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

Wai Yee Wan*
Gerard McCormack**

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 point to two reasons for why there is a lack of complete harmonization. First, states have not fully implemented the Model Law in their domestic law. Second, states’ judiciaries have not consistently interpreted their legislation enacting the Model Law. 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 forward as a reason for the divergence; as these two jurisdictions are not based

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on common law, they require greater local modification to assure the Model Law will fit into their legal systems. However, we argue legal origins are insufficient 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 fully implement the Model Law. Where States start from an exclusively territorialist approach (such as in 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 implementation of Model Law. However, in Korea, 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 the context of “soft law,” we should take into account the importance of the signaling effect and path dependency of 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 complexities in resolving cross-border insolvencies, in 1997, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (Model Law)¹ was conceived. The Model Law aims to grant foreign courts relief by providing an adoptable, consistent framework for countries to obtain recognition of foreign insolvency proceedings.² The Model Law promotes cooperation between courts by giving foreign creditors or foreign representatives access to local courts in states where the debtor's assets are located.³ 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.⁴ The Model Law has achieved moderate success internationally, with major common law jurisdictions including the United Kingdom (UK),⁵ the United States (US),⁶ Australia,⁷ and more recently Singapore,⁸ having changed their domestic laws on cross-border insolvency cooperation based on the Model

¹ See generally G.A. Res. A/RES/52/158, Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (Jan. 30, 1999 [Hereinafter "Model Law"]).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Cross-Border Insolvency Regulations 2006, SI 2006/1030 (UK), <http://www.legislation.gov.uk/uksi/2006/1030/contents/made>; Insolvency Act 2000 c. 39, § 14 (UK), http://www.legislation.gov.uk/ukpga/2000/39/pdfs/ukpga_20000039_en.pdf.

⁶ 11 U.S.C. §§1501–1532 (2019).

⁷ *Cross-Border Insolvency Act 2008* sched. 6 (Austl.) (stating that section 6 that the Model Law, subject to some modifications, has the force of law in Australia).

⁸ Companies Act, ch. 50, sched. 10 (2006) (Sing.) [hereinafter "Companies Act 2006"]. 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 L. REV. COMMITTEE, REP. OF THE INSOLVENCY L. REV. COMMITTEE: FINAL REP. (2013), <https://app.mlaw.gov.sg/files/news/announcements/2013/10/ReportoftheInsolvencyLawReviewCommittee.pdf> [hereinafter "2013 Report"]; COMMITTEE TO STRENGTHEN SINGAPORE AS AN INT'L CTR. FOR DEBT RESTRUCTURING: REP. OF THE COMMITTEE (2016), <https://app.mlaw.gov.sg/files/news/public-consultations/2016/04/Final%20DR%20Report.pdf>.

Law provisions.⁹ Japan¹⁰ and Korea¹¹ have also enacted legislation 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.¹² 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,"¹³ thereby reducing transaction costs. However, despite the ostensible adoption of the Model Law among the participating states, the academic literature has documented several reasons for why there lacks complete harmonization of insolvency assistance and enhanced cooperation.¹⁴ First, since 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) recommends there be as few deviations as possible.¹⁵ Second, despite the existence of the Guide, the courts in the adopting states have

⁹ As of July 2018, forty-four states have adopted the Model Law. UNCITRAL, OVERVIEW OF THE STATUS OF THE UNCITRAL CONVENTIONS AND MODEL LAWS (2019), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/overview-status-table_2.pdf.

¹⁰ Law on Recognition of and Assistance in Foreign Insolvency Proceedings, Law No 129 of 2000, 31(2) (Japan), translated in Junichi Matsushita & Stacy Steele, *Law Relating to Recognition and Assistance for Foreign Insolvency Proceedings*, (Law No. 129 of 2000) (Jan. 12, 2005), https://www.iiiglobal.org/sites/default/files/12-Japanese_insolvency_law_129_of_2000.pdf [Hereinafter "Recognition Law"].

¹¹ Debtor Rehabilitation and Bankruptcy Act, Act No. 7428, March 2005, amended by Act. No. 8863, Feb. 29, 2008, (S. Kor.), translated in Korean Ministry of Government Legislation <http://www.moleg.go.kr/english/korLawEng?pstSeq=52645> [Hereinafter "DRBA"].

¹² 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 central goals of UNCITRAL); see also U.N. COMM'N ON INT'L TRADE L., GUIDE TO ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, at 21, ¶ 8, U.N. Sales No. E.14.V.2 (2013) (pointing out the drawbacks of the regime without a Model Law).

¹³ UNCITRAL-INSOL-World Bank, *11th Multinational Judicial Colloquium*, at 12, ¶ 33, (Mar. 21–22, 2015), <http://www.uncitral.org/pdf/english/news/EleventhJC.pdf>.

¹⁴ See generally LOOK CHAN HO, CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW, 324 (Globe L. and Bus., 4th ed. 2017); S. CHANDRA MOHAN, *Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?*, 21 INT'L INSOLVENCY REV. 143, 199–223 (2012).

¹⁵ U.N. COMM'N ON INT'L TRADE L., GUIDE TO ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, at 25, ¶ 20, U.N. Sales No. E.14.V.2 (2013). *The Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross Border Insolvency* [Hereinafter "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. INT'L BANKING L. Rev. 325 (Thomson Reuters 2014).

not interpreted the legislation enacting the Model Law consistently.¹⁶ The divergence of the implementation strategies of the Model Law raises the question of whether the Model Law promotes the goals of achieving a quick, certain, and predictable outcome in cross-border insolvency proceedings.¹⁷

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.¹⁸ Further, we examine how the domestic legislation implementing the Model Law has been interpreted in Australia, Singapore, and Korea.¹⁹ 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. On a general level, one can argue this divergence merely reflects how insolvency policies and procedures differ substantially between states. Lord Millett observed that “no

¹⁶ *But see* UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, (Mar. 2014), <https://www.uncitral.org/pdf/english/texts/insolven/Judicial-Perspective-2013-e.pdf>. This document 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. 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.

¹⁷ G.A. Res. A/RES/52/158, Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (Jan. 30, 1998). 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. U.N. COMM’N ON INT’L TRADE L., GUIDE TO ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, at 26, ¶ 22, U.N. Sales No. E.14.V.2 (2013).

¹⁸ *See generally* KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., Clarendon Press 2d ed. 1992).

¹⁹ 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): Search Results for English Translation Summary of Cases on Model Law, UNCITRAL, <http://www.uncitral.org/clout/index.aspx> (follow “Search” hyperlink; then search “cases” and apply additional criteria “Country: Japan”) (generating only four search results). These decisions are not relevant for the purposes of this Article. Checkmarks 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 [S. Ct.], 2009Ma1600, Mar. 25, 2010 (S. Kor.).

branch of the law is moulded more by considerations of national economic policy and commercial philosophy.”²⁰ More specifically, with respect to the adoption of the Model Law by civil law jurisdictions in Asia, scholars like Yamamoto argue that different legal origins explain why Korea and Japan have different strategies for implementing the Model Law. Korea and Japan follow the civil law, distinct from the common law tradition.²¹

As attractive as the legal origin explanation appears, at least two issues exist with this explanation. First, while some provisions in the Model Law might pose difficulty for civil law countries to adopt unequivocally, such as provisions relating to the conferment of judicial discretion, the scholarly literature on Japanese or Korean jurisprudence does not suggest that the reasons for not adopting the provisions lies 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.²² Further, Korea has not adopted, in full, the judicial cooperation and coordination in the Korean Debtor Rehabilitation and Bankruptcy Act in 2006 (DRBA),²³ 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 common law countries, signals a willingness to cooperate.²⁴

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 a dichotomy in how states approach cross-border insolvency: universality and territoriality.²⁵ 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

²⁰ Peter Millet, *Cross-Border Insolvency: The Judicial Approach*, 6 INT’L INSOLVENCY REV. 99, 109 (1997).

²¹ Kazuhiko Yamamoto, *New Japanese Legislation on Cross-border Insolvency as Compared with the UNCITRAL Model Law*, 11 INT’L INSOLVENCY REV. 67, 68–69 (2002) (arguing that in the case of Japan, the possibility of giving greater discretion to judges in the manner envisaged by the common law may cause confusion).

²² See discussion *infra* Section I(B)(5).

²³ See discussion *infra* Section I(B)(6).

²⁴ See discussion *infra* Section I(B)(6).

²⁵ Memorandum from Jay L. Westbrook to U.S. Nat’l Bankr. Rev. Comm. (July 29, 1998), Re: UNCITRAL Model Law on Cross-Border Insolvency (July 29, 1997), available at <http://govinfo.library.unt.edu/nbrcreport/e1.pdf>.

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 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.²⁶ It is beyond the scope of this article to discuss the advantages and disadvantages of either approach.²⁷ Mervorach has argued that certain universal biases explain the states' territorialist approaches (such as preserving the status quo and aversion to perceived loss of sovereignty and control over local assets) and not by the expected utility of such approaches.²⁸ Recognising that neither the pure version of the universalist nor the territorialist principle is ideal or in the best interests of management of multi-national insolvencies, the Model Law adopts a "modified universalist" principle.²⁹ 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, the 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.³⁰ 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 proceeding is a "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 and foreign court or foreign insolvency representatives. They also establish the coordination required for the management of concurrent

²⁶ See Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999).

²⁷ See generally IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW* 13 (Oxford University Press 2d ed. 2005).

²⁸ Mevorach, *infra* note 32, at § 2.

²⁹ See JAY L. WESTBROOK, *National Regulation of Multinational Default*, in *ECONOMIC LAW AND JUSTICE IN TIMES OF GLOBALISATION: Festschrift for Carl Baudenbacher 777* (Mario Monti et al. eds., Nomos Verlagsgesellschaft 2007).

³⁰ Guide, *supra* note 15, at 26–27, ¶ 24.

proceedings, the aim of which is to “foster decisions that would best achieve the objectives of both proceedings.”³¹

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.³² However, where states start from the position of an exclusively territorialist approach, even in the presence of external pressure from 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.³³ 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.³⁴ 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.³⁵ Our research suggests the regulatory preferences involved in the signalling effect of adopting the Model Law remains significant in Asia-Pacific.

³¹ Guide, *supra* note 15, at 31, ¶ 42.

³² See Irit Mevorach, *Modified Universalism as Customary International Law*, 96 TEX. L. REV. 1403, 1405 (2018) (discussing the Model Law and the evolving norm of “modified universalism”). However, the author concedes that the status of the principle is “somewhat amorphous.” *Id.* at 1405. See also IRIT MEVORACH, *THE FUTURE OF CROSS-BORDER INSOLVENCY LAW: OVERCOMING BIASES AND CLOSING GAPS* (Oxford University Press, 2018).

³³ See also DAVID ANDREW SINGER, *REGULATING CAPITAL: SETTING STANDARDS FOR THE INTERNATIONAL FINANCIAL SYSTEM* (Eric Helleiner & Jonathan Kirshner eds., Cornell University Press, 2007). See generally ANDREW WALTER, *GOVERNING FINANCE: EAST ASIA’S ADOPTION OF INTERNATIONAL STANDARDS* (Eric Helleiner & Jonathan Kirshner eds., Cornell Univ. Press, 2008).

³⁴ WALTER, *supra* note 33, at 3.

³⁵ *Id.*

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.³⁶ 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.³⁷ The lessons learned from the experience of the Model Law implementation will be relevant to the other supplemental Model Laws.

The rest of the Article is divided as follows. Section I explains the background and judicial approaches towards cross-border insolvency that lead to the enactment of the Model Law. Section I 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

³⁶ See, e.g., Rebecca Parry and Nan Gao, *The Future Direction of China’s Cross-Border Insolvency Laws, Related Issues and Potential Problems*, 27 INT’L INSOLVENCY REV. 5–31 (2018).

³⁷ See G.A. Res. A/RES/52/158, Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment of the United Nations Commission on International Trade Law (April 2019), <https://uncitral.un.org/en/texts/insolvency/modellaw/mlj> [hereinafter “Judgments Model Law”]. UNCITRAL has noted that according to the UK Supreme Court in *Rubin v. Eurofinance SA*, long-standing common-law rules for the recognition of foreign insolvency judgments remained undisturbed by the UK’s adoption of the Model Law. *Rubin v. Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 (on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 97). The case brought to light problems of a global nature which, as the Court noted, the Model Law did not provide an explicit solution. This led to significant uncertainty and might have a chilling effect on the prospects of the Model Law gaining international acceptance. Therefore, UNCITRAL considered it to be an opportune time to tackle the recognition and enforcement of these types of judgements. See U.N. GAOR, 46th Sess., 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 U.N. GAOR, 46th Sess., 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).

free to implement the Model Law in the way that they deem 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.³⁸ 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.³⁹

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 2001.⁴⁰

The Cross-Border Insolvency Act of 2008 was the legislation that implemented the Model Law, with suitable modifications to take into account local conditions.⁴¹ This Act was promoted on the basis that Australia's implementation 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 dealing with cross-border insolvency cases, they were not well-suited to dealing with the manifold consequences and complexities of cross-border insolvencies.⁴² 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."⁴³

The responsible body in Australia, the Treasury, as part of the Corporate Law Economic Review Program (CLERP) considered the possibility of having

³⁸ Model Law, *supra* note 1, at art. 7.

³⁹ Guide, *supra* note 15, at 53, ¶ 105.

⁴⁰ *Corporations Act 2001*, (ACT) s 580–581 (Austl.).

⁴¹ *Cross-Border Insolvency Act 2008* (Austl.). Australian cross-border insolvency law has been comprehensively covered by Professor Rosalind Mason in a series of scholarly articles. *See, e.g.*, Rosalind Mason, *Cross-border Insolvency and Legal Transnationalisation*, 21 *INT'L INSOLVENCY REV.* 105 (2012); *Cross-Border Insolvency Bill 2007: The UNCITRAL 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 UNIV. 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).

⁴² *See* Corporate Law Economic Reform Program (CLERP) Proposals for Reform Paper No 8: *Cross-Border Insolvency: Promoting International Cooperation and Coordination* (Cth) 2002, at 14 (Austl.).

⁴³ *Id.*

a single comprehensive Cross Border Insolvency Regime. However, the Treasury (which is the Australian Government department responsible for the economic policy, fiscal policy and market regulation) 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.⁴⁴ 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 proposed 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.

Singapore adopted its version of the Model Law based on the 2016 Report of the Committee on Singapore as an International Centre for Debt Restructuring⁴⁵ and the 2013 Insolvency Law Review Committee Report.⁴⁶ The 2016 Report referenced the provision of a clear and internationally recognized framework for resolving cross-border insolvencies⁴⁷ 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:

[I]ncreased certainty and cooperation will in many cases lead to a greater predictability of process and outcome, which . . . [often may] 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.⁴⁸

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.⁴⁹

⁴⁴ See generally Gerard McCormack and Anil Hargovan, *Australia and International Insolvency Paradigm*, 37 SYDNEY L. REV. 389 (2015).

⁴⁵ 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>.

⁴⁶ 2013 Report, *supra*, note 8.

⁴⁷ 2016 Report, *supra*, note 45, at para. 3.27.

⁴⁸ 2013 Report, *supra*, note 8, at 239.

⁴⁹ The Model Law on Recognition and Enforcement of Insolvency-Related Judgments was not yet promulgated in 2016; it was promulgated in 2018. See G.A. Res. A/RES/52/158, Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment of the United Nations Commission on International Trade Law (April 2019), <https://uncitral.un.org/en/texts/insolvency/modellaw/mlj>.

The Model Law's enactment 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.⁵⁰

2. *What happened in Korea and Japan?*

Prior to the enactment of their Model Law legislation, Korea and Japan each were seen 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 seen in the next Section, 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 Act, and the Bankruptcy Act) was not significant and there were hardly any reorganisation proceedings.⁵¹ Financial institutions lent readily to the chaebols to finance risky projects without proper due diligence, due to the belief that the chaebols were too big to fail.⁵² However, when the Asian financial crisis struck in 1997, many companies, including financial institutions, were badly hit and applied for judicial proceedings to restructure.⁵³ 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 World Bank, put pressure on Korea to implement wholesale insolvency reforms.⁵⁴ The Debtor Rehabilitation and Bankruptcy Bill (DRBA) was tabled

⁵⁰ *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.).

⁵¹ *See* Soogeun Oh, *An Overview of the New Korean Insolvency Law*, 16 NORTON J. BANKR. L. & PRAC. 5 art. 5, tbl. 1 (2007) (Table 1 setting out the proceedings brought 1990 to 1997 which averages less than eighty a year).

⁵² *See* Jong-Wha Lee, "Twenty Years after the Financial Crisis in the Republic of Korea," ADB, Working Paper No. 790 (Nov. 2017), available at <https://www.adb.org/sites/default/files/publication/378801/adb-wp790.pdf>.

⁵³ *Id.* (Table 1 showing that the cases for reorganisation increased sharply in 1997 and 1998 to 132 and 148, respectively).

⁵⁴ 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 Univ. Press, 2009).

before the National Assembly in 2003 and 2004, but in part due to international pressure, passed in 2005, with an effective date of March 1, 2006.⁵⁵ The DRBA became the comprehensive integrated legislation on insolvency and replaced the Corporate Reorganization Act,⁵⁶ Composition Act,⁵⁷ and Bankruptcy Act.⁵⁸

Commentators⁵⁹ and the Korean Supreme Court⁶⁰ described the Corporate Reorganization Act (which was repealed by the DRBA) as distinctly territorial. For example, Article 4 of the Corporate Reorganization Act provided that reorganization proceedings commenced in a foreign country have no effect on property in Korea.⁶¹

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 ([Bankruptcy Act] Art. 3, [Corporate Reorganization Act] Art. 6.⁶²

With the onset of the Asian financial crisis of 1997, various international organisations including the International Monetary Fund and World Bank, put pressure on Korea to implement wholesale insolvency reforms, including the automatic stay upon application for commencement of insolvency proceedings.⁶³ As part of the reform, Part V of DRBA included provisions providing for the recognition and support of foreign insolvency cases in Korean courts, Korean insolvency proceedings in foreign courts, and appointment of an international administrator or trustee.⁶⁴

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

⁵⁵ *See id.*

⁵⁶ Corporate Reorganization Act, enacted December 12, 1962 by Act No. 1214 (S. Kor.).

⁵⁷ Composition Act, enacted January 20, 1962 by Act No. 997 (S. Kor.).

⁵⁸ Bankruptcy Act, enacted January 12, 1962 by Act No. 998 (S. Kor.).

⁵⁹ *See id.*

⁶⁰ Supreme Court [S. Ct.], 2009Ma1600, Mar. 25, 2010 (S. Kor.), *translated in* Korean Ministry of Government Legislation <https://www.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=559&pageIndex=1&mode=6&searchWord=> (visited Jan. 1, 2019).

⁶¹ *Id.*

⁶² Soogeun Oh, "Insolvency Law in Korea" in ROMAN TOMASIC, *INSOLVENCY LAW IN EAST ASIA* 91 (Routledge 2016) (2006).

⁶³ HALLIDAY AND CARRUTHERS, *supra* note 54.

⁶⁴ *Id.*

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 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 hotchpot rule's application in Article 32 of the Model Law. However, developments in the last five years indicate that issues relating to (2) and (3) may be more apparent than real.⁶⁵

Japan's 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.⁶⁶ 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 created 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 Reorganization 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."⁶⁷ The administrator of Japan's proceedings had no right to manage and dispose of the debtor company's assets located in a foreign country and vice versa.⁶⁸ While Matsushita pointed out that Japanese courts modify 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."⁶⁹ Bhala 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.⁷⁰

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 2000.⁷¹

⁶⁵ See discussion, *infra* Section I (B).

⁶⁶ 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 21; Junichi Matsushita, *Comprehensive Reform of Japanese Personal Insolvency Law*, 7 *THEORETICAL INQ. L.* 555 (2006).

⁶⁷ Raj Bhala, *International Dimensions of Japanese Insolvency Law*, in 19 *MONETARY AND ECON. STUD.* 131, 166 (2001).

⁶⁸ *Id.* at 162.

⁶⁹ Junichi Matsushita, *Present and Future Status of Japanese International Insolvency Law*, 33 *TEX. INT'L L.J.* 71, 75-77 (1998).

⁷⁰ Bhala, *supra* note 67, at 163.

⁷¹ See references to notes 10 and 11 in Sohsuke Takahashi, *The Reality of the Japanese Legal System for*

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 between Japan's Recognition Law and the Model Law are: (1) 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; (2) modification of the provisions on judicial communication and cooperation; and (3) the priority given to 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 diverge in the Model Law's enactment and interpretation. We argue that due to the differences in the adoption of the Model Law, states enacting the Model Law have signaled the recognition of giving effect to foreign insolvency proceedings. However, differences in the details 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 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 reciprocity requirement—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.⁷² 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

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 Sept. 17, 2019).

⁷² 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).

basis when considering the recognition of foreign proceedings—as the approach is in China.⁷³ Alternatively, a reciprocity requirement might be carried out by a government agency tasked with designating certain countries as having fulfilled reciprocity conditions.⁷⁴

The majority of the states that have adopted the Model Law have not insisted on the reciprocity requirement.⁷⁵ When Singapore considered the Model Law’s adoption, 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.”⁷⁶ The Committee noted that the Model Law had not yet achieved widespread international adoption. Nevertheless, the Committee decided not to recommend any reciprocity obligation⁷⁷ and its reasons for adopting this viewpoint seem sound.

While the consensus among a majority of states is that reciprocity is unnecessary, the Model Law contains certain elements that protect local creditors and local public policy. In relation to local public policy, 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.⁷⁸ 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.”⁷⁹ There are suggestions in the English case—*Cherkasov v. Olegovich, the Official Receiver*

⁷³ Law of the People’s Republic of China on Enterprise Bankruptcy (Bankruptcy Law), Aug. 27, 2006, effective June 1, 2007 (China).

⁷⁴ 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).

⁷⁵ 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).

⁷⁶ 2013 Report, *supra* note 8, at 236.

⁷⁷ 2013 Report, *supra* note 8, at 236–38.

⁷⁸ Model Law, *supra* note 1, at art. 6.

⁷⁹ FLETCHER, *supra* note 27, at 462.

of *Dalnyaya Step LLC*⁸⁰—that the public policy exception may be used in cases where there is a breach of natural justice or procedural fairness. In *Cherkasov*, 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.⁸¹ The *Cherkasov* court states: “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.”⁸² The mere fact that the foreign law’s priorities in liquidating the company differ from English law is not sufficient to invoke English public policy.⁸³

After Australia adopted Article 6 of the Model Law, the provision was unsuccessfully invoked in *Re Legend International Holdings*⁸⁴ to try and avoid recognition of a U.S. chapter 11 reorganisation. The *Legend* court pointed out that courts are “slow” to invoke public policy.⁸⁵

Other states implemented Article 6 slightly differently. Singapore adopted Article 6 of the Model Law but without the word “manifestly.” Japan⁸⁶ and South Korea’s⁸⁷ legislative provisions also did not include the word “manifestly.” This appears 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

⁸⁰ *Re Dalnyaya Step LLC* [2017] EWHC (Ch) 756 [22]–[30] (Eng.).

⁸¹ *Id.* at [24].

⁸² *Id.* at [82]; UNCITRAL itself has recognized the “notion of public policy is grounded in national law and may differ from State to State[.]”; Guide, *supra* note 15, at ¶ 101.

⁸³ *Re Agrokro* [2017] EWHC (Ch) 2791, [131] (Eng.).

⁸⁴ *Indian Farmers Fertiliser Coop. Ltd. and Kisan Int’l Trading FZE v Legend Int’l Holdings Inc.* [ARBN 120 855 352] [2016] VSC 308.

⁸⁵ *Id.* at [52].

⁸⁶ 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-ICHIRO 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.

⁸⁷ See DRBA, *supra* note 11, art. 632(2) (S. Kor.), translated in Korean Ministry of Government Legislation, <http://www.moleg.go.kr/english/korLawEng?pstSeq=52645> (last visited Oct. 11, 2019) (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); CHIYONG RIM, *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).

than that in jurisdictions where the Model Law has been enacted unmodified.⁸⁸

In *Zetta*, the court held that foreign insolvency proceedings instituted in the 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, other provisions exist in the Model Law that may be utilised to reflect 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.⁸⁹ The court needs to be satisfied that 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 creditors and other interested persons are adequately protected.⁹⁰ However, the Model Law does not define "local creditors" and "adequate protection" and are left to the courts' interpretation. In the Australian case, *Akers v Deputy Commissioner of Taxation*, the Full Federal Court held that Articles 21 and 22 prevented 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.⁹¹ Under the relevant foreign law, the Australian foreign revenue debt could not be proven in the main proceedings.⁹² This order created a form of 'mini-Australian liquidation,' which enables the tax authorities to recover such amounts as if the debtor wound up in Australia.⁹³

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 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.'⁹⁴ This gives rise to two possible interpretations: the first, argued by Yamatomo, means

⁸⁸ *Re Zetta Jets Pte Ltd.* [2018] SGHC [21], [23] (Sing.).

⁸⁹ *Model Law*, *supra* note 1, at art. 21(2).

⁹⁰ *Model Law*, *supra* note 1, at art. 22(1).

⁹¹ *Akers v Deputy Comm'r of Taxation* [2014] FCAFC 57 [41] (Austl.).

⁹² *Id.*

⁹³ Gerard McCormack & Anil Hargovan, *supra* note 44, at 395–96.

⁹⁴ Kent Anderson, *Testing the Model Soft Law Approach to International Harmonisation: A Case-Study Examining the UNCITRAL Model Law on Cross-Border Insolvency*, 23 AUSTL. Y.B. INT'L L. 1, 12 (2004) (quoting *Recognition Law*, *supra* note 10, at art. 31(2)); see ABE, *supra* note 86, at 328.

that the provision is intended to protect the local creditors in the same way as the Model Law.⁹⁵ 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.⁹⁶ 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 Law⁹⁷ 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 in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation[.]”⁹⁸ 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.⁹⁹

The definition of collective insolvency proceedings covers both “debtor-in-possession” restructuring regimes such as chapter 11 of the U.S. Bankruptcy Code of 1978 and manager-displacing regimes like voluntary administration in Australia and judicial management in Singapore.¹⁰⁰

⁹⁵ Yamamoto, *supra* note 21, at 87.

⁹⁶ See Anderson, *supra* note 94, 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 J. BANKING FIN. L. PRAC. 40, 43–44, 48 (2011) (arguing that this issue is largely untested in Japan).

⁹⁷ *Model Law*, *supra* note 1, at art. 21(1)(e).

⁹⁸ *Id.* at art. 2(a); see *Re Chow Cho Poon (Private) Ltd* [2011] NSWSC 35 (Austl.).

⁹⁹ *Model Law*, *supra* note 1, at art. 2(e).

¹⁰⁰ In *Re 19 Entm't Ltd.* [2016] EWHC 1545 (Ch) (Eng.), U.S. chapter 11 bankruptcy reorganization 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*, that a creditors' voluntary liquidation in Hong Kong was entitled to recognition in the U.K. under the Model Law and CBIR. *Re New Paragon Inv. Ltd.* [2012] BCC 371 (Eng.) The

At least two issues exist with the general definition, and implementing states tweaked the basic Model Law definition in different ways. There are issues surrounding “non-insolvency” winding up. The laws in many states contain provisions under which the affairs of a company may be wound up, assets distributed, and legal existence brought to an end even though the company may not be insolvent. The winding up may be ordered on general public interest grounds, or on the basis that it is just and equitable. For example, this might happen where the company is a small, tightly-knit company and there are squabbles between the company’s principals.

Australia has held 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.¹⁰¹ Similarly, Australia has held that members’ voluntary winding-up, essentially a solvent liquidation, gives appropriate assistance under the U.S. version of the Model Law, chapter 15 of the U.S. Bankruptcy Code.¹⁰²

One might justify these decisions on the basis of a foreign law under which a winding up is ordered and characterized. Such characterization occurs even though the particular provisions under which winding up is ordered are not necessarily confined only to insolvency situations.¹⁰³

Second, different decisions may owe something to the diverging ways in which states adopted the Model Law. For instance, Singapore and Australia adopted schemes of arrangement that have been used extensively in recent years as debt restructuring tools.¹⁰⁴ The schemes of arrangement need approval from a majority representing seventy-five percent in value of concerned members or creditors voting at relevant class meetings.¹⁰⁵ There are essentially three stages

court held that a “‘foreign proceeding’ included an extra-judicial proceeding or an administrative proceeding provided it related to liquidation.” *Id.*

¹⁰¹ *Poon, supra* note 98, at ¶ 51. It has been held however, in the UK in *Re Sturgeon Central Asia Balanced Fund Ltd (In Liquidation)* [2020] EWHC 123 (Ch) that the foreign proceedings in respect of which recognition was sought had to relate to the resolution of the debtor’s insolvency or financial distress. Therefore, recognition was not available to a solvent company that was subject to just and equitable winding-up in another country.

¹⁰² *See In re Betcorp Ltd.*, 400 B.R. 266 (D. Nev. 2009).

¹⁰³ *See Guide, supra* note 15, at ¶ 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”); *Guide, supra* note 15, at ¶ 71.

¹⁰⁴ 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 Univ. Press, 2012); JENNIFER PAYNE, *SCHEMES OF ARRANGEMENT: THEORY, STRUCTURE AND OPERATION* (Cambridge Univ. Press, 2014).

¹⁰⁵ *See id.*

to the process: (1) an initial court application; (2) a subsequent court application; and (3) court approval for the scheme. These separate stages and the necessity of obtaining court approval are why the scheme procedure was costly, cumbersome, and little used. While the separate stages remain, judicial decisions have smoothed over some of the potential pitfalls such as disagreements over class composition and the need for multiple classes.¹⁰⁶

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.¹⁰⁷ In other words, proceedings outside Japan are equivalent to those under the Japanese insolvency laws. A Japanese commentator argues 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.¹⁰⁸ In Korea, Article 628 of the Debtor Rehabilitation and Bankruptcy Act (DRBA), which incorporates Article 2 of the Model Law, specifically refers to, among others, rehabilitation, bankruptcy, and other similar proceedings for which petitions are filed with a foreign court (including the corresponding authorities).¹⁰⁹ Schemes of arrangement are likely to be regarded as proceedings similar to rehabilitation proceedings.

3. Treatment of Foreign Creditors

Article 13 of the Model Law provides that foreign creditors have the same rights 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)*,¹¹⁰ Lord Hoffmann observed:

¹⁰⁶ *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.

¹⁰⁷ Hideyuki Sakai & C. Christian Jacobson, *Cross-Border Insolvency – Japan*, INTERNATIONAL INSOLVENCY INSTITUTE (2001), https://www.iiiglobal.org/sites/default/files/11-_CROSS%20BORDER%20INSOLVENCY-Japan.pdf.

¹⁰⁸ See also ABE, *supra* note 86, at 322–33.

¹⁰⁹ See also RIM, *supra* note 87, at 582–83.

¹¹⁰ *Cambridge Gas Transp. Corp. v Official Comm. of Unsecured Creditors of Navigator Holdings plc*,

“The English 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.”¹¹¹

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.¹¹²

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.¹¹³ The U.S.¹¹⁴, Australia¹¹⁵ and Singapore have made use of this ‘opt-out.’ They have not used 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 Japanese legislation,¹¹⁶ the legislation does not specifically address the issue of foreign

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

¹¹¹ *Id.* at ¶ 16.

¹¹² Model Law, *supra* note 1, at art. 13(2).

¹¹³ Guide, *supra* note 15, at ¶ 118–20. *See* the discussion in FLETCHER, *supra* note 27, at 477.

¹¹⁴ 11 U.S.C. § 1513(b)(2)(B) (2019) provides that the admissibility and priority of a foreign tax claim is governed by any applicable tax treaty of the U.S., under the conditions and circumstances specified therein. The implementation of the Model Law in the U.S. does not change U.S. law on the inadmissibility of foreign revenue claims. Some of the reasons for the exclusion were articulated 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. U.S. 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).

¹¹⁵ *Cross-Border Insolvency Act 2008* s 12 (Austl.) (From Dec. 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).

¹¹⁶ *See* Recognition Law, *supra* note 10, at art. 3; ABE, *supra* note 86, at 325.

tax and social security claims.¹¹⁷ The position is similar to Korea's position, where foreign 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.¹¹⁸ This gives rise to some uncertainty for foreign creditors seeking to commence or participate in Korean and Japanese insolvency proceedings.

Certainly, foreign creditors are often disadvantaged by the opening of insolvency proceedings. These proceedings may be taking place according to a foreign procedure and in an unfamiliar language. Foreign creditors may not be aware of the time limits for lodging claims, or the proofs that must be submitted. An insolvency proceeding 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. The European Commission notes: "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."¹¹⁹

Article 14 of the Model Law contains certain concrete measures to alleviate the disadvantage that foreign-based creditors may suffer in practice.¹²⁰ 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.¹²¹ 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.¹²² These provisions are rather limited, however, and certainly they do not establish a comprehensive procedural framework.¹²³

¹¹⁷ See ABE, *supra* note 86, at 325.

¹¹⁸ See RIM, *supra* note 87, at 588.

¹¹⁹ *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 17, COM (2012) 743 final (Dec. 12, 2012).

¹²⁰ *Model Law*, *supra* note 1, at art. 14.

¹²¹ *Model Law*, *supra* note 1, at art. 14(2).

¹²² *Model Law*, *supra* note 1, at art. 14(3).

¹²³ For a general analysis of the distinctions between the European Insolvency Regulation and the UNCITRAL Model Law and drawing attention to the more limited provisions of the latter see Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 *International Law Review* 246. See also European Insolvency Regulation (Regulation 2015/848) Articles 53–55 on treatment of foreign creditors, duty to inform creditors, and procedure for lodgement of claims.

4. *Extent of Application of Foreign Law*

A controversial aspect of the 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 officeholder.¹²⁴

Transactional avoidance is dealt with in Article 23 of the Model Law, which gives a foreign representative standing to invoke local laws on transactional avoidance. Singapore¹²⁵ and Australia¹²⁶ have both implemented Article 23 in this way.

The Australian and Singaporean 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 officeholder. Nevertheless, it seems to limit the type of relief that may be available to an officeholder 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.¹²⁷ Insofar as Article 21(1)(g) of the Model Law concerns reliefs, in Korea, Article 636 of DRBA (which is based on Article 21 of the Model Law), the Supreme Court of South Korea held that recognition of a foreign discharge must be based on the local laws of civil procedure.¹²⁸ The foreign discharge cannot be recognized by obtaining recognition and relief under DRBA.¹²⁹ In Japan, Article 26(1) of the Recognition Law allows for the court to grant a “disposition” with regard to the debtor’s assets and business to give effect

¹²⁴ Companies Act 2006, *supra* note 8, at art. 21(1)(g), sched. 10 (Sing.).

¹²⁵ *Id.* at art. 23, sched. 10 (Sing.).

¹²⁶ *Cross-Border Insolvency Act 2008* s 17 (Austl.).

¹²⁷ See RIM, *supra* note 87; Yamamoto, *supra* note 21, at 88; ABE, *supra* note 86, at 328.

¹²⁸ See 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 355 (Muruga Perumal Ramaswamy & Joao Ribeiro eds., New Zealand Association for Comparative Law, 2015) (citing Supreme Court [S. Ct.], 2009Ma1600, Mar. 25, 2010 (S. Kor.)).

¹²⁹ 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.*

to the recognition and assistance proceedings, but it is assumed that disposition is limited to what is permitted under the civil or civil procedure code.¹³⁰

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 v. Eurofinance SA* and the 2010 Korean decision, *Gohap*.¹³¹ In *Gohap*, the Supreme Court of South Korea held that the U.S. 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.¹³² However, the discharge resulting from the U.S. 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.¹³³

It remains to be seen, however, whether states will take the approach of: (1) adopting a new corpus of rules on insolvency-related judgments, or (2) merely clarifying that their existing Model Law implementation provisions allow the recognition and enforcement of insolvency-related judgments and the application of foreign law. The new Model Law's intention is not to replace legislation in states that have previously enacted the Cross-Border Insolvency Model Law or to limit that legislation's application.¹³⁴

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 Australia¹³⁵ and Singapore¹³⁶ have implemented Article 20, Japan and Korea have not done so. In Japan, no distinction exists between foreign main proceedings and foreign non-main proceedings. Japan's version of the Model Law gives the court discretion to grant relief upon or after issuing a recognition

¹³⁰ See Recognition Law, *supra* note 10, at art. 26(1).

¹³¹ 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); *Rubin v. Eurofinance SA*, [2012] UKSC 46, [2013] 1 AC 236 (on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 97).

¹³² Supreme Court [S. Ct.], 2009Ma1600, Mar. 25, 2010 (S. Kor.), translated in Korean Ministry of Government Legislation <https://www.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=559&pageIndex=1&mode=6&searchWord=> (last visited Jan. 1, 2019).

¹³³ See Kwang Yun Suk, *South Korea, Recognition and Enforcement of Foreign Judgments in Asia*, ASIAN BUS. L. INST. (2017), <https://abli.asia/Projects/Foreign-Judgments-Project>.

¹³⁴ See Judgments Model Law, *supra* note 37, at 3–4, preamble recital 2, art. X.

¹³⁵ *Cross-Border Insolvency Act 2008*, s 16 (Austl.).

¹³⁶ Companies Act, 2006, art. 20, sch. 10 (Sing.).

order.¹³⁷ Yamamoto notes the decision not to allow an automatic effect would result in the recognising court prudently deciding on recognition that it would delay the recognition process.¹³⁸ However, Yamamoto 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.”¹³⁹

Similar to Japan, Korea has not adopted the automatic stay upon recognition of the foreign bankruptcy proceedings.¹⁴⁰ 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).¹⁴¹ This reflects the Korean position that an automatic stay does not follow a bankruptcy petition.¹⁴² 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.¹⁴³

Soogeun 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 must 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.¹⁴⁴ In contrast, under Article 11 of the Model Law, the foreign insolvency representative can apply for a domestic insolvency proceeding before the recognition of the foreign proceeding. Chiyong Rim has reported that as of the end of November 2016, Korean courts only recognized six foreign bankruptcy proceedings.¹⁴⁵

¹³⁷ Recognition Law, *supra* note 10, at art. 25; ABE, *supra* note 86, at 328.

¹³⁸ Yamamoto, *supra* note 21, at 83.

¹³⁹ *Id.*

¹⁴⁰ 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. DRBA, *supra* note 11, at art. 633; *see also* RIM, *supra* note 87, at 586–587.

¹⁴¹ DRBA, *supra* note 11, at arts. 635, 636.

¹⁴² *See* RIM, *supra* note 87, at 587; Soogeun Oh, *An Overview of the New Korean Insolvency Law*, 16 NORTON J. BANKR. L. & PRAC. 779 (2007).

¹⁴³ DRBA, *supra* note 11, at art. 635; Soogeun Oh, *An Overview of the New Korean Insolvency Law*, NORTON J. BANKR. L. & PRAC., 2007 at 779.

¹⁴⁴ *See id.*

¹⁴⁵ RIM, *supra* note 87, at 584.

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.¹⁴⁶ 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 prerequisite to the foreign insolvency representative commencing domestic proceedings in Korea,¹⁴⁷ and it is not possible to commence the domestic proceedings until obtaining recognition. This process ensures the Seoul District Court has the expertise and should hear the recognition case first.¹⁴⁸

6. *Judicial Communication and Cooperation*

While Singapore and Australia adopted Article 25 of the Model Law,¹⁴⁹ this is an area where the civil law countries diverged “in the books.”¹⁵⁰ Japan has not adopted Article 25, which provides for court-to-court communication and cooperation. Yamamoto has argued that express enactment of this provision is unnecessary. Inherent power stems from court cooperation.¹⁵¹ Certainly in Japan, evidence of assistance and cooperation with foreign courts exists. A study

¹⁴⁶ Recognition Law, *supra* note 10, at 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.

¹⁴⁷ See DRBA, *supra* note 11, at art. 634.

¹⁴⁸ See Soogeun Oh, *An Overview of the New Korean Insolvency Law*, 16 NORTON J. BANKR. L. & PRAC. 5, arts. 5, 19 (2007).

¹⁴⁹ 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 U.S. 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, Towards Greater Excellence in Cross-Border Insolvency*, SUPREME CT. SINGAPORE, <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 Sheryl Jackson & Rosalind Mason, *Developments in Court to Court Communications in International Insolvency Cases*, 37(2) U.N.S.W.L.J. 507, 512–19 (2014).

¹⁵⁰ See Companies Act, 2006, ch.50, sched. 10, art. 25 (Sing.); see also Cross-Border Insolvency Act, 2008, s 6 (Austl.).

¹⁵¹ See ABE, *supra* note 86, at 324.

by Anderson Mori and Tomotsune provides that, as of April 2017, the Tokyo District Court provided relief in fifteen 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).¹⁵² In the same study, the authors argued that while Japan does not have an Article 25 equivalent, 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 to] carefully review cases in advance.”¹⁵³

In Korea, Article 641 of the DRBA adopts Model Law Article 25 but limits the court’s cooperation with a foreign court or a representative of a foreign insolvency proceeding.¹⁵⁴ Other persons, such as an examiner, do not have power to communicate with the foreign court or a foreign representative.¹⁵⁵ Rim has argued that 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.¹⁵⁶ 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.¹⁵⁷

Moreover, Korea has entered into a Memoranda of Understanding regarding judicial cooperation. In April and May 2018 respectively, the Seoul Bankruptcy

¹⁵² See Yuri Ide & Atsushi Nishitani, *Legal Framework of Cross-Border Insolvency in Japan*, ANDERSON MORI & TOMOTSUNE, 1, 3–4 (2017), https://www.amt-law.com/asset/en/pdf/bulletins11_pdf/170531.pdf. Similarly, Shin Abe reports that there are 15 cases as of 2017. See ABE, *supra* note 86, 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) E.B.O.R. 517, 546–49 (2011), which only records three cases from Japan granting relief as at 2010.

¹⁵³ See Ide & Nishitani, *supra* note 151, at 3–4.

¹⁵⁴ DRBA, *supra* note 11, at art. 641.

¹⁵⁵ RIM, *supra* note 87, at 595.

¹⁵⁶ *Id.*

¹⁵⁷ Allen & Overly has reported the cooperation between the Korean court and the New Jersey court in dealing with a cross-border insolvency in 2017. See *Restructuring Across Borders*, ALLEN & OVERLY, 9 (December 2017), <http://www.allenoverly.com/expertise/practices/restructuring/Pages/Korea-corporate-restructuring.aspx> (last visited Jan. 1, 2019).

Court has separately executed a Memorandum with the U.S. Bankruptcy Court for the Southern District of New York¹⁵⁸ and Singapore insolvency cases.¹⁵⁹

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,¹⁶⁰ or to prevent the distortion of the policy of distribution that applies to insolvency.¹⁶¹ The rule prevents creditors from gaining more favourable treatment, as compared with other creditors in the same class, in insolvency proceedings in different jurisdictions. Singapore¹⁶² and Australia¹⁶³ both adopted Article 32 of the Model Law. In particular, for Australia, the rule is not controversial because of its long history in the common law tradition.¹⁶⁴ 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, their 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,¹⁶⁵ and a creditor in a local proceeding may receive the dividend after deducting the amounts collected from the foreign proceedings.¹⁶⁶ Japanese scholars identify two further differences between the Japanese legislation and Model Law. First, payments outside foreign insolvency proceedings, including payments in execution

¹⁵⁸ *Memorandum of Understanding Between the Seoul Bankruptcy Court and the United States Bankruptcy Court for the Southern District of New York*, 1–2 (2019), http://www.nysb.uscourts.gov/sites/default/files/MOU_SDNYBK_SBC.pdf.

¹⁵⁹ Towards Greater Excellence in Cross-Border Insolvency, *supra* note 149, at 4–6.

¹⁶⁰ *See Banco de Portugal v. Waddell* [1880] 5 App. Cas. 161 (UKHL) (Eng.); *Cleaver v. Delta American Reinsurance* [2001] UKPC 6, [2001] 2 AC 328 (on appeal from Cayman Is.) (Eng.).

¹⁶¹ Look Chan Ho, *Insolvency Policy and the Pari Passu Principle*, in CROSS-BORDER INSOLVENCY PRINCIPLES AND PRACTICE, 288–290 (Sweet & Maxwell, 2016).

¹⁶² *See Companies Act, 2006*, art. 32, sched. 10 (Sing.).

¹⁶³ *See Cross-Border Insolvency Act, 2008*, s 6 (Austl.).

¹⁶⁴ For Australia, *see Re Harris, Goodwin & Co* (1887) 5 QJL (NC) 94; for U.K. *see Cleaver v. Delta American Reinsurance Co* [2001] UKPC 6, [2001] 2 AC 328 (on appeal from Cayman Is.) (Eng.).

¹⁶⁵ *Corporate Reorganization Act, Law no. 154 of 2002*, art. 137 (Japan).

¹⁶⁶ ABE, *supra* note 86, at 329.

proceedings or voluntary payments by debtors, are subject to the rule.¹⁶⁷ This differs from the Model Law, which only affects payments in foreign insolvency proceedings.¹⁶⁸ These same Japanese scholars described the rationale as aiming for ‘high-grade cooperation and more equal treatment of creditors.’¹⁶⁹ 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.¹⁷⁰ However, the outcomes may not differ significantly from the common law position in Australia or Singapore. In Australian common law, the hotchpot rule does not capture payments made outside of foreign proceedings,¹⁷¹ though it is possible that under the domestic insolvency laws, such payments may be set aside on the ground of unfair preference. In Singaporean common law, payments made before the commencement of local proceedings do not fall within the hotchpot rule.¹⁷²

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 foreign proceedings but also judgment execution and foreclosure proceedings.¹⁷³ Second, Article 642 is silent on the exclusion of secured claims, which indicates that secured claims fall within Article 642. The rationale for this view is that secured debts are subject to the rehabilitation proceedings in Korea.¹⁷⁴ Min Han has taken a different view and argued that payment recovered from collateral outside of Korea should not be affected by Article 642.¹⁷⁵ Article 642 has been described as giving rise to complex

¹⁶⁷ Yamamoto, *supra* note 21, at 95.

¹⁶⁸ Model Law, Article 32.

¹⁶⁹ Yamamoto, *supra* note 21, at 95.

¹⁷⁰ *Id.*

¹⁷¹ The hotchpot rule 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 3 EDWARD MANSON, REPORTS OF CASES IN BANKRUPTCY AND COMPANIES’ WINDING-UP, DECIDED IN THE HIGH COURT OF JUSTICE, THE COURT OF APPEAL, AND THE HOUSE OF LORDS (1894–1915) 134–35 (Sweet & Maxwell 1896) (discussing *Re S.F. Somes, Ex parte De Lemos* (1896) 3 Mans 131). 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. Delta 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).

¹⁷² See *Cleaver v. Delta American Reinsurance Co* [2001] UKPC 6 [25], [2001] 2 AC 328 (on appeal from Cayman Is.) (Eng.) (citing *Banco de Portugal v. Waddell* [1880] 5 App. Cas. 161 (UKHL) (Eng.)) (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.”).

¹⁷³ See RIM, *supra* note 87, at 595–596.

¹⁷⁴ See RIM, *supra* note 87, at 595.

¹⁷⁵ *Id.*; Min Han, *The Hotchpot Rule in Korean Insolvency Proceedings*, 7 J. KOREAN L. 445, 445–468

problems.¹⁷⁶ 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. Katharina Pistor argues that colonial legacies may produce convergence in the resolution of problems based around legal families such as common law or civil law.¹⁷⁷ Halliday and Carruthers argue that such convergence may then be reinforced by U.S. dominance of both the legal regulation and rule of law discourse.¹⁷⁸ Scholars point out that Model Law is based on an American ideal of modified universalism.¹⁷⁹ The English common law reflected the principle of universality (at least insofar as regarding its own insolvency proceedings),¹⁸⁰ and it could be expected that states 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, Yamamoto argues that civil law countries find it difficult to adopt wholesale provisions of the Model Law. He argues that evidence of such difficulty can be seen in the provisions on communication and cooperation, where civil law judges have difficulty dealing with judge discretion.¹⁸¹ However, Anderson argued that such an explanation is not

(2008).

¹⁷⁶ See RIM, *supra* note 87, at 595–596.

¹⁷⁷ Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97 (2001).

¹⁷⁸ TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, *BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS* 10 (Stanford Univ. Press 2009).

¹⁷⁹ The earlier law contained in U.S. Bankruptcy Code § 304 as originally enacted (allowing for foreign insolvency representative to file ancillary proceedings to seek assistance in the U.S.). See 11 U.S.C. § 304 (1978). The provision has since been repealed by the Bankruptcy Abuse Prevention and Consumer Protection Act. See also Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 119 Stat. 23, 145 (codified as amended at 11 U.S.C. §§ 102(g)(3), 1325(a)).

¹⁸⁰ *Cambridge Gas Transp. Corp. v Official Comm. of Unsecured Creditors of Navigator Holdings plc*, [2006] UKPC 26, [2007] 1 AC 508 [16]–[17] (appeal from The Isle of Man); see also *In re HIH Casualty and General Insurance Ltd.*, [2008] UKHL 21 [6]–[10] (Eng.); *McMahon v. McGrath* [2008] 1 WLR 852, [856]–[857] (Eng.).

¹⁸¹ Yamamoto, *supra* note 21, at 69; see James Spigelman, Chief Justice of New South Wales, *Cross-Border Insolvency: Co-Operation or Conflict?*, Address by the Honourable JJ Spigelman AC Before the INSOL International Annual Regional Conference Shanghai (Sept. 16, 2008), in 83(1) ALJ 44, 64 (2009) (pointing out

convincing, considering other civil law states adopted these Model Law provisions without such qualification.¹⁸² Further, more recent developments show that the civil law courts in Korea are taking more proactive steps in entering into judicial cooperation.¹⁸³

At first sight, the legal origins theory appears attractive, but does not provide a complete account of the divergence. A number of examples demonstrate this point. For instance, as highlighted in Section I, Singapore and Australia enacted diverging public policy riders, subject to different interpretations. In Singapore, the High Court took the view that a lower standard exists to invoke the public policy ground.¹⁸⁴ Korea and Japan's choices 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 consequential to a recognition of foreign insolvency proceedings.¹⁸⁵ The reason was not the inability of civil law to produce the consequences of an automatic stay, but rather for reasons linked closely to the path dependence.¹⁸⁶ The Korean and Japanese law prior to the Model Law did not provide for such stays or 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).¹⁸⁷

Second, Korea and Japan also give priority to local proceedings where there are concurrent foreign and recognition proceedings. Korea limits the insolvency representative's ability to file local proceedings before recognition; comparatively, Japan stays the recognition of foreign proceedings to give priority to local proceedings unless certain exceptions apply.¹⁸⁸ Japan also requires separate court approval for the assets to be turned over to the insolvency representative.¹⁸⁹ No academic literature suggests 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 precedents.

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 Dimensions of Japanese Insolvency Law*, MONETARY AND ECON. STUD. 131 (2001).

¹⁸² Anderson, *supra* note 94, at 13–14.

¹⁸³ *See supra* Section I(B)(6).

¹⁸⁴ *See In re Zetta Jets Pte Ltd.* [2018] SGHC [21], [23] (Sing.).

¹⁸⁵ *See supra* Section I(B)(5).

¹⁸⁶ *See id.*

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See supra* Section I(B)(4).

Third, where Korean and Japanese law is silent, as it is on tax, social security, and transaction avoidance claims, the legislation under the respective jurisdictions chooses not to explicitly adopt the Model Law position.¹⁹⁰ This suggests that where Korea and Japan do not have an explicit domestic law solution, they prefer a “wait-and-see” approach, rather than adopting 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 toward cross-border insolvency to the Model Law’s modified universalism approach, they are more likely to fully implement the Model Law. Comparatively, where states start from an exclusively territorialist approach, they are likely to be more circumspect and require more exceptions or carve-outs from the Model Law. This avoids giving full effect to the recognition of foreign insolvency proceedings.

We draw a parallel example to deviations from international standards that are driven by multilateral organizations despite states’ ostensible adoption of 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 projects on international financial regulation (relating to banking and securities regulation, corporate governance, disclosures, and policy transparency).¹⁹¹ Such cosmetic or mock compliance arises from, among others, path dependence and the enduring concentration of family owned companies.¹⁹² These make compliance very costly for the private actors.¹⁹³

In this regard, we turn to our case studies. Singapore and Australia, prior to their 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

¹⁹⁰ See *supra* Section I(B)(4).

¹⁹¹ See *generally* Walter, *supra* note 34.

¹⁹² See *id.*

¹⁹³ See *id.*

foreign insolvency proceedings.¹⁹⁴ However, apart from the legislative provisions which constrain the remission of assets of an insolvent foreign company, more recent case law demonstrates the courts' willingness to provide other forms of assistance at common law regarding foreign insolvency proceedings. In the unreported judgment of *Re Aero Inventory (UK) Limited*,¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ 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 conducive to the orderly conduct of business and resolution of business failures across jurisdictions.¹⁹⁸

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).¹⁹⁹ These aid and auxiliary, and ancillary liquidation provisions, reflect a modified universalist approach towards cross-border insolvency, though the Model Law

¹⁹⁴ Companies Act 2006, § 377(3)(c) (Sing.) (prior to the amendment in 2017); see *Beluga Chartering GmbH (in liquidation) and Others. v. Beluga Projects (Singapore) Pte Ltd and Another* [2014] 2 SLR 815 (Sing.).

¹⁹⁵ See *Beluga Chartering GmbH (in liquidation) and Others. v. Beluga Projects (Singapore) Pte Ltd and Another* [2014] 2 SLR 815, [88] (Sing.).

¹⁹⁶ 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. 2013 Report, *supra* note 8, at 230 (Singapore Insolvency Law Review Committee arguing that there is some reported authority to show that recognition at common law is limited.).

¹⁹⁷ See generally Sek Keong Chan, *Cross-Border Insolvency Issues Affecting Singapore*, 23 SACLJ 413 (2011).

¹⁹⁸ *Re Opti-Medix Ltd*, [2016] 4 SLR 312, [17] (Sing.).

¹⁹⁹ McCormack and Hargovan, *supra* note 44.

made further moves in that direction.²⁰⁰ For example, in the aid and auxiliary provisions, a distinction is drawn between prescribed and non-prescribed states. Prescribed states require that aid of auxiliary provisions to the foreign courts is mandatory, and in non-prescribed states, 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 foreign company's property 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 some ambiguity exists 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.²⁰¹

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 criticisms of the territoriality principles.

However, Korea and Japan started from an exclusively territorialist position.²⁰² Both jurisdictions adopted 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 adopted legislation based on the Model Law and allow for the recognition of foreign insolvency proceedings, pre-existing outcomes under existing legislation remain 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 post-crisis and yet simultaneously allows both jurisdictions to avoid committing to allowing the 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 see significant divergences.

The reasons are as follows. Korea's wide-ranging bankruptcy reforms were brought closer to international standards, including having in place

²⁰⁰ See Rosalind Mason, *Implications of the UNCITRAL Model Law for Australian Cross-Border Insolvencies*, 8(2) INT'L. INSOLV. REV. 83, 107 (1999).

²⁰¹ See McCormack and Hargovan, *supra* note 44, at 401.

²⁰² See *supra* Section I(A).

reorganisation proceedings in the aftermath of the Asian financial crisis of 1997, due to pressure from the IMF and World Bank. While Korea adopted numerous bankruptcy reforms, it excluded provisions such as an automatic stay on debt collection upon application for bankruptcy. This exclusion was heavily resisted. Thus, it was not surprising that Korea resisted adopting 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 signaling as opposed to full functional reform; the same can be said for the Model Law.²⁰³ 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 recognizing 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 reflects the resistance of 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,²⁰⁴ and the application of foreign law on transaction avoidance.²⁰⁵ This indicates that these countries prefer a wait and see approach.

²⁰³ See Halliday and Carruthers, *supra* note 54, at 238.

²⁰⁴ See *supra* Section I(B)(3).

²⁰⁵ See *id.*

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 led UNCITRAL to formulate a recent supplemental Model Law addressing the recognition and enforcement of insolvency-related judgments.²⁰⁶

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 and 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 in 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 remains as to why they have chosen not to adopt the Model Law in full, which would address the certainty and predictability issues.

²⁰⁶ 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).

We argue that the differences result not only from the difference in legal origins of the states but also from the intentions of the states in signaling their intention of compliance. This may impact the practical realizability of the UNCITRAL's initiatives to facilitate cross-border insolvency of enterprise groups,²⁰⁷ 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, and creditors and other stakeholders have 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.²⁰⁸

While the Model Law represents a kind of modified universalism, participating countries which traditionally 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 how 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,²⁰⁹ Canada chose to make significant changes in its implementation of the Model Law,²¹⁰ notably by allowing for recognition of a greater number of cases than the strict Model Law provisions would permit.²¹¹ Such cases are likely to emanate from the United States.²¹²

²⁰⁷ See *Draft UNCITRAL Model Law on Enterprise Group Insolvency*, U.N. COMM'N. ON INT'L TRADE L. (2019), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlegi_-_advance_pre-published_version_-_e.pdf.

²⁰⁸ See, e.g., *Cambridge Gas Transp. Corp. v Official Comm. of Unsecured Creditors of Navigator Holdings plc*, [2006] UKPC 26, [2007] 1 AC 508 (appeal from The Isle of Man) (per Lord Hoffmann); Chan, *supra* note 197. Cf. *Rubin v. Eurofinance SA*, [2012] UKSC 46, [2013] 1 AC 236 at note 123 (on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 97), 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.

²⁰⁹ See Janis Sarra, *Northern Lights, Canada's Version of the UNCITRAL Model Law on Cross-Border Insolvency*, 16 INT'L. INSOLV. REV. 19 (2007).

²¹⁰ An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, S.C. 2005, C-47 (Can.).

²¹¹ 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.

²¹² See NEIL HANNAN, *CROSS-BORDER INSOLVENCY: THE ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW 17-18* (Springer 2017) (pointing out the differences in the enactment of five common

law countries: U.S., U.K., Australia, New Zealand, and Canada).