One of the problems with insolvency laws is that generally they can only be effective within the confines of the jurisdiction in which those laws had been enacted. Problems arise when an insolvent debtor from one State has assets and affairs in another State. Even if the national law of the debtor’s State purports to give to the debtor’s insolvency representative control over the assets and affairs located in the other State, the representative can take effective control of those assets only to the extent permitted by the law of the other State.

This inability to effectively control a debtor’s assets has several potentially detrimental consequences. Debtors with assets in different countries can shield or conceal them from their creditors and from their insolvency representative. Where an insolvency representative cannot get access to those assets, they may be unable to reorganize the debtor and save an essentially viable business or, where the debtor has to be liquidated, be unable to realize those assets in an effective manner that will maximize returns for creditors.

What is needed is a framework for cooperation and coordination that both respects the sovereignty of national laws and procedural systems and allows the assets located in different countries to be treated comprehensively, transparently and fairly. Such a framework is provided by the UNCITRAL Model Law on Cross-Border Insolvency. It focuses upon what is required to facilitate the administration of cross-border insolvency cases, but does not address issues of substantive law, which are left up to the law of the State enacting the Model Law.

What is cross-border insolvency?

- Where the insolvent debtor has assets in more than one State
- Where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place
- Where insolvency proceedings concerning the same debtor have commenced in more than one State

Why are we concerned about cross-border insolvency?

- There is a general lack of understanding about cross-border insolvency:

  The 2017 Africa Roundtable on Insolvency Reform (ART) was the first time that jurisdictions such as Kenya, Ghana and Mozambique reported cross-border activity. Prior to that, it was pretty much limited to South Africa and Mauritius. This means that there is still a significant lack of understanding and mystery surrounding cross-border – for the policy-makers, judiciary and private practitioners. This lack of understanding is even more significant with the Model Law. Lack of understanding of the goal and purpose of the Model Law can lead to cherry-picking that destroys the coherence of the framework.

- Increasing incidence of cross-border insolvency proceedings
- Numerous difficulties associated with those proceedings – delay, cost, cumbersome procedures and formal requirements, lack of authorization to cooperate, conflicting court decisions on the same or similar matters, uncertainty and unpredictability
- Lack of national and international legal regimes providing solutions
- Insolvency law as a “frontline factor” in financial crisis prevention and management
A. BACKGROUND

1. The Model Law was negotiated between 1995 and 1997 by an intergovernmental working group comprising representatives of 72 States, seven inter-governmental organizations (IGOs) and ten non-governmental organizations (NGOs). This diversity of representation may be seen as key to the wide acceptance and adoption of the text by States from different legal traditions and stages of economic development.

2. The negotiation of the Model Law had a number of clear objectives, which are set out in the Preamble:

   (a) Promoting cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
   (b) Providing greater legal certainty for trade and investment;
   (c) Facilitating the fair and efficient administration of cross-border insolvencies in a manner that protects the interests of all creditors and other interested persons, including the debtor;
   (d) Protecting and maximizing the value of the debtor’s assets; and
   (e) Facilitating the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

   **Does not attempt unification of substantive insolvency law**

   **Respects differences in procedural law**

4. The framework provided is unilateral – the Model Law relies for its effect on enactment by individual States. Such enactment generally signals that a State will accept applications for recognition of foreign insolvency proceedings from all other States, irrespective of whether those other States have adopted the Model Law. The only exception is where the Model Law has been enacted on the basis of reciprocity and provides, for example, that applications for recognition will only be accepted from other enacting States.

   - **Article 8**

5. Because of its unilateral nature, it is important for its effective cross-border application that the text be interpreted uniformly by different States. That interpretation is aided by the objectives set out in the preamble and also by article 8. This article encourages States to have regard to the international origin of the text and the need to promote uniform interpretation. In practice, this may mean considering the decisions of courts of other States when determining how certain issues should be resolved – some States have included this provision as a direction to the courts (USA). This uniform interpretation is facilitated by tools prepared by UNCITRAL. These include the system which reports case law on the application of the Model Law (Case Law on UNCITRAL Texts or CLOUT), and a guide for judges on how to apply and interpret the Model Law (The Judicial Perspective).

B. ENACTMENTS BASED ON THE MODEL LAW

6. As at the end of August 2018, legislation based on the Model Law has been enacted by 44 States in a total of 46 jurisdictions:

   - Australia (2008); Benin (2015); Burkina Faso (2015); British Virgin Islands (overseas territory of the United Kingdom of Great Britain and Northern Ireland) (2003); Cameroon (2015); Canada (2005); Central African Republic (2015); Chad (2015); Chile (2013); Colombia (2006); Comoros (2015); Republic of the Congo (2015); Côte d’Ivoire (2015); Dominican Republic (2015); Democratic Republic of Congo (2015); Equatorial Guinea (2015); Gabon (2015); Gibraltar (2014); Greece (2010); Great Britain (2006); Guinea (2015); Guinea-Bissau (2015); Israel (2018); Japan (2000); Kenya (2015); Malawi (2015); Mali (2015); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Niger (2015); Philippines (2010); Poland (2003); Republic of Korea (2006); Romania (2002); Senegal (2015);
Serbia (2004); Seychelles (2013); Singapore (2017); Slovenia (2007); South Africa (2000); Togo (2015); Uganda (2011); the United States of America (2005); and Vanuatu (2013).

A number of States are actively considering enacting the Model Law or have already drafted legislation to enact it, including: Brazil, India, Ireland, and Thailand.

7. As a model law, the text is flexible and can be amended by enacting States. In recommending the text to States, the United Nations General Assembly suggests it be given favourable consideration, “bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency”. Clearly, the more changes made to the text, the less the harmonizing effect of the resulting legislation and the less certainty and predictability there will be for cross-border insolvency proceedings.

8. While many of the States noted above have followed the Model Law quite closely in enacting their legislation, some changes have been made and the enacting legislation needs to be carefully examined; it should not be assumed that it corresponds exactly to the terms of the Model Law. Some of the changes made expand the application of the Model Law to reflect local insolvency law (e.g. the US provisions on automatic relief refer to the relief available under the Bankruptcy Code, which is somewhat broader in scope than that available under the Model Law); other changes limit the application of the Model Law (e.g. in Japan the relief available on recognition is not automatic but requires an application to the court or may be ordered by the court on its own initiative, art. 25 is omitted and art. 26 is limited to cooperation between insolvency representatives; South Africa, Romania, Mexico and Uganda have included a reciprocity provision).

9. Different methods of enactment have been used. Some States have drafted specific provisions either using the drafting of the Model Law or based, to a greater or lesser extent, upon that drafting (many enacting States); some have included the Model Law, as drafted, in a schedule to the enabling legislation (Australia and New Zealand); some have enacted it by way of regulation (Great Britain).

C. SCOPE

10. The Model Law applies in 4 specified situations, where (art.1):

(a) Requests from a foreign court for assistance from the enacting State (inbound requests);
(b) Request by the enacting State to a foreign State (outbound requests);
(c) There are concurrent proceedings concerning the same debtor;
(d) Creditors or other interested parties in a foreign State have an interest in requesting commencement of, or participation in an insolvency proceeding under the law of the enacting State.

11. The text covers foreign proceedings that (art.2):

(a) Relate to insolvency
(b) Are for the purpose of reorganization or liquidation of the debtor
(c) Are “collective” and
(d) Subject the assets and affairs of the debtor to control or supervision by a court.

12. Under the Model Law scheme, proceedings that do not meet those criteria would not qualify for recognition. The 2013 revision of the Guide to Enactment provides more information on the meaning of article 2, clarifying for example, that:

(a) A “collective proceeding” is one in which substantially all of the assets and liabilities of the debtor are dealt with, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding that does not deal with a certain class of claim, such as those of secured creditors, should not be excluded if it satisfies the other elements of article 2, subparagraph (a) (for court decisions on this point see The Judicial Perspective (2013), paras. 71-78);
(b) A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress for the purposes of the subparagraph. Financial adjustment agreements or similar contractual arrangements that do not lead to the commencement of an insolvency proceeding also would not generally satisfy the requirements of subparagraph (a). However, such agreements would clearly be enforceable outside the Model Law without the need for recognition; and

(c) Control or supervision by an insolvency representative may be sufficient to satisfy the requirements of subparagraph (a), even if it is potential rather than actual; mere supervision of an insolvency representative by a licensing authority however would not be sufficient (for court decisions on this point see The Judicial Perspective (2013), paras. 84-90).

13. Exclusions are contemplated by the Model Law. Banking and insurance institutions are a common example – generally on the ground that they are subject to special regulatory regimes. Exclusions for financial and investment institutions, clearing houses and commodity brokers have also been introduced in some enacting legislation.

Reciprocity – see further below

UNCITRAL decided against including a requirement for reciprocity in the ML, but several enacting jurisdictions have done so:

South Africa: requires designation by Minister [s. 2(2)(a)] – no countries designated, moves to remove requirement

Mexico: requires “international reciprocity” [art. 280]

Romania: requires reciprocity with respect to the effects of foreign judgements [art. 18 (1)(e)]

Uganda: requires designation by Minister, as well as reciprocal agreements, treaties etc. [ss. 212-213]

D. KEY ELEMENTS

The basic premise is that the Model Law establishes simple, straightforward requirements that

Minimize formality for recognition of foreign proceedings,

Facilitate predictable outcomes,

Reduce scope for disputes, and

Recognize the need for speedy outcomes.

14. The text is organized around four key elements, identified through a series of studies and consultations conducted in the early 1990s as being the areas upon which international agreement might be possible:

(a) Access to local courts for representatives of foreign insolvency proceedings and for creditors

(b) Recognition of certain orders issued by foreign courts

(c) Relief to assist foreign proceedings

(d) Cooperation among the courts of States where the debtor’s assets are located in order to facilitate coordination of proceedings

1. ACCESS

15. When a foreign representative seeks to manage the assets of the debtor in a foreign country they have to obtain access to the assets. The Model Law does this by giving the foreign representative a right of direct access to the courts of the State where the Model Law has been
enacted (art. 9). This right of access is not subject to any special conditions, but what the foreign insolvency administrator will be able to achieve is largely left to the local law and, in a large measure, to the discretion of the local court.

16. These provisions address inbound and outbound aspects of cross-border insolvency. An insolvency representative of the enacting State is authorised to act in a foreign State (art. 5) on behalf of local proceedings. A foreign representative has:

(a) A right of direct access to courts in the enacting State (art. 9);
(b) A right to apply to commence a local proceeding in the enacting State on the conditions applicable in that State (art. 11); and
(c) A right to participate in insolvency-related proceedings in the enacting State under the law of that State (art. 12).

17. The right to commence a local proceeding under art. 11 is not limited to cases where a foreign proceeding has already been recognized. Some States however, have adopted a different view and subjected that right to prior recognition (USA).

18. The fact that a foreign representative has the right to apply to the courts of the enacting State does not subject him/her/the foreign assets and affairs of the debtor to the jurisdiction of the enacting State for any purpose other that that application (art. 10).

19. Foreign creditors have the same right as local creditors to commence proceedings and participate in proceedings (art. 13).

2. RECOGNITION

20. A foreign representative can apply for recognition of a foreign proceeding (art. 15.1). One of the key objectives of the Model Law was to establish simplified procedures that would avoid time-consuming legalization or other processes and provide certainty with respect to the decision to recognize. Where the foreign proceeding is a foreign proceeding within the definition of art. 2 (as discussed above) and certain evidential requirements relating to the appointment of the foreign representative and commencement of the foreign proceedings are met (art. 15.2), the court should recognize the foreign proceedings [subject only to the public policy exception of art. 6].

21. In terms of evidence, the foreign representative is required to provide:

(a) A certified copy of the decision commencing the foreign proceedings and appointing the foreign representative; or
(b) A certificate from the foreign court as to the matters in (a); or
(c) Evidence acceptable to the recognizing court as to the matters in (a); plus
(d) A statement identifying all foreign proceedings against the debtor that are known to the foreign representative.

22. The only proviso to recognition is found in art. 6, which allows recognition to be refused where it would be “manifestly contrary to the public policy” of the recognizing State. No definition of what constitutes public policy is attempted as notions vary from State to State. However, the intention is that it be interpreted restrictively and that art. 6 be used only in exceptional circumstances. Several United States cases note the need for limited use of this article (for a discussion of article 6, see The Judicial Perspective (2013), paras. 48-54).

23. The court should recognize foreign proceedings as either (art. 17.2):

(a) Main proceedings, that is proceedings taking place where the debtor has its centre of main interests or COMI as it is commonly known. This concept is not defined in the Model Law, but is based on a presumption of the registered office or habitual residence (in the case of an individual) of the debtor (art. 16.3); or
(b) Non-main proceedings, that is proceedings taking place where the debtor has an establishment. This is defined as "any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services" (art.2 (f)).

**Revision of the Guide to Enactment**

24. While the majority of applications for recognition and relief made under the Model Law appear to proceed without issue, a number of cases have raised questions relating to the interpretation of certain provisions. These have included, for example, what is required to satisfy the various elements of the definitions in article 2 of the Model Law, particularly “foreign proceeding” under subparagraph (a); the factors to be considered with respect to rebuttal of the presumption in article 16, paragraph 3 that the centre of the debtor’s main interests is its place of registration (or incorporation under some laws); the relevant time for consideration of the location of the debtor’s centre of main interests; and the scope of the public policy exception under article 6.

25. The degree of unpredictability and uncertainty produced by some of the different decisions on these issues has been the subject of numerous articles and discussions. Although the Guide to Enactment accompanying the Model Law, together with the original working group papers and reports, serve as key sources of information on the policy settings of the Model Law and are often cited by judges in numerous jurisdictions as tools for its interpretation, they do not always provide ready answers to all of the questions that have arisen.

26. In response to a proposal from the United States in 2010 (UNCITRAL document A/CN.9/WG.V/WP.93/Add.3), work was undertaken to provide additional information and clarify a number of the issues arising from its application and interpretation, without revising the text of the Model Law itself. UNCITRAL’s Working Group V decided that that information should be provided by way of revision of the Guide to Enactment of the Model Law on the basis that having a single source of information and guidance might avoid any confusion that potentially could arise from the preparation of a document additional to the existing Guide. The revision was finalised in July 2013 and the resulting text, adopted by the Commission in 2013, is entitled the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

27. The revisions relate, firstly, to the elements of article 2, subparagraph (a), which define what is required for a foreign proceeding to be recognized under the Model Law. That foreign proceeding is required to be (i) a collective judicial or administrative proceeding, (ii) pursuant to a law relating to insolvency, (iii) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, and (iv) for the purpose of reorganization or liquidation.

28. The Guide to Enactment and Interpretation clarifies that:

(a) A “collective proceeding” is one in which substantially all of the assets and liabilities of the debtor are dealt with, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding that does not deal with a certain class of claim, such as those of secured creditors, should not be excluded if it satisfies the other elements of article 2, subparagraph (a) (for court decisions on this point see The Judicial Perspective (2013), paras. 71-78);

(b) With respect to the requirement for the proceeding to be one “pursuant to a law relating to insolvency”, the Guide suggests that a simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress for the purposes of the subparagraph;

(c) Control or supervision of the assets and affairs of the debtor may be exercised directly by a court or by an insolvency representative where the insolvency representative is itself subject to control or supervision by the court, even if that control is potential rather than actual.
Mere supervision of an insolvency representative by a licensing authority however would not be sufficient (for court decisions on this point see The Judicial Perspective (2013), paras. 84-90);

(d) Financial adjustment agreements or similar contractual arrangements that do not lead to the commencement of an insolvency proceeding also would not generally satisfy the requirements of subparagraph (a) that the proceedings be “for the purposes of liquidation or reorganization”. However, such agreements would clearly be enforceable outside the Model Law without the need for recognition.

29. Central to the revision of the Guide to Enactment is the concept of “centre of main interests” or COMI, in particular, identification of factors that might be relevant to rebutting the presumption under article 16, paragraph 3 that the debtor’s COMI is its place of registration. The revisions note that where the debtor’s COMI coincides with its place of registration, no issue concerning rebuttal of the presumption will arise. In reality, however, the debtor’s COMI may not always coincide with its place of registration. The party alleging that it is not at that place will be required to satisfy the court of the State receiving an application for recognition as to its location. The court will be required to consider independently where the debtor’s COMI is located. Two principal factors have been identified. Considered together, these factors should indicate whether the location in which the foreign proceeding has commenced is the debtor’s COMI, namely that: (a) the location is where the debtor’s central administration takes place, and (b) the location is readily ascertainable by creditors.

30. Where those two factors don’t yield a ready answer, the Guide suggests that additional factors may be considered, with the court giving greater or less weight to a given factor, depending on the circumstances of the individual case. These factors include, in no particular order or priority: the location of the debtor’s books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor’s principal assets or operations are found; the location of the debtor’s primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

31. The final key revision concerns the time by reference to which the debtor’s COMI (or establishment) should be determined. The revised text suggests that the date of commencement of the foreign proceeding provides a test that can be applied with certainty and consistency to all insolvency proceedings, wherever commenced; the date of an application for recognition, in comparison, will vary from jurisdiction to jurisdiction. Moreover, the choice of the date of commencement also addresses issues that may arise where the business activity of the debtor has ceased at the time of the application for recognition, and, as may occur in cases of reorganization, it is not the debtor entity that continues to have a COMI, but rather the reorganizing entity.

32. The Judicial Perspective has been updated to reflect the changes included in the Guide to Enactment and Interpretation, as well as judicial decisions issued after the first edition was completed in 2011. Quite a few cases of importance were decided in that time, not least of which are those relating specifically to the work being done to identify factors relevant to determining COMI. A number of recent cases also address aspects of the relief provisions of the Model Law (articles 19-21), including the enforceability of insolvency-derived judgements under article 21.

3. RELIEF

33. The Model Law principle is that the relief considered necessary for the orderly and fair conduct of a cross-border insolvency should be available to assist foreign proceedings, whether on an interim basis or as a result of recognition. The Model Law provides that:
(a) Interim relief is available at the discretion of court between the making of an application for recognition and the decision on that application (art. 19);

(b) Automatic relief specified in the Model Law is available on recognition of main proceedings (art. 20); and

(c) Relief at the discretion of the court is also available for both main and non-main proceedings; for main proceedings, it would be in addition to that available automatically on recognition (art. 21).

34. The Model Law adopts the approach of specifying the types of relief that should be automatically available as a minimum. That approach is a compromise between importing the relief available to the foreign proceeding under the law of the foreign State and applying the relief that would be available under the law of the recognizing State.

35. All States that have enacted legislation based on the Model Law, except for Japan and Korea, provide for automatic relief on recognition (both of those States provide for it to be available at the discretion of the court); but the scope of that relief varies slightly. The Model Law provides that with respect to the automatic relief, the scope of the effects of commencement depends upon exceptions/limits existing in the laws of the recognizing State with respect to the stay or suspension (art. 20.2). This might include, for example, exceptions allowing the enforcement of security over the debtor’s property (Great Britain) or allowing commencement or continuation of action or proceedings against the debtor or its assets except execution against its assets (Mexico).

36. With respect to both interim relief and discretionary relief, the court can impose conditions and modify or terminate the relief to protect the interests of creditors and other interested persons affected by the relief ordered (art. 22).

4. COOPERATION and COORDINATION

a. Cooperation

37. The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts. This is not dependent upon recognition and may thus occur at an early stage and before an application for recognition. Nor is it limited to proceedings that would qualify for recognition under art. 17 and may thus apply with respect to proceedings commenced on the basis of presence of assets.

38. Cooperation is authorized between courts, between courts and foreign representatives and between foreign representatives.

39. Recognizing that the idea of cooperation might be unfamiliar to many judges and insolvency representatives, art. 27 sets out some of the possible means of cooperation. That article is the basis of further work by UNCITRAL - the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) discusses the various elements of article 27 and in particular, compiles practice and experience with respect to the use and negotiation of cross-border agreements or protocols as they are often known.

b. Concurrent proceedings

40. The Model Law contains several provisions addressing coordination of concurrent proceedings, which aim to foster decisions that would best achieve the objectives of all of those proceedings.

41. The recognition of foreign main proceedings does not prevent commencement of local proceedings (art. 28), nor does the commencement of local proceedings terminate recognition already accorded to foreign proceedings or prevent recognition of foreign proceedings.
42. Article 29 addresses adjustment of the relief available where there are concurrent proceedings. The basic principle is that relief granted to a recognized foreign proceeding should be consistent with local proceedings, irrespective of whether the foreign proceeding was recognized before or after the commencement of the local proceeding. For example, where local proceedings have already commenced at the time the application for recognition is made, relief granted to the foreign proceeding must be consistent with the local proceeding. If the foreign proceeding is recognized as a main proceeding, the automatic relief generally available on recognition (art. 20) does not apply.

E. ENACTMENT of the Model Law: issues and apprehensions

43. Discussions about adoption of the Model Law have revealed a few apprehensions. Two principal concerns relate to sovereignty and reciprocity. UNCITRAL is currently undertaking a study to gather information on the obstacles to wider adoption of the Model Law. The provisions of the Model Law provide answers to some of these issues; others are not (or cannot be) directly addressed by the terms of the Model Law, as they are of a more general application than insolvency, or they relate to the implementation of insolvency law, raising questions of judicial and institutional capacity.

1. SOVEREIGNTY

44. The concern with respect to sovereignty is not one that is limited in its application to cross-border insolvency and adoption of the Model Law, but rather may apply broadly to all situations where recognition of foreign judgments and arbitral awards, as well as exposure to other decisions and processes of foreign courts, can impact upon the local legal system. The concerns focus on the disadvantages likely to accrue from exposing one country to the legal processes and decisions of another, for example, a finding that a debtor is insolvent or the decision to commence insolvency proceedings. This is regarded as having the potential to subordinate national interests and institutions to foreign influence, with a consequent loss of ability to regulate one’s own affairs.

45. A related concern is the potential for inconsistency between royal prerogative (of which judicial power is one part) and the autonomy of the jurisdiction if foreign judgments are to be recognized.

2. RECIPROCITY

46. A widely-discussed issue that is closely related to the concern about sovereignty is that of reciprocity. As noted above, a suggestion to include a reciprocity requirement in the Model Law was ultimately not accepted, and it consequently functions unilaterally on a global basis. Concern that this approach might lead to recognition of inbound requests but not outbound requests has led some countries to include a reciprocity provision in legislation enacting the Model Law. An issue of concern with that approach, however, is the implementation of the reciprocity requirement. To facilitate cross-border insolvency, a clear and quick determination is required as to whether another State’s legislation is sufficiently similar to qualify as being reciprocal. That might be achieved by designating in the law those countries whose laws are regarded as satisfying the requirement. Different approaches, such as a legislative formulation that defines reciprocal treatment by reference to whether or not another country has enacted a law “based on the Model Law,” or a consideration of foreign law by the courts on a case-by-case basis, are unlikely to achieve a quick and certain result. In the first instance, the flexibility allowed by the Model Law and the likelihood of local variations in enactment will require close scrutiny of enacting legislation to ensure the required level of compliance with the requirement. The second approach is likely to involve delay while the court conducts the necessary investigations, which may include, in order to give a true picture of the foreign law, consideration of difficult questions of implementation of that law.

47. A few countries have adopted such a requirement, in various forms, including South Africa, Romania, Mexico and Uganda. They are somewhat different in nature and it remains to be seen how they will be implemented in practice. South Africa will recognize proceedings only from designated countries; Mexico and Romania specify the need for reciprocal treatment but do not provide for the designation of countries that satisfy that requirement, or otherwise indicate how reciprocal treatment will be determined. One commentator on the Japanese law observed that the principle of
reciprocity was much criticized in Japan, not only because reciprocity has proven, historically, not to be a useful means of achieving harmonization of law, but also because creditors and other actors in insolvency proceedings who have limited capacity to influence the legislative policy of their governments should not be penalized because of that policy.

3. OTHER CONCERNS

48. These include:

a. That the Model Law will import the insolvency law of the foreign country if a foreign insolvency order is recognized.

It should be noted that with respect to the automatic stay, the Model Law avoids both the import of foreign law and the application of domestic law by specifying the effects of recognition. At the same time, it defers to local law, providing that the scope, modification, or termination of the relief applicable upon recognition are subject to provisions of the law of the enacting State that applies to such exceptions, limitations, modifications, or terminations. In addition to this provision, the Model Law provides that in granting relief the court may subject that relief to such conditions as it considers appropriate (art. 17.2), and that at the request of the foreign representative or any person affected by the relief granted, or at its own motion, the court may modify or terminate that relief (art. 22). In terms of coordination of concurrent proceedings, the Model Law again defers to the local law by providing that relief must be coordinated and consistent with that granted in the local proceeding, whether it commenced before or after the foreign proceeding (art. 29).

b. That the foreign representative, without any limitations, will be able to administer local proceedings.

As an interim measure, or as discretionary relief available after recognition, the court may entrust the foreign representative with administration or realization of all or part of the debtor’s assets located in the enacting State in order to protect and preserve value, but it is not automatic and an order of the court is required under art. 21.1(e). In ordering that relief, the court must be satisfied that that the interests of creditors and other interested persons are adequately protected (art. 22). However, the court is not obliged to appoint the foreign representative to perform that task, and it may designate another person, such as a local practitioner.

The Model Law does give the foreign representative certain entitlements with regard to local proceedings concerning the debtor. For example, the foreign representative may apply to commence local insolvency proceedings (art. 11) and, following recognition of foreign proceedings, to participate in local proceedings regarding the same debtor (art. 12), or to intervene in local proceedings to which the debtor is a party (art. 24). Applying for commencement and intervening in proceedings are both subject to the requirements of local law being met (arts. 11 and 24).

c. Local creditors will be significantly disadvantaged by the recognition of foreign main proceedings as assets will be turned over to the foreign proceedings where they may be subject to different priorities etc.

With respect to the interests of creditors, particularly local creditors, there will always be an issue of whether recognizing foreign insolvency proceedings in a particular case will be to their advantage or disadvantage. The answer depends upon the case in question and whether quarantining local assets for the benefit of local creditors will ensure a greater return to them than pooling those assets to increase the global assets available to creditors generally. In some cases, quarantining will lead to a greater return, and in others pooling will bring more. The answer may also depend upon whether the foreign proceedings are for liquidation or reorganization. While the answer can be relatively straightforward in the case
of liquidation, in reorganization it may depend as much upon the particular interests of a creditor as upon the relative amounts that may be received through quarantining or pooling. Employees, for example, may have a greater interest in ongoing employment than in a distribution, while trade creditors may derive more benefit from a continuing marketplace for goods and services. As one commentator notes, there is no answer to the dilemma of whether or not local creditors will be better off if countries apply cross-border recognition law. He continues that “[i]t might be best addressed by accepting the observation that, in a system of inter-country cooperation, any loss to local interests in one case will be roughly balanced by a gain in another case.”. It is possible, therefore, that by participating in the universal insolvency estate, local creditors may gain access to a larger pool of assets to satisfy their claims than they would have had had they been limited to the local assets.

The Model Law does not (and cannot) provide an answer to this question. Nor, as a unilateral instrument, can it address the treatment of local creditors in foreign proceedings. However, it does seek to ensure the equality of treatment of foreign and local creditors and to ensure that their interests are protected as far as possible. While the Model Law provides that the court may order that assets be turned over for distribution by the foreign representative (art. 21.2), that order is subject to the condition that the interests of local creditors are adequately protected. Foreign creditors are to have the same rights as local creditors with respect to commencement of, and participation in, insolvency proceedings (art. 13). In addition, the rule in article 32 prevents double dipping, particularly by foreign creditors.

F. USE of the MODEL LAW

49. The Model Law is being increasingly used by both States that have enacted it and States that have not. The largest number of cases has been heard in the USA. These cases originate from many different jurisdictions, some of which are ML countries, but many are not: Australia, Bahamas, Bahrain, Barbados, Bermuda, Brazil, BVI, Canada, Cayman Islands, Colombia, Denmark, France, Germany, HK, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Korea, Mexico, Netherlands, NZ, Poland, Russia, St Vincent/Grenadines, Singapore, Spain, Switzerland, South Africa, UK, and USA.

50. Cases applying the Model Law are reported in the CLOUT (Case Law on UNCITRAL texts) system; key cases are discussed in The Judicial Perspective (2013) on the Model Law. A digest of case law on the Model Law is currently being prepared.