the United States was said to act as an adjunct or arm of a foreign bankruptcy court where the main proceedings were conducted - in other words, an ancillary proceeding in the United States providing support to the foreign insolvency administrator:

“The goal is to direct creditors and assets to the foreign main proceeding for orderly and fair distribution of assets, avoiding the seizure of assets by creditors operating outside the jurisdiction of the foreign main proceeding.”

7 The ABC Learning analysis has also been adopted by courts in other countries including the United Kingdom and Australia though the Australian Federal Court in Akers v Deputy Commissioner of Taxation tempered the high flown rhetoric in ABC Learning in at least two respects. First, it suggested that the universalism of the Model Law was qualified and also that this description could only be accepted “for what it is worth”. Secondly, it suggested that “local” law may have to be applied in respect of the distribution of assets collected locally rather than the law of the main insolvency proceedings. Allsop CJ said that:

“the sacrifice of the rights… of local creditors upon an altar of universalism may be to take the general informing notion of universalism too far.”

**Relief Consequent on the Recognition of Foreign Insolvency Proceedings including Use of Foreign Law**

8 Under Article 20 of the Model Law, recognition of foreign main insolvency proceedings has three automatic consequences. Firstly, upon recognition there is an automatic stay on individual proceedings against the debtor or its assets. Secondly, there is a stay on executions against the debtor’s assets and thirdly, the right to

---

8 HR Rep No 109–31, at paragraph 108.
10 [2014] FCAFC 57, at paragraph 111.
11 Ibid., at paragraph 120.
12 For a discussion of why “developed States” may prefer “universalist” insolvency norms, see Lord Hoffmann in Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc) [2007] 1 AC 508 and, for some reasons why developing countries might want to ring-fence assets for the benefit of local creditors, see the paper by the former Singapore Chief Justice S-K. Chan, “Cross-Border Insolvency Issues affecting Singapore” (2011) 23 Singapore Academy of Law Journal 413, at 419 and see also Franken, above note 7.
13 [2014] FCAFC 57, at paragraph 118. See also the paper by Judge A. Gropper, “The Payment of Priority Claims in Cross-Border Insolvency Cases” (2011) 46 Texas International Law Journal 559, at 564, which notes that there have been very few reported cases where of assets being handed over to a foreign insolvency representative where there are potential disadvantage to United States creditors. He is critical of the argument that under Chapter 15 permits the remission of assets to a foreign representative over the objection of, and in derogation of the rights of, United States priority creditors.
transfer, encumber or otherwise dispose of any assets of the debtor is suspended. The stay and suspension is however, expressly stated to be subject to whatever limitations that form part of domestic insolvency law. Article 20 is supplemented by Article 21 which applies irrespective of whether the foreign proceedings are “main” or “non-main”. It allows appropriate relief to be given as a matter of discretion and this “appropriate” relief can take the form, inter alia, of:

1. providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;
2. entrusting the administration or realisation of all or part of the debtor’s assets to the foreign representative or another person designated by the court;
3. extending interim relief;
4. granting any further relief that might be available to an insolvency office holder in domestic proceedings.

9 Article 22 of the Model Law provides that in granting or denying relief under Article 21, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. In permitting the grant of relief consequent on the recognition of foreign insolvency proceedings, the Model Law does not expressly permit the application of foreign insolvency law. The issue was hotly debated in the negotiations that led up to the enactment of the Model Law but ultimately the provision authorising the application of foreign law disappeared from the text that was finally enacted. Nevertheless, under Article 21, a recognising court is authorised to grant various reliefs on a discretionary basis and the fact that various reliefs are specified does not detract from the general discretion.

10 The United States made legislative adjustments in transforming the Model Law provisions into those of Chapter 15. Chapter 1521(a)(7) limits the effect of Article 21 by expressly stipulating that the additional relief does not include relief available under the transactional avoidance provisions of the United States Bankruptcy Code. These include the power to avoid transactions as preferences under section 547 and the power to avoid “fraudulent” transfers, including “undervalue” transfers, under section 548. Article 23 of the Model Law gives a foreign representative the power, on conditions similar to domestic insolvency office holders, to initiate proceedings for the avoidance of actions, or transactions, detrimental to creditors. In Chapter 15, Article 23 has been altered somewhat, with section 1523 stating that a foreign representative only has the standing to invoke the United States avoidance provisions where full, plenary bankruptcy proceedings have been commenced under Chapters 7 or 11 of the Bankruptcy Code.

14 See the discussion by Morgan J in Re Pan Ocean Co Ltd [2014] EWHC 2124 (Ch), at paragraphs 81-87 and see his conclusion at paragraph 87: “My reaction to the discussions of the working group is that it seems improbable that the working group, having deleted (from what is now article 21(1)(g)) a power for the recognising court to apply the law of the foreign proceeding, intended to bring back in such a power under the general wording which refers to ‘any appropriate relief’.”

15 See section 548(a)(1(b), Bankruptcy Code.
According to the congressional report on Chapter 15, this limitation reflects concerns raised by the United States delegation during the UNCITRAL debates that the simple conferral of standing to initiate actions neglects to address very difficult choice of law and forum issues. In other words, foreign insolvency representatives might “forum shop” avoidance actions to the United States. It is the case, however, that full bankruptcy proceedings under Chapters 7 or 11 are likely to be significantly more expensive than Chapter 15 proceedings and certain foreign debtors, including foreign-incorporated insurance companies, are specifically precluded from using Chapters 7 and 11.

The prohibition on the use of Chapters 7 and 11 was largely the reason why in Re Condor Insurance Ltd, a foreign representative sought to use foreign fraudulent transfer law to invalidate a large transfer by the company to a United States affiliate. The company was in liquidation in its “home” jurisdiction of Nevis. The United States Fifth Circuit Court of Appeals recognised the Nevis liquidation as “foreign main proceedings” under Chapter 15 and held that the foreign liquidator could then use Nevis law to avoid the transfer in the context of the Chapter 15 proceedings. The court took the view that Chapter 15 permitted the application of foreign insolvency law; referring to the fact that debtors might otherwise be tempted to hide assets in the United States out of the reach of the foreign jurisdiction.

The court adverted to the cost and inconvenience of full United States bankruptcy proceedings which, in any event, were statutorily prohibited in this case. It observed that the United States Congress had not explicitly barred all avoidance actions from whatever source – an easy step to take had it wished to do so. The court also referred to the:

“helpful marriage of avoidance and distribution whether the proceeding is ancillary applying foreign law or a full proceeding applying domestic law—a marriage that avoids the more difficult... rules of conflict law presented by avoidance and distribution decisions governed by different sources of law.”

It suggested that this solution met the concern that foreign representatives might bring an ancillary action simply to gain access to avoidance powers not provided by the relevant foreign law. This interpretation of Chapter 15 was said to be consistent

---

16 HR Rep 109–31, at paragraph 152.
17 For a recent example of such an attempt, see Re Hellas Telecommunications (Luxembourg) 11 SCA: Hosking v TPG United States Bankruptcy Court SDNY 29 January 2015 (Judge Martin Glenn).
18 Section 109(3), Bankruptcy Code.
20 Ibid., at 325–327.
21 Ibid., at 327.
with judicial interpretation of the predecessor provision – section 304 of the Bankruptcy Code.22

15 The decision is a bold one for at least four reasons. Firstly, the court’s view on the proper interpretation of the earlier provision in the Bankruptcy Code – section 304 – is by no means an uncontroversial one. Apart from Re Metzeler,23 there are decisions on section 304 that permit a degree of “mix and match”; allowing a foreign representative to use avoidance powers under both United States and foreign law in section 304 ancillary proceedings.24 Secondly, the detailed investigation of the legislative history of the Model Law carried out by the English court in Re Pan Ocean Co Ltd,25 this suggests that the examination and conclusions on this history by the court in Condor are questionable at best. Thirdly, one might argue from the United States Bankruptcy Code as a whole that foreign avoidance laws may be relevant, but only in a Chapter 7 or 11 bankruptcy. The Maxwell case26 shows that while foreign law may not be used as the basis for avoidance actions in Chapters 7 or 11, nevertheless foreign law might be used as a defence if the transaction sought to be impeached was connected strongly with a foreign country i.e. the centre of gravity of the relevant transaction was “foreign”. Fourthly, the Condor decision effectively permits foreign representatives to “Chapter shop”. The foreign representative would seek to bring Chapter 15 ancillary proceeding when seeking exclusively to use foreign law, and Chapter 7 or 11 proceedings when using United States domestic avoidance law.

16 The Condor decision brings benefits to foreign representatives by enhancing possible asset recoveries. Nevertheless, the decision does not sit very well with the structure of Chapter 15 which seems designed to keep a tight grip on avoidance actions by foreign representatives through confining use of United States avoidance law to fully blown United States bankruptcy proceedings. Nor does Condor discuss the possibility of using United States law as a “shield” when a transaction is challenged under foreign avoidance law pursuant to Chapter 15. If the transaction out of which a disputed transfer arises was governed by United States law, and United States law does not allow the transfer to be set aside, it is very questionable whether a United States court would allow the settled expectations of the parties to be disturbed on the basis of foreign law.27

---

22 Ibid., at 329.
23 (1987) 78 BR 674.
25 [2014] EWHC 2124 (Ch), at paragraph 106.
27 See Re Hellas Telecommunications (Luxembourg) 11 SCA: Hosking v TPG United States Bankruptcy Court SDNY 29 January 2015 (Judge Martin Glenn) which involves the almost converse situation where a foreign insolvency representative sought to avoid transactions on the basis of New York Debtor and Creditor Law but the court rejected the attempt on the basis, inter alia, that the relevant transactions were more closely related to foreign law (which did not allow avoidance in the particular case).
17 In the United Kingdom, the courts have taken a different view from the United States courts and held that the Model Law provisions do not authorise the application of foreign insolvency law. In Re Pan Ocean Co Ltd, the court recognised that the words “appropriate relief” in Article 21 had a wide literal meaning but the very width of their literal meaning led to the conclusion that a broad interpretation was inappropriate. The court considered the preliminary materials leading to the elaboration of the Model Law and it appeared from these documents that a recognising court should not be allowed to grant relief that it could not grant in a domestic insolvency.

18 The court in Re Pan Ocean Co Ltd also said its conclusions on Article 21 were supported by the decision of the United Kingdom Supreme Court in Rubin v Eurofinance SA that the only relief available was of a procedural nature. In Pan Ocean, the relief requested went well beyond matters of procedure and affected the substance of the rights and obligations of parties under a contract. The case concerned a contract of carriage which a Brazilian company had entered into with a Korean shipper. The contract was governed by English law and contained a clause allowing the Brazilian party to terminate the contract in certain events, including if the shipper entered insolvency proceedings. The shipper entered insolvency proceedings in Korea and the Brazilian party wished to activate the termination provision. The shipper’s insolvency representative, on the other hand, sought to keep the contract alive because it was quite profitable for the shipper. It appeared that under Korean insolvency law, unlike United Kingdom insolvency law, termination clauses of this type could be overridden. Morgan J concluded that even if he had the power to do so, it would not be appropriate in this particular case to give effect to the provisions of Korean insolvency law. The parties had deliberately chosen English law as the law of the contract and they would be surprised if an English court applied Korean insolvency law to their substantive rights under a contract which they had agreed should be governed by English law.

19 In this respect, one may conclude that the United States courts have been more “internationalist” in their interpretation of Chapter 15 than their United Kingdom counterparts but their interpretation can be explained on the basis of the particular legislative context in the United States; namely, the fact that United States transactional avoidance law has been shut off to foreign insolvency representatives by section 1523. In the United Kingdom, on the other hand, the foreign representative is empowered, on the same basis as domestic insolvency office

28 [2014] EWHC 2124 (Ch). For criticism of the decision see the article by the unsuccessful counsel M. Phillips QC, “International Insolvency at a Crossroads…” South Square Digest (November 2014), at 6.

29 Ibid., at paragraphs 81-87.

30 [2013] 1 AC 236, at paragraph 143.

31 [2014] EWHC 2124 (Ch), at paragraph 112. There is the generally accepted principle of English law expressed in Wight v Eckhardt Marine GmbH [2003] UKPC 37; [2004] 1 AC 147, at paragraph 11 that the discharge of a contract is governed by its proper law.
holders, to institute proceedings for the avoidance of actions that are detrimental to creditors.\textsuperscript{32} This power kicks in once the foreign proceedings have been recognised.

**Public Policy**

20 The Model Law in Article 6 contains a public policy exception stating that nothing in the Law prevents the court from refusing to take an action that would be manifestly contrary to the public policy of the enacting State. Section 1506 of the United States Bankruptcy code reproduces this provision more or less exactly. The exception provides States with potentially a lot of leeway to avoid recognising foreign insolvency proceedings for, as UNCITRAL itself has recognised:

“the notion of public policy is based on national law and accordingly may differ from State to State.”\textsuperscript{33}

21 Moreover, in some States the notion of “public policy” is given a broad interpretation and can relate to any mandatory rules of national law. But in other States, the notion may be restricted to fundamental legal principles such as constitutional guarantees and recognition would only be refused on public policy grounds where there is an infringement of those fundamental principles.

22 The scope for divergence between States in the application of the public policy criterion is compounded in the insolvency field. Bankruptcy policies and procedures differ substantially between States and Lord Millett has gone so far as to say that no branch of the law:

“is moulded more by considerations of national economic policy and commercial philosophy.”\textsuperscript{34}

23 Countries may differ on the parties that may be subject to bankruptcy proceedings; the scope of such proceedings; the procedures employed in adjudicating claims that arise in the course of such proceedings and the effect of any discharge of debts. On one view, these are simple matters of civil procedure that may be the subject of legitimate disagreement between and within States. On another view, they implicate fundamental matters of constitutional policy enshrining basic values of the particular legal system.\textsuperscript{35}

\textsuperscript{32} Schedule 1, Article 23(1), CBIR, which sets out the list of avoidance actions to which the provision is intended to apply.


24 The differing national views on the permissibility of intercepting a bankrupt’s emails came to the fore in *Re Toft*, where a debtor was the subject of insolvency proceedings in Germany and the German courts authorised mail interception. The insolvency representative had initiated Chapter 15 proceedings for the purpose of gaining access to the debtor’s email accounts stored on the servers of two internet service providers in the United States. Earlier the English court had recognised and given effect to the German order holding that it was in the public interest and necessary in a democratic society to intercept the bankrupt’s communications. The order was said not to be in conflict with public policy because otherwise bankrupts might be able to evade bankruptcy trustees and avoid paying their creditors. The United States Bankruptcy Court however, took the view that recognising the German order would be manifestly contrary to United States public policy since it would infringe United States constitutional safeguards that protected the safety of electronic communications.

25 The United States courts have said however, including in *Re Toft*, that a restrictive view should be taken of the public policy exception. The use of the word “manifestly” limited it to exceptional circumstances implicating the most fundamental policies of the United States. These judicial statements have also been carried though in practice. For example, in *Re ABC Learning Centres*, it was held that Australian proceedings were not manifestly contrary to United States public policy and could be recognised under Chapter 15 even if they allowed creditors with security over all the debtor’s assets to retain these assets rather than providing for the administration of all creditor claims and distributions generally.

26 It is worth pointing out however, that most of the applications for Chapter 15 recognition have come from common law jurisdictions where procedures are broadly analogous to those in the United States. There is a long standing principle, predating the Model Law, that United States courts should be favourably disposed towards recognition and relief applications from such countries. For example, in *Hilton v Guyot*, the Supreme Court held that if the foreign forum provides:

> “a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting.”

---

38 See also the Congressional Report on HR Rep No 109–31, at paragraph 109.
40 (1895) 159 United States 113, at 202–03.
the judgment should be enforced and the matter not tried all over again.

27 This point was reiterated and reinforced in *Re Board of Directors of Hopewell International*, where the court said that if the foreign proceedings are in:

> “a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings.”

28 The United States and Canada share the same common law traditions and fundamental legal principles affording creditors a full and fair opportunity to be heard. Consequently, United States courts have repeatedly granted comity to Canadian proceedings even though bankruptcy law and procedure is not exactly on all fours in the United States and Canada. A case in point is *Re Ephedra*, where the United States courts recognised and enforced in the United States a claims resolution procedure ordered by a Canada court even though the procedure made no provision for jury trial which would have been the norm had the matter been the subject of plenary proceedings in the United States.

29 One of the areas for potential disagreement between the United States and Canada concerns bankruptcy orders that permit third parties to be relieved from liability for certain actions. A United States court remarked in *Re Metromedia* that:

> “[a] nondebtor release is a device that lends itself to abuse. By it, a non-debtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity.”

30 Canadian courts appear to grant such releases on a more liberal basis than United States courts but nevertheless, United States courts have recognised Canadian proceedings with non-debtor releases. Cases in point include *Re Sino-Forest Corp* and *Metcalfe*, where the United States Bankruptcy Court held that third-party releases, approved as an integral part of Canadian insolvency proceedings, could be enforced in the United States under Chapter 15, even though similar releases may not have been approved as part of a United States Chapter 11 restructuring plan. In *Metcalfe*, the court also pointed out that the Canadian plan had received near-unanimous creditor support despite the inclusion of the non-debtor releases.

---

31 These decisions are to be contrasted with that in *Vitro*,\(^{46}\) where the relief requested under chapter 15 was refused; namely, a permanent injunction restraining actions by creditors against third parties in respect of the corporate debt. There are some similarities between the cases. All three, at least partially, involved non-debtor releases that, as a matter of substantive United States law, were not likely to have been approved in Chapter 11. There are also some superficial differences between the cases; not least the fact that *Sino-Forest* and *Metcalfe* originated from Canada whereas *Vitro* was a Mexican case. But what seems to have decisive against recognition in *Vitro* was the fact that the Mexican restructuring plan only received creditor approval on the basis of votes from “insider” creditors. If “outside” creditors were considered in isolation, then the plan did not meet with creditor approval.

32 In addressing relief under Chapter 15, the 5\(^{th}\) Circuit Court of Appeals\(^ {47}\) in *Vitro* suggested that, first of all, the court should ask whether the relief requested is specifically enumerated in section 1521; secondly, if not, it should then consider whether it falls more generally under the grant of any appropriate relief in section 1521 and thirdly, it should move on to consider whether the relief would be appropriate as “additional assistance” under section 1507.\(^ {48}\) In this particular case, the court concluded that section 1507 theoretically provided for the relief sought because the section was intended to provide relief that was not otherwise available under United States law. Nevertheless, the relief would not be appropriate in this particular case because *Vitro* had failed to demonstrate “extraordinary circumstances”.

33 The court was able to avoid ruling on the question whether the Mexican restructuring would be manifestly contrary to a fundamental public policy of the United States and so justify the denial of relief under section 1506. At first instance, the bankruptcy court had invoked public policy to justify the denial of relief but the Court of Appeals said that the exception should be read narrowly and used only in exceptional circumstances concerning matters of fundamental importance for the United States.\(^ {49}\) In particular, it cautioned against engaging in:

“[an] independent determination about the propriety of individual acts of a foreign court.”\(^ {50}\)

34 Perhaps the most controversial consideration of the public policy exception in the United States came in *Re Qimonda*. But again the Court of Appeals,\(^ {51}\) unlike the

\(^{46}\) *In re Vitro SAB de CV* (2012) 701 F 3d 1031. For another case in a somewhat different context involving the denial of comity to Mexican proceedings see *Milbank v Phillips Lighting* (2014) 521 BR 189.

\(^{47}\) (2012) 701 F 3d 1031, at 1054.

\(^{48}\) But see *Re Atlas Shipping A/S* (2009) 404 BR 726, where it was said that the jurisdiction to grant appropriate relief was “exceedingly broad”.

\(^{49}\) Reference was made to *In re Ran* (2010) 607 F 3d 1017, at 1021.

\(^{50}\) Citing *Metcalfe* 421 BR 685, at 697.
Bankruptcy Court, was able to resolve against the particular relief requested by the insolvency representative without having to invoke public policy as the basis of the decision.

35 *Qimonda* concerned a German company that produced computer chips and which held thousands of patents, including United States patents. It entered into various joint venture and patent cross-licensing agreements with United States entities. The company entered insolvency proceedings in Germany and, under German insolvency law, it could opt not to perform the licensing agreements resulting in termination of the licensee’s rights to use the company’s patents. The position was different under the United States Bankruptcy Code where the licensee retained its rights under the contract if it continued to make royalty payments.

36 In Chapter 15 proceedings, the United States Bankruptcy Court refused to allow the provisions of German insolvency law to take precedence. In considering public policy, the court invoked three considerations. Firstly, the mere fact of conflict between foreign law and United States law was not enough. Secondly, there should be no deference to foreign proceedings where the procedural fairness of these proceedings was doubtful and could not be cured by the adoption of additional protections. Thirdly, recourse to the public policy exception was also appropriate to prevent actions that would impinge severely on a United States constitutional or statutory right.

37 In this case, the procedural fairness of the German proceedings or its insolvency laws were not in question. Germany was reckoned to have a mature and well-developed system of insolvency law with goals congruent to those of United States bankruptcy law, including maximizing returns to creditors and treating equally-situated creditors equally. In addition, aggrieved parties had ready access to a functioning and fair court system to challenge these decisions. The United States bankruptcy court suggested however, that the approach of deferring to German law, to the extent that this permitted the cancellation of the United States patent licenses, would be manifestly contrary to United States public policy. The court considered that terminating the licenses would enhance the value to the debtor’s estate but that this legitimate interest was outweighed by the risk to the licensees who had invested substantially in research and manufacturing facilities relying on the design freedom provided by the licensing agreements. The court was concerned that terminating the licenses would create uncertainty leading to a slower pace of innovation and detriment to the United States economy.

---

52 (2011) 462 BR 165.
53 Section 365(n), Bankruptcy Code.
54 (2011) 462 BR 165, at 182.
55 Ibid., at 185.
38 It might be argued however, that the balance between debtor and creditor interests and also between protecting existing employment as distinct from facilitating the creation of new employment are areas where national governments and national insolvency laws may justifiably take different views. The particular protections afforded by United States bankruptcy law are not mirrored around the globe and many countries might find the debtor in possession norm reflected in the United States Chapter 11 to be somewhat quixotic. The bankruptcy court in Qimonda conceded that the balancing of debtor and creditor interests was close and, in these circumstances, it hardly seems appropriate to wave the big stick of public policy and refuse the application of German insolvency law. After all, it specifically mentioned that mere differences in laws between countries were not enough to warrant reliance on public policy. Fortunately, the Court of Appeals was able to decide the case without reference to public policy.

39 Essentially the reliefs requested by the German insolvency representative was an order entrusting him with the administration or realization of all or part of the assets of Qimonda within the territorial jurisdiction of the United States and specifically identifying the company’s United States patents among these assets. Section 1521(b) states that the debtor’s assets located in the United States can only be handed over to a foreign representative but only where the court is satisfied that the interests of creditors in the United States are sufficiently protected. The Court of Appeals said that the bankruptcy court had a broad latitude to mould relief to the circumstances and the insertion of a proviso safeguarding the rights of patent licensees under United States law was considered to be a justified exercise of the power to ensure protection of United States creditors.

40 If the facts of Vitro or Qimonda were to occur in an English context, it is submitted that the English court would come to a broadly similar conclusion, perhaps through recourse to the “adequate protection for local creditors” qualification on relief under the Model Law and the Cross-Border Insolvency Regulations. In Qimonda, if assets in the United Kingdom were handed over to a foreign representative with creditors shorn of their rights under United Kingdom law, it can hardly be said that creditors in the United Kingdom are adequately protected.56

41 The fact situation in Vitro is perhaps more interesting from an English perspective. On the one hand, creditors in the United Kingdom could be said to be prejudicially affected if they were preventing from suing third parties who had guaranteed discharge of the debtor’s obligations to the creditors. This state of affairs therefore justifies a straightforward application of Article 22 of the Model Law and refusing the relief sought by the foreign representative. On the other hand, “non-debtor” discharges seem to have become an established feature of United

56 It should be noted however that there are no specifically tailored provisions protecting IP licensees under United Kingdom insolvency law.
Kingdom restructuring law particularly in the context of schemes of arrangement under the Companies Act 2006. If English courts have jurisdiction to approve “non-debtor” discharges in a domestic insolvency, it might be argued that they have a similar jurisdiction when sanctioning the grant of appropriate discretionary relief to a foreign representative under Article 21 of the Model Law. After all, it is said that discretionary relief encompasses the kind of things a court might do in a domestic insolvency.57

42 The leading case on non-debtor releases under United Kingdom restructuring law is Re T & N Ltd (No 3).58 It was held that there was nothing to prevent the company from proposing that, in consideration of what it provides under the scheme, the creditors will discharge not only the debts and liabilities of the company, but also the liabilities of guarantors for these same debts. Something of a cautionary note however, was introduced by the Court of Appeal in Re Lehman Brothers International (Europe),59 where Patten LJ suggested that the release of third party claims should be “merely ancillary” to the arrangement between the company and its own creditors.60

An English court would no doubt be mindful of the fact that statutory procedures and insolvency/restructuring law differs substantially between countries. Nevertheless, if the non-debtor release contained atypical features and/or the requirements for getting the release approved lacked procedural rigour, then it is submitted the court would deny any relief under Article 21 that allowed the release to take effect in England. Article 21 relief is discretionary and needs to be appropriate, and the courts would be wary of measures such as a permanent injunction staying actions against third parties in respect of the debt.61 So in conclusion, English courts might come to similar conclusions as the United States Bankruptcy Courts in Vitro and Qimonda but analogous, to the United States

---

57 See Re Pan Ocean Co Ltd [2014] EWHC 2124 (Ch), at paragraphs 90-92 and Rubin v Eurofinance SA [2013] 1 AC 236, at paragraph 28 (per Lord Collins). It should be noted however, that in the absence of statutory authority, the United Kingdom courts cannot permit a foreign liquidator to do the same kind of things that might be done in a domestic insolvency, see Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36.
58 [2006] EWHC 1447 (Ch); [2007] 1 All ER 851.
60 Ibid., at paragraph 63. Lord Neuberger MR implied that creditors’ rights against the third parties should be closely connected with their rights as creditors against the company and he also said that the decision in T & N Ltd (No 3) was near the outer limits of the court’s jurisdiction to sanction schemes of arrangement.
61 See also the generally accepted principle of English law articulated in Wight v Eckhardt Marine GmbH [2003] UKPC 37; [2004] 1 AC 147, at paragraph 11 that the discharge of a contract is governed by its proper law i.e. a discharge from any debt or liability under a foreign insolvency law is recognised as a discharge from the debt or liability in England if, and only if, it is a discharge under the law that applies to the contract. This principle was held in the case of PT Bakrie [2011] EWHC 256 (Comm); [2011] 1 WLR 2038 to have survived the Model Law and the CBIR.
Circuit Court of Appeals, are likely to eschew reliance on the public policy qualification on recognition and relief under the Model Law.

**Conclusion**

44 At the outset, this paper asked whether United States interpretations of the Model Law provisions differ from those in the United Kingdom. There have seem some significant differences but these stem essentially from the local legislative adjustments made in the two countries and the fundamental distinction under the Model Law between recognition and relief. Foreign insolvency proceedings may be recognized but this begs the question of what relief may be granted consequent on recognition including whether the application of foreign insolvency law is permitted. The United States courts have sanctioned the application of foreign transactional avoidance law but this result owes in large part to the way in which the relevant provisions in the Model Law have been restricted in a United States context. A United Kingdom court, on the other hand, has refused to apply foreign insolvency law as part of the relief granted following the recognition of foreign insolvency law proceedings. The court pointed out that there was no express authorization to apply foreign law in either the Model Law or the Cross Border Insolvency Regulations. This legislative silence was significant for there was a statutory precedent for the application of foreign insolvency law under section 426 Insolvency Act 1986.

45 Another point of difference arises from the fact that United States courts at first instance appear to have been more willing to apply the “public policy” qualification on recognition of foreign proceedings. This willingness however, has been tempered on appeal. Therefore, one reaches pretty much the same result as in the United Kingdom that the “public policy” criterion should only be resorted to in very exceptional circumstances.
[this page is intentionally left blank]