United Nations Day Lecture – 2019
25 Years of Cross-Border Insolvency Law Reform 1994- 2019

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1. Introduction

Your Honour, ladies and gentlemen, it is a privilege to present the 2020 Brisbane lecture in the United Nations Day Lecture Series. This series is an annual initiative of *the UNCITRAL Coordination Committee for Australia* to highlight, for practitioners and students, the work of the UN Commission on International Trade Law.

Known as UNCCA for short[2] the Committee was established in 2013, by founder and initial chair, Tim Castle. With members from across Australia, UNCCA has achieved much in just a few years[3] - of particular note has been the representation by Australians at all six UNCITRAL Working Groups since 2015, either as part of an official Australian delegation (eg WGII on Arbitration and Conciliation in 2016) or as observers on behalf of LAWASIA (e.g. WGV on insolvency).

Another activity has been this annual United Nations Day Lecture held in most capital cities since 2017. United Nations Day has been celebrated since 1948 to mark the anniversary of the UN Charter of 1945.[4] That Charter sets out the aims of the UN which include "the promotion of the economic and social advancement of all peoples".[5] Some 20 years later (in 1966), the UN established the inter-governmental United Nations Commission on International Trade Law (UNCITRAL), of which Australia is a member.[6] Since then UNCITRAL has created "an enviable and successful record of developing conventions and model laws in commercial and business law areas".[7] These include on the sale of goods, commercial arbitration, security interests, and electronic commerce. It also includes insolvency and restructuring.

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[1] This paper includes material from a briefing paper prepared by UNCCA Fellow and Chair of WGV Expert Advisory Group, QUT Adjunct Professor Michael Murray.

[2] https://uncca.org.au/ UNCCA has established Expert Advisory Groups based on the 6 Working Groups and UNCCA colleagues mentioned in this paper are all co-members of the WGV Expert Advisory Group.

[3] Additional achievements: Participation at numerous UNCITRAL conferences and symposia in Asia and the Pacific, as speakers and session chairs; Participation at expert group meetings organized by the UNCITRAL Secretariat in preparation for Working Group Meetings; Conducting annual UNCITRAL Seminars in May each year in Canberra for government and private sector stakeholders; Delivering UN Day lectures in most Australian capitals in 2017, 2018 and now 2019.

[4] In its Preamble, the UN Charter sets out the aims of the UN which include to employ international machinery for the promotion of the economic and social advancement of all peoples. These are elaborated on in Chapters IX and X which address international economic and social cooperation.

[5] That is, "to employ international machinery for the promotion of the economic and social advancement of all peoples": https://www.un.org/en/charter-united-nations/

[6] UNCITRAL was established by the United Nations General Assembly resolution 2205 (XXI) of 17 December 1966. Resolution 2205 (XXI) referred to the importance of international trade co-operation among States for the promotion of friendly relations and, consequently, for the maintenance of peace and security. https://uncitral.un.org/

[7] Paul Omar 2002, 'The UNCITRAL Insolvency Initiative: A Five-Year Review', The Paul J. Omar Collection in The International Insolvency Institute Academic Forum Collection, p 1. https://www.iiiglobal.org/sites/default/files/uncitralinsolvencyinitiativefiveyearreview.pdf

This year we focus on UNCITRAL's work in the area of insolvency over the past quarter-century and I will note in passing just some of the contributions made by Australian representatives to many UNCITRAL developments in this area. I will also outline the framework of the first Model Law dealing with insolvency (specifically the 1997 ML on Cross-Border Insolvency) as well as describe the other insolvency projects undertaken by UNCITRAL. Australia has adopted that the 1997 Model Law through domestic legislation and so my UNCCA colleague, **Scott Butler** will comment in greater detail on its implications for local practice.

2. History of UNCITRAL's work on Insolvency

UNCITRAL's involvement in insolvency began largely as a result of an initiative by practitioners through non-governmental organisations in the sector, in particular by INSOL International (of which ARITA and the Business Section of the Law Council of Australia are members) together with input from the International Bar Association and others.[8]

This call for a more consistent approach to cross-border insolvency issues was made after the recession of the early 1990s. The financial collapse of global enterprises had led to their constituent parts falling like dominoes - without regard for national boundaries and the complexities of diverse legal systems and insolvency laws.

A classic example was the collapse of the Maxwell Communications Corporation plc (MCC) group.[9] This followed shortly after the death by drowning of its charismatic leader Robert Maxwell who fell from his luxury vessel off the Canary Islands the day before he was to meet with the then deputy governor of the Bank of England.[10] The MCC group consisted of some 400 public companies intertwined with 400 Maxwell private companies. MCC itself was an English holding company with more than 400 subsidiaries worldwide primarily known for its general and consumer publishing. Assets were located across numerous and varied jurisdictions, such as Israel, Bulgaria, Germany, Kenya and Canada.

The group's principal assets were situated in the US (these included the American publishing firm Macmillan) – and were valued at up to $1 billion whereas its non-US assets were valued at less than £100 million. Yet England was the holding company's place of incorporation and the group's place of central management and control.[11] It also traded on the London Stock Exchange, kept its corporate books in pounds sterling and owed most of its $2.4 billion debt to British banks and London branches of foreign banks.

Two concurrent plenary insolvency proceedings were instigated by the MCC Board. On 16 December 1991, they applied in the United States for a Chapter 11 reorganisation and the following day they sought an administration order in England. A few days later, the court-appointed Examiner in the US and the English Joint Administrators proposed a unique 'Order and Protocol' which was approved by the English High Court on New Year's Eve and the US Bankruptcy Court by mid-January. The purpose of this operating agreement at the start of the case was "to address issues of stabilization and asset

[8] See Gerold Herrmann, 'International Co-Operation on Cross-Border Insolvency Issues' (1996) 24 *International Business Lawyer* 218.

[9] This case study draws upon Rosalind Mason, "Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet" in Paul Omar (ed), *International Insolvency Law: Themes and Perspectives* (2008, Ashgate)

[10] Caroline Davies, "Robert Maxwell was to meet bank official the day he died, say sons" *The Guardian* (9 September 2018).

[11] *Barclays Bank plc v Homan* [1993] BCLC 680 at 683 [*sub nom Re Maxwell Communications Corp plc (No 2)* [1992] BCC 757].

preservation, and a second agreement was negotiated at the end to address distribution to creditors and closure of the proceedings."[12]

Despite the Protocol assisting in the insolvency administration, issues still arose for litigation by claimants, one of the more significant being over an allegedly voidable US $30 million transaction with connections to both the United States and England.[13] We will return to the issue of voidable transactions in a cross-border context later.

So against the backdrop of the Maxwell and other major global insolvencies,[14] a call for an improved approach to cross-border insolvency issues, was made at an UNCITRAL Congress, "Uniform Commercial Law in the 21st Century",[15] held in New York in May 1992.

This issue was important because insolvency is typically excluded from international instruments that seek to harmonize the private international law of commercial and civil law matters. For example, it is excluded from the draft Hague Convention on the Recognition and Enforcement of Foreign Judgments.

Insolvency has been described as a 'unique' sub-system of commercial law, linked to broader issues of the public interest and aiming to promote a fair process taking account of the interests of multiple groups of stakeholders, to maximize value, minimize waste and enable rescue of viable businesses.[16]

Immediately following the 1992 Congress, a proposal was made to the regular UNCITRAL Session asking it to consider undertaking work on international aspects of insolvency. As a result, the UNCITRAL Secretariat prepared a Note on the topic that was discussed at the 1993 Session.[17]

Then in 1994, UNCITRAL and INSOL International (INSOL) held a significant Colloquium on Cross-Border Insolvency in Vienna.[18] It was attended by expert insolvency lawyers and accountants, judges, government officials and representatives of other interested sectors including lenders. Australian and Lawasia representative Ron Harmer, who was the lead Commissioner on the ALRC General Insolvency Inquiry (1988), presented a paper and contributed to the deliberations.[19] The Colloquium identified three useful limited goals for UNCITRAL – that of facilitating judicial cooperation, court access for foreign representatives and recognition of foreign insolvency proceedings.

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[12] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, p 36.

[13] The protocol approved by the courts did not clearly address the choice of law and choice of forum questions generated by the voidable transaction litigation and so the courts were required to resort to principles of comity and choice of law: *Maxwell Communication Corporation plc v Société Generale* 93 F 3d 1036 at 1053 (2nd Cir 1996).

[14] At the 1992 Congress, Carlos Zeyen, a lawyer from Luxembourg also referred to the global collapse of Bank of Credit and Commerce International (BCCI), which highlighted the lack of harmonization in the field of bankruptcy and insolvency proceedings in general.

[15] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Colloquia/uniform_commercial_law_congress_1992_e.pdf

[16] Irit Mevorach and Adrian Walters, 'The Characterisation of Pre-Insolvency Proceedings in Private International Law' *(*2019) *European Business Organization Law Review* (forthcoming)

[17] https://undocs.org/en/A/CN.9/378/Add.4

[18] See (1994) *International insolvency Review* special Issue.

[19] Ron Harmer, "What has been Done and What is Proposed" (1994) 4 *International insolvency Review* 36 at 38ff referred to the s 29 *Bankruptcy Act 1966* (Cth) provisions on requests for judicial assistance.

This was followed in March 1995 by a Judicial Colloquium in Toronto with over 60 judges and government officials attending from thirty-six states. This Judicial Colloquium[20] reached a consensus that UNCITRAL's development of a model legislative text with a limited scope was 'desirable', 'feasible' and 'in need of urgent attention'. (The Judicial Colloquium on insolvency, which is now supported by UNCITRAL/INSOL/World Bank, continues to meet biennially. Its most recent meeting was in Singapore in March 2019.[21])

And so, at its next regular Session in May 1995, UNCITRAL decided to develop a legal instrument relating to cross-border insolvency.[22] UNCITRAL has a small permanent Secretariat. Jenny Clift, an Australian Principal Legal officer, made a significant contribution to the Secretariat and in particular to WGV over some twenty years. WGV carries out its projects through working groups that are composed of all the member states and meet in annual or biannual sessions. Other UN member states and interested international organisations are invited to attend as observers.[23]

Working Group V (WG) was constituted to consider cross-border insolvency and met in Vienna in October 1996.[24] Australia was a member of the WG and was represented during this Model Law project by the then Australian Solicitor-General, Dr Gavan Griffith QC.[25]

The WG achieved consensus in a remarkably short period of time and in 1997 the UN recommended that member states adopt the Model Law on Cross-Border Insolvency as part of domestic legislation.[26] Australia adopted it through the *Cross-Border Insolvency Act 2008*, which commenced on 1 July 2008.

WGV has continued its work on issues relevant to insolvency.

[20] "The purpose of the Judicial Colloquium was to obtain for the Commission, as it embarked on work on cross-border insolvency, the views of judges and of Government officials concerned with insolvency legislation, on the specific issue of judicial cooperation in cross-border insolvency cases and the related topics of access and recognition." https://undocs.org/en/A/CN.9/419

[21] Beginning in 2017 in Sydney, various members have contributed to judging the Ian Fletcher International Insolvency Law Moot, established by the founding sponsors: INSOL; International Insolvency Institute; and QUT Faculty of Law, that has been held immediately prior to the 2017 and 2019 Colloquium..

[22] https://www.uncitral.org/pdf/english/travaux/insolvency/acn9-wg5-wp42-e.pdf

[23] Paul Omar 2002, 'The UNCITRAL Insolvency Initiative: A Five Year Review', p2

[24] It has been acknowledged as one of the most active WGs. Terence C Halliday, Josh Pacewicz, Susan Block-Lieb, "Who governs? Delegations and delegates in global trade lawmaking" (2013) 7 *Regulation & Governance* 279 at 283. This article is an intensive case study of the WGV drafting of the first two parts of the Legislative Guide on Insolvency.

[25] A private conversation in 2006 between the author and the late Ron Harmer.

[26] The Model Law is published in Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17, annex I) (UNCITRAL Yearbook, vol. XXVIII: 1997, part three). The discussion at the thirtieth session concerning the Model Law is reproduced in doc. A/52/17, paras. 12-225 (UNCITRAL Yearbook, vol. XXVIII: 1997, part one, A).

3. Working Group V – Insolvency

In 1999, Australia proposed work on a model law on corporate insolvency,[27] which project evolved into the development of a Legislative Guide,[28] the first two parts for which were finalised in 2004. In passing, I note a study led by Terence Halliday (a sociologist working for the American Bar Foundation) and NY insolvency professor Susan-Block-Lieb undertook a detailed analysis of the work of delegations and delegates to WGV on the first two parts of the Legislative Guide.[29] They found that Australia was one of only 2 state delegations[30] who attended all 8 sessions with high consistency in attendance by the delegates. In Australia's case, that was just one person.[31] And perhaps unsurprisingly, the research found that to play an effective role in 'global law-making' there is value in turning up![32]

While Australia was re-elected as a member of UNCITRAL in 2015, an outcome supported by UNCCA, Australia has not itself been represented at WGV sessions in recent years. However, UNCCA has ensured Australian experts have continued to attend *pro bono* the WGV sessions in recent years and to contribute to discussions occurring around the formal sessions.[33]

As mentioned, WGV has continued to make significant contributions on insolvency – in addition to producing the Legislative Guide, it has developed explanatory texts on the 1997 Model Law, as well as two more model laws in 2018 and 2019 and WGV is continuing to work on further projects on the

[27] https://undocs.org/en/A/CN.9/462/Add.1 See Conan Brownbill, Matthew Crooke and Andrew Sellars, 'Improving global frameworks for corporate regulation: an Australian perspective' in The Treasury, *Economic Roundup Spring 2004* http://archive.treasury.gov.au/documents/930/HTML/docshell.asp?URL=03_Global.asp . It refers to a task force, commissioned by the Prime Minister in October 1998 following the Asian financial crisis, to advise on ways that Australia could assist international financial reform. The report recommended that Australia propose, and actively encourage, an international guide on insolvency law by the United Nations Commission on International Trade Law (UNCITRAL). The report suggested that "given its recent experience preparing a model law on cross-border insolvency and its broad constituency and expert contacts, UNCITRAL would be a suitable body to prepare a model legislative framework for national insolvency laws for use in a range of different legal systems and commercial environments." Australian involvement in international insolvency projects was also considered by the Parliamentary Joint Committee on Corporations and Financial Services 2004 report on 'Corporate Insolvency Laws: A Stocktake'. It considered at [13.12] that "well-functioning insolvency laws are a necessary component of a country's financial architecture and a vital complement to international trade and investment. Australia's participation in international efforts to build credible and effective insolvency systems has the potential to benefit Australian businesses trading overseas and give reassurance to Australians and Australian institutions whose funds are at risk with cross-border operations."

[28] https://undocs.org/en/A/CN.9/504

[29] Terence C Halliday, Josh Pacewicz, Susan Block-Lieb, "Who governs? Delegations and delegates in global trade lawmaking" (2013) 7 *Regulation & Governance* 279 at 285. For background, see Susan Block-Lieb and Terence Halliday, Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law (2007) 42 *Texas International law Journal* 475

[30] The other three being Thailand (whose delegate chaired the WG), INSOL and the IBA.

[31] Andrew Sellars, then an officer from Australian Treasury and currently General Counsel at the Australian Financial Security Authority.

[32] Terence C Halliday, Josh Pacewicz, Susan Block-Lieb, "Who governs? Delegations and delegates in global trade lawmaking" (2013) 7 *Regulation & Governance* 279 at 291: "A handful of delegations (Australia, France, Germany, IBA, III, INSOL, Japan, Thailand, World Bank, US) appeared best positioned to participate effectively because they combined: high attendance of delegations; high consistency of delegations; high density of delegations; high diversity of delegations; and high consistency of delegates."

[33] In many cases, they have been accompanied by university students.

area. It will be interesting to observe how these may influence Australian developments in insolvency and restructuring regulation.

I will now briefly outline the significance of the Legislative Guide before turning to the Model Laws.

3.1 Legislative Guide on Insolvency Law

The **Legislative Guide on Insolvency Law** has been mentioned already. To date four Parts to the Guide have been adopted by UNCITRAL since 2004:

- Part one addresses key objectives and structure, including institutional framework requirements.
- Part two deals with core provisions for an effective and efficient insolvency law.
- Part three addresses the treatment of enterprise groups in insolvency, both nationally and internationally.
- Part four focuses on directors' obligations (including within groups) in the period approaching insolvency.

It "is intended to inform and assist insolvency law reform" by "providing a reference tool for national authorities and legislative bodies" when preparing new laws or reviewing existing ones.[34] Perhaps its greatest significance is that, together with the World Bank Principles on Creditor-Debtor Regimes,[35] they constitute international best practice standard for insolvency regimes.[36]

Turning now to the Model Laws in relation to insolvency, I begin with the 1997 Model Law, and its associated explanatory texts. This is only to outline its approach on which **Scott** will provide more detailed commentary.

3.2 Cross-Border Insolvency Act and the 1997 ML on CBI

At the time of writing, the 1997 Model Law has been adopted in a total of 48 jurisdictions.[37] In the Asia-Pacific region, it has been adopted by Australia,[38] Japan,[39] New Zealand,[40] the Philippines,[41] South Korea,[42] Singapore[43] and Vanuatu.[44] Key trading partners such as the United Kingdom[45] and the United States of America[46] have also adopted it.

The mode of adoption has varied, with some enacting stand-alone legislation and others amending existing insolvency legislation. Some states have also modified the uniform text to greater or lesser

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[34] https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law

[35] World Bank Principles for Effective Insolvency and Creditor-Debtor Regimes (2015) https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights

[36] Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (2018 Oxford University Press), p 40.

[37] http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (accessed 26 July 2015).

[38] *Cross-border Insolvency Act 2008* (Cth), adopting the Model Law largely unchanged.

[39] *Bankruptcy Law; Corporate Reorganisation Law; Civil Rehabilitation Law 2000; Law on Recognition of Foreign Proceedings 2001.* (Japan)

[40] *Insolvency (Cross-border) Act 2006* (NZ), adopting the Model Law largely unchanged.

[41] *Republic Act No. 10142 (Financial Rehabilitation and Insolvency Act of 2010)*. (The Philippines)

[42] *Debtor Rehabilitation and Bankruptcy Act 2005* (South Korea).

[43] *Insolvency, Restructuring and Dissolution Act 2018* (Singapore)

[44] *Insolvency (Cross-Border) Act 2013* (Act No. 4/2013) (Vanuatu)

[45] *The Cross-Border Insolvency Regulations 2006.* (Great Britain). Also adopted in Northern Ireland.

[46] *Bankruptcy Code* (Chapter 15) (USA).

extent through this process. Australia attached the 1997 Model Law as a Schedule to a stand-alone *Cross-Border Insolvency Act 2008* (Cth), making only the necessary changes to adapt it to the Australian context.[47]

Essentially the Act provides:

- for **access** by foreign insolvency representatives or creditors to the relevant Australian courts;[48]
- for **recognition** of foreign insolvency proceedings and the granting of local **relief**; as well as
- for **cooperation and coordination** by local and foreign courts and insolvency representatives.

The Act is supplemented by Federal Court bankruptcy rules and harmonised corporations' rules of the Federal Court[49] and Supreme Courts. This is addition to harmonised Court Practice Notes of the Federal Court and some State and Territory Supreme Courts on cross-border insolvency.

These Practice Notes provide an opportunity to mention another WGV text, the 2009 **Practice Guide on Cross-Border Insolvency Cooperation.**[50] Its purpose is to inform insolvency practitioners and judges on practical aspects of **cooperation and communication** in concurrent cases. In particular, it provides useful information on implementing Articles 25 and 27 of the 1997 ML. The 2009 Practice Guide (or its penultimate draft) is specifically mentioned in:

- The Federal Court's Cross-Border Insolvency Practice Note on Cooperation with Foreign Courts and Foreign Representatives (2016)[51] and
- Practice Notes issued by the Supreme Courts in NSW;[52] Victoria;[53] Tasmania;[54] Western Australia;[55] and the Northern Territory.[56]

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[47] Explanatory Memorandum, *Cross-border Insolvency Bill 2007* (Cth) [1.4].

[48] A foreign proceeding in insolvency that relates to a personal or corporate debtor may be granted recognition in Australia by the Federal Court or a Territory or State Supreme Court. The FCCA has no CBI jurisdiction and the State and Territory Supreme Courts have no cross-border bankruptcy jurisdiction.

[49] *Federal Court (Bankruptcy) Rules 2016;* Division 15A *Federal Court (Corporations) Rules 2000*.

[50] https://uncitral.un.org/en/texts/insolvency/explanatorytexts/practice_guide_cross-border_insolvency

[51] Cross-Border Insolvency Practice Note: Cooperation with Foreign Courts or Foreign Representatives (GPN-XBDR) 25 October 2016: www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-xbdr. Specific mention is made in the Federal Court Practice Note of the steps to be taken in a maritime insolvency where there are concurrent proceedings to arrest a ship.

[52] *Practice Note SC Eq 6 - Cross Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives*, 15 September 2017 www.practicenotes.justice.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/4f96eb1106eb1b61ca25819f0002a5dc/$FILE/2017_09_15_Practice%20Note%20SC%20EQ%206.pdf.

[53] *Practice Note SC CC 6: Cross-Border Insolvency Cooperation with Foreign Courts or Representatives and Coordination Agreements* 30 January 2017 www.supremecourt.vic.gov.au/sites/default/files/assets/2017/10/f3/855ec74aa/CC6CrossborderInsolvency.pdf.

[54] *Practice Direction No 2 of 2009 - Cross-Border Insolvency – Cooperation with Foreign Courts or Foreign Representatives*, 27 February 2009 https://supremecourt.wa.gov.au/_files/Consolidated%20Practice%20Directions.pdf.pdf

[55] *Consolidated Practice Directions 2009 - 9.11 – Cross-Border Insolvency – Cooperation with Foreign Courts or Foreign Representatives*. https://supremecourt.wa.gov.au/_files/Consolidated%20Practice%20Directions.pdf.pdf

[56] *Practice Direction No 5 of 2009 - Corporations Law Rules Division 15A – Cross-Border Insolvency – Cooperation with Foreign Courts* or Foreign Representatives, 11 June 2009 http://www.supremecourt.nt.gov.au/lawyers/documents/List_of_Supreme_Court_Practice_Directions.pdf

Note that in respect of judicial cooperation the old 'letter of request' provisions in section 29 of the *Bankruptcy Act* and sections 580-581 of the *Corporations Act* still apply and are used,[57] for example where the ML does not apply to the relevant 'foreign proceeding'.[58]

Commenting more broadly on the pre-existing law, Chief Justice Allsop in *Akers as a joint foreign representative of Saad Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation* [2014] FCAFC 57, at [69] noted:

> [69] The place of the pre-existing law in the resolution of any dispute that now involves the operation of the CBI Act and the Model Law depends on the nature and content of that previous law. To the extent that any such pre-existing law is contrary to a provision of the CBI Act or the Model Law, it would be superseded. Further, an operative principle would need to conform with the principles that underpin the Model Law. When the question of relief to be granted arises, foreign cases upon the Model Law will, of course, be relevant: see Art 8; but also will be local cases on pre-existing law to the extent that they are conformable with the operation of the Model Law and its aims and purposes.

Article 8 of the Model Law requires that in its interpretation, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Supporting such an Article, the UNCITRAL Secretariat has established a system called CLOUT - Case Law on UNCITRAL texts (CLOUT) to collect and disseminate information on court decisions and arbitral awards relating to UNCITRAL Conventions and Model Laws.[59] Its purpose is to promote international awareness of UNCITRAL's legal texts and to facilitate uniform interpretation and application of those texts. Another UNCCA colleague, Stewart Maiden QC based in Victoria, is the Australian insolvency correspondent for CLOUT.

An important aspect to the ML is that, as drafted,[60] it is not based on the principle of reciprocity between States. There is no requirement for a foreign representative seeking to rely upon the Model Law to have been appointed under the law of a state which has itself adopted the Model Law.[61]

The Model Law adopts an approach termed '**modified universalism'**,[62] described by Chief Justice Allsop as one in which a local court "extends a degree of co-operation to foreign insolvency proceedings whilst also protecting local interests".[63]

Depending upon the debtor's connection with the foreign jurisdiction, recognition of foreign insolvency proceedings may result in an automatic stay on Australian proceedings and suspend power to deal with the debtor's assets. Examples of discretionary relief available are an order

[57] See CBIA s 22 and *Re Chow Cho Poon (Pte) Ltd* [2011] NSWSC 300 (Barrett J).
[58] The two regimes are not mutually exclusive — recognition overseas under the Model Law does not preclude the local issue of letters of request.
[59] *http://www.uncitral.org/clout.*
[60] Some States have introduced a requirement for reciprocity e.g. South Africa, the Philippines.
[61] Also, banks, insurers and life companies are excluded from the Model Law regime. See reg 4 pursuant to CBIA s 23.
[62] *Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 at [120].
[63] *Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 at [28].

authorising the foreign representative to examine witnesses in Australia or an order entrusting the foreign representative with the administration of the debtor's Australian assets.

One aspect of the 1997 ML on which I will comment briefly is this principle of cooperation and coordination by Australian insolvency courts with foreign courts and foreign representatives.

In matters within the ML's scope, Australian insolvency courts are required by Article 25 to cooperate to the maximum extent possible with foreign courts or foreign. Unusually for Australian practice, it authorises direct communication by the Australian court.[64]

A current matter before Justice Gleeson potentially involves a request by the Federal Court of Australia to the New Zealand High Court (NZHC) that there be a joint hearing of those courts in respect of applications relating to the pooling of various funds held by companies subject to Australian and New Zealand liquidations, respectively.[65] Those companies include an Australian incorporated parent and a New Zealand incorporated subsidiary.[66] The letter of request could be issued by the Federal Court to a foreign court in the context of an Australian insolvency process pursuant to s 581 of the *Corporations Act*.

In the Halifax case, the liquidators (who were appointed to both the Australian company and New Zealand company) argued that client trust funds of the two related companies had become extensively commingled and were also not sufficient to meet client claims. They sought orders allowing them to pool the funds across the Australian and NZ insolvencies but because of the commingling between the companies, it was seen as not feasible for the pooling orders to be determined separately by the Australian and NZ courts, as "each application [was] to a significant extent an application for judicial advice or directions in respect of the same commingled pool of funds."[67]

The Federal Court approved in principle the concept of issuing a letter to the NZ High Court requesting a joint hearing on the pooling applications, describing it as a "classic candidate for cross-border cooperation between courts to facilitate the fair and efficient administration of the winding up".

Justice Gleeson said she saw merit in hearing the matters together "because they would involve common questions of fact and law and because the claims arise, at least to some extent … from the same series of transactions". Ultimately however the Judge decided that issuance of the letter of request was premature as the relevant client respondents to the pooling application had not yet been identified and consulted.[68]

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[64] There is some precedent for this globally with the joint hearings of US and Canadian courts in the bankruptcy of the *Nortel* group.

[65] *Kelly, in the Matter of Halifax Investment Services Pty Ltd (in liq) (No 5)* [2019] FCA 1341.

[66] See *Halifax New Zealand Limited* [2018] NZHC 3390.

[67] *Kelly, in the Matter of Halifax Investment Services Pty Ltd (in liq) (No 5)* [2019] FCA 1341 at [30].

[68] The Federal Court was required by s 581(2) to act in aid of the NZHC because NZ is a "prescribed country" under s 581 (see reg 5.6.74(e) and because the NZHC has jurisdiction in "external administration matters". There was no need for a letter of request from the NZHC to the FCA if the NZHC were to accede to a letter of request. The decision also demonstrates the ongoing relevance of section 581 of the Corporations Act despite the adoption of the Model Law. The parties' view was that the Model Law had no role because there were two separate entities, and the model law appears to contemplate a single entity. However, this is being queried as to whether one could facilitate such cooperation through parallel recognition applications under the Model Law in each country. In any event, the model law on group insolvencies would likely be helpful in situations like this. (See [2019] *Insolvency Law Bulletin* forthcoming.)

A recent international judicial initiative[69] has been the formation of the Judicial Insolvency Network which has developed Guidelines to facilitate joint hearings in respect of cross-border insolvencies.[70] The NSW SC is the only Australian court[71] that has adopted these Guidelines, doing so on an interim basis and pending consideration by the Council of Chief Justices of any further amendments to the uniform Corporations Rules and the Practice Note in respect of the JIN Guidelines.[72]

The significant role played by judges in cross-border insolvency is reflected in yet another WGV text, **The Judicial Perspective.**[73] This explanatory text was first published in 2011 and is periodically updated, most recently in 2013. It identifies issues that may arise on an application for recognition or cooperation and discusses the approaches that courts have taken in states that have enacted legislation based on the Model Law.[74]

I now turn to the two additional Model Laws dealing with insolvency that have been developed by UNCITRAL. Neither of these have as yet been adopted domestically by Australia – *and I do not know when their adoption may be considered by the Australian government*.

3.3 Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)

The **Model Law on Recognition and Enforcement of Insolvency-Related Judgments** was formally adopted by UNCITRAL in July 2018. It is drafted in a form that can either be integrated into the 1997 Model Law or enacted as a stand-alone statutory regime.

Its purpose is to address an apparent limitation in the 1997 Model Law arising from the UK Supreme Court decisions in *Rubin v Eurofinance* (UK/USA) and *Grant v New Cap Re* (UK/Australia). These cases which were heard together confirmed the long-standing English position that a foreign court would not enforce a judgment *in personam* if the defendant had not submitted to the jurisdiction.[75]

The background to the *New Cap Re* case is described by UNCCA member John Martin, who acted in the matter as follows:

> "the Australian liquidator had obtained a $7M preference judgment against a Lloyd's syndicate in default of their appearance in Australia. Lord Collins treated Justice Barrett's order seeking to reconstitute the insolvent estate as being no different to a money judgment

[69] The network seeks to provide judicial thought leadership, develop best practices and facilitate "communication and cooperation amongst national courts in cross-border insolvency and restructuring matters." https://www.supremecourt.gov.sg/news/media-releases/judges-of-the-worldwide-judicial-insolvency-network-to-meet-in-new-york-city-this-september.

[70] http://www.jin-global.org/jin-guidelines.html. The JIN Guidelines have been adopted by the NSW SC.

[71] Versions have also been adopted by courts in Bermuda; Cayman Islands; Eastern Caribbean; England and Wales; Singapore; South Korea (Seoul); and the US (Delaware, Florida and Southern District New York Bankruptcy Courts).

[72] *Practice Note SC Eq 6 - Cross Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives*, 15 September 2017 www.practicenotes.justice.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/4f96eb1106eb1b61ca25819f0002a5dc/$FILE/2017_09_15_Practice%20Note%20SC%20EQ%206.pdf.

[73] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial-perspective-2013-e.pdf

[74] It refers to the underpinning four principles of access; recognition; relief; and cooperation and coordination.

[75] *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236

in private litigation and declined to enforce it against the Lloyd's syndicate other than in accordance with traditional rules for enforcement of judgments in personam."

To give a sense of the scope of the judgments intended to be covered by this new Model Law, Article 2(d) defines "Insolvency-related judgment" as follows:

"(i) Means a judgment that:

a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and
b. Was issued on or after the commencement of that insolvency proceeding; and

(ii) Does not include a judgment commencing an insolvency proceeding."

It should be noted that Australian courts are not necessarily bound by the *Rubin* decision*,* although an UNCCA member Neil Hannan suggests that it may be *persuasive,* subject to appropriate facts existing. On the other hand, the High Court of Australia may rather find that "insolvency law has its own rules for recognition and are not bound by the general rules that exist for recognition of foreign judgments", an outcome that Neil Hannan argues (and with which I agree) is desirable. That unresolved issue may cause the Australian government to defer consideration of adoption of this Model Law.

3.4 Model Law on Enterprise Group Insolvency (2019)

In May 2019, WGV completed its lengthy work on the **Model Law on Enterprise Group Insolvency**. This addresses the difficult yet common case of multinational affiliated companies being the subject of insolvency proceedings in two or more States.

It provides procedures to harmonize the various proceedings by way of addressing such issues as intercompany claims, duties of directors in the period approaching insolvency, the need to avoid inconsistent rulings affecting the enterprise group, and the appointment of a single group representative.

In July 2019, UNCITRAL formally adopted this Model Law along with its Guide to Enactment and a text on the obligations of directors of enterprise group companies, which are being added to Part Four of the UNCITRAL Legislative Guide on Insolvency Law.[76]

4. Ongoing Work by WGV: *Micro/Small/Medium-Sized Enterprises*

UNCITRAL's WGI is working on **Micro/Small/Medium-Sized Enterprises** and reducing the legal obstacles they face throughout their life cycle, in particular, in developing economies. Associated with this, WGV is addressing the particular difficulties MSMEs face in insolvency. This has resulted in a draft text on objectives and features of a simplified insolvency regime that may guide countries in how such insolvencies are to be administered. The further development of this issue will be the subject of discussions at the next WGV meeting in Vienna in December 2019.

5. Possible Future Work

5.1 Choice of Law

The pragmatic drafters of the 1997 Model Law, who recognised the difficulties in achieving domestic adoption of a cross-border insolvency instrument, were careful not to import the consequences of the foreign insolvency law into the local system.[77]

[76] See http://www.unis.unvienna.org/unis/en/pressrels/2019/unisl277.html

[77] For example, the Article 20 mandatory stay following automatic recognition of the foreign insolvency proceeding and the related appointment of the foreign insolvency representative in the debtor's COMI refers to local relief in terms of the enacting state's insolvency laws: Article 20(2).

Likewise, the recent ML on **Recognition and Enforcement of Insolvency-Related Judgments** does not expressly address choice of law (and choice of forum). John Martin sees this as problematic, saying that the 2018 Model Law

> "does not address the issue as to whether enforcement of an insolvency judgment can be declined where, consistently with choice of law principles, the law applied to the transaction was not, in the private international law sense, the appropriate choice of law. (This is a different issue to that addressed in article 14(g)(iii).)[78]
>
> This is a highly significant omission. With preferences, for example, US and Australian preference law is materially the same except that our look back period is 6 months, compared to their 3-month period. With an international insolvency and a transaction with a US/Australian flavour that occurred, say, 5 months before the relevant date, the selection to be made between Australian and US preference law will be determinative of the outcome of the dispute. Similarly, where the insolvency/transaction has a UK/US dimension (as in both Maxwell and Rubin v Eurofinance) or an Australian/UK dimension (as in Grant v New Cap Re), the forensic differences between Australian and English preference law will also likely mean that choice of law will be determinative of the dispute".

As argued in John Martin's and my paper on 'Conflict and Consistency in Cross border Insolvency Judgments' presented at UNCITRAL's 50th Anniversary Congress in 2017, if consensus can be achieved regarding choice of law rules, the risk of inconsistent judgments will largely be avoided.[79]

It is encouraging to see that conflict-of-law issues in insolvency have been listed for a Colloquium discussion in May 2020, following the NY WGV meeting.

5.2 Asset tracing

WGV is also discussing whether a US proposal for a **model law on cross-border asset tracing and recovery** is an appropriate subject for WGV work. This topic is listed for a Colloquium discussion in December 2019, following the next Vienna WGV session.[80]

6 Conclusion

And so concludes my brief history of UNCITRAL's work on insolvency as well as its current and potential future projects in the area. I will now hand over to **Scott Butler** who will provide a practitioner's perspective and comment on some key implications of Australia's adoption of the 1997 ML, including some suggestions for improving Australia's current CBI laws. Laws that will no doubt be tested as individuals and companies increasingly engage in business across borders.

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[78] Article 14 Grounds to refuse recognition recognition and enforcement of an insolvency-related judgment: (g)(iii) "The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction".

[79] Rosalind Mason and John Martin, "Conflict and Consistency in Cross border Insolvency Judgments", paper presented at the UNCITRAL 50th Anniversary Congress (2017): http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/46-MASON_and_MARTIN-Conflict_and_Consistency_in_Cross_border_Insolvency_Judgments.pdf

[80] The proceedings in *Zetta Jet* are an instance of an asset being pursued overseas by a US trustee.