
Avoiding Inherent Uncertainties in Cross-Border Insolvency: Is the UNCITRAL Model Law the Answer?

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"Imagine the scenario: Global Products Inc. is headquartered in the United States and has manufacturing operations, assets, directors and creditors there and in Britain, Italy, South Africa and Australia. Global's operations in each of those countries have borrowed from local banks. The company has developed serious problems, but a "free for all" will develop if Global goes under, with banks and other creditors fighting desperately to hold their positions."¹

1. Introduction

In May 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law"). The purpose of the Model Law is:

to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximisation of the value of the debtor's assets; and

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¹ David Cowling 'Cross-border insolvencies: building a framework' (1997) *Australian Accountant* 48.

- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

The author supports the harmonisation of cross-border insolvency laws as espoused by the Model Law as a means to overcome the inherent uncertainties in this area.

This article considers the powers that an Australian court has to assist foreign jurisdictions where assets are located in Australia, to wind up a foreign company in Australia, and to make ancillary winding up orders where a foreign company has been (or is being) wound up in its place of incorporation.

It is concluded that, while the legislative provisions currently in existence in jurisdictions such as Australia, the United Kingdom and the United States go some way towards addressing the problems, inconsistencies between the provisions make it difficult to obtain a harmonious (and predictable) result. However, these difficulties will be minimised if a uniform approach to insolvency law, such as the regime presented by the Model Law, is adopted.

Cross border insolvency issues have been considered by applying one of two theories: the universality theory and the territoriality theory. The universality theory requires that all assets of the insolvent company are administered by the court in the place of incorporation and all creditors seeking to claim in the winding up² submit claims to that court. Where assets of the company are located in foreign jurisdictions, the court has the power to apply for assistance from courts in those jurisdictions.³

The territoriality theory recommends separate proceedings for each country and no recognition is given to proceedings completed in other jurisdictions.

The Model Law adopts the universality approach to cross-border insolvency which, it is submitted, is the appropriate theory to be applied.

2. The Powers of Australian Courts to Assist a Foreign Jurisdiction when a Foreign Company is being wound up outside Australia

2.1 Recognition of foreign winding up orders

Winding up in place of incorporation

At common law, foreign companies are recognised outside their place of incorporation provided the "foreign law attaches to it incidents which correspond to our concepts of legal personality".⁴

² The terms "liquidation", "winding up" and "dissolution" are used interchangeably to describe the process whereby a company ceases to exist in accordance with the provisions of the laws under which it was incorporated.

³ Mason 'Australian Liquidation of Foreign Companies and Recognition of Foreign Insolvencies in Australia: Some Aspects of Cross-Border Corporate Insolvency' (1994) 12 *CSLJ* 182 at 182.

⁴ Sykes & Pryles *Australian Private International Law* (3rd edn, Law Book Company, 1991) at 381.

The *Corporations Law* 1989 (Cth) ("the *Corporations Law*") recognises foreign companies.⁵ The dissolution of a company in its place of incorporation will also be recognised⁶, however, s 582(3) *Corporations Law* provides a statutory exception to this common law rule. It allows a Part 5.7 body⁷ to be wound up under Part 5.7 even though it has been wound up, dissolved, deregistered or otherwise ceased to exist as a body corporate in its place of incorporation.⁸

The policy behind a provision of this nature is well stated by Lord Atkin (commenting on the provisions in the *Companies Act* 1929 (UK))⁹ in *Russian and English Bank v Baring Bros & Co Ltd*:¹⁰

I see nothing incongruous in the Legislature saying in effect, we accept the existence of a foreign corporation coming to trade in this country; we shall only impose a condition of registration. But if the corporation does trade here, acquire assets here and incurs debts here, we shall not accept its dissolution abroad without a stipulation that if desirable it may be wound up here so that its assets here shall be distributed amongst its creditors (I do not stay to consider whether its English creditors or creditors generally) and for the purposes of the winding-up it shall be deemed not to have been dissolved; for that event would defeat our municipal provisions for winding up a corporation. This does not appear to me to be recreating or reconstituting a new corporation; it is for particular and limited purposes refusing to recognise the dissolution of the old.

The comments of the House of Lords reflect a territoriality approach to cross-border insolvency issues as the focus is on the assets and debts of the company located in the relevant jurisdiction rather than the assets and debts of the company as a whole. Unfortunately, this approach is often necessary to protect local creditors.¹¹

In 1989, the *Foreign Corporations (Application of Laws) Act* 1989 (Cth) was introduced. The preamble states that the Act is a law "to be applied in determining certain questions relating to foreign corporations, and for related purposes".¹²

It is submitted that these provisions have limited application and will only operate where the foreign corporation is not a foreign company for the purposes of the *Corporations Law*¹³, for example, if a company incorporated overseas holds property in Australia but is not carrying on business here.¹⁴

⁵ A "foreign company" is defined in *Corporations Law*, s 9.

⁶ *Re Alfred Shaw & Co Ltd* (1897) 8 Q LJ 93; Sykes & Pryles *supra* n 4 at 385, McPherson *The Law of Company Liquidation* (Law Book Company, London, 1987) at 460.

⁷ Defined in *Corporations Law*, s 9. The definition includes a foreign company.

⁸ The provisions of Part 5.7 will be discussed below.

⁹ The relevant Victorian provisions were based on the UK legislation and are substantially the same as the current *Corporations Law* provisions. See the decision in *TM Burke Estates Pty Ltd v PJ Constructions (Vic) Pty Ltd (in liq)* (1990) 8 ACLC 381 where the Full Court of the Supreme Court of Victoria held that the company could be wound up in Victoria even though it had already been dissolved in Western Australia.

¹⁰ [1936] AC 405 at 427-428.

¹¹ The protection of local creditors will be considered below.

¹² See s 7(3).

¹³ Sykes *supra* n 4 at 384.

¹⁴ Nor is it deemed to be carrying on business under s 21.

Winding up in place other than place of incorporation

Australian courts have power to wind up a foreign company under the *Corporations Law*. It would be hypocritical if Australian courts refused to recognise the winding up of a foreign company in a jurisdiction other than its place of incorporation.

The Canadian courts recognise a winding up order of a foreign company in a place other than its place of incorporation if the foreign company:

- has submitted to that jurisdiction;
- carried on business in that jurisdiction; or
- has some real and substantial connection with the jurisdiction.¹⁵

It is submitted that Australian courts should adopt this approach.

2.2 Cooperation with foreign courts

Under the *Corporations Law*¹⁶, Australian courts (with jurisdiction under the *Corporations Law*) are required to "act in aid of, and be auxiliary to, the courts of ... prescribed countries, that have jurisdiction in external administration matters...".¹⁷ While Australian courts must act in aid of a foreign court in a prescribed country under s 581(2)(a)¹⁸, s 581(2)(b) gives the courts a discretion to assist courts of other (non-prescribed) countries.¹⁹

Section 581(3) allows an Australian court that receives a letter of request for assistance in an external administration matter²⁰, from an excluded Territory or from a country other than Australia, to exercise the powers the Court would have had if the matter had arisen in its own jurisdiction. The Australian court only has power to deal with the matters specified in the request.²¹ Section 581(4) gives an Australian court the reciprocal right to request the assistance of the foreign court.²²

Section 581 gives the courts an opportunity to adopt the universality approach to cross-border insolvency law however the application of the provisions by the courts has not always been consistent with the universality theory.

¹⁵ Grace 'Law of Liquidations: The Recognition and Enforcement of Foreign Liquidation Orders in Canada and Australia – A Critical Comparison' (1986) 35 *ICLQ* 664 at 667.

¹⁶ Part 5.6, Division 9 titled "Cooperation between Australia and foreign courts in external administration matters".

¹⁷ Regulation 5.6.74 lists the prescribed countries which include Canada, the United Kingdom and the United States of America.

¹⁸ *Smith v Australian Securities Commission* (1995) 13 *ACLC* 511.

¹⁹ *Rolfe v Transworld Marine Agency Company NV* (1998) 28 *ACSR* 117.

²⁰ An "external administration matter" is defined broadly in s 580(1).

²¹ *Smith v Australian Securities Commission* (1995) 13 *ACLC* 511. The Supreme Court of Victoria held that it did not have power under s 581(3) to assist the English High Court to recover shares held by the ASC which were not specified in the request.

²² In *Joye v Beach Petroleum NL & Anor* (1996) 67 *FCR* 275, the Australian liquidator sought the assistance of the Supreme Court of Hong Kong in an action not directly related to the winding up of the company. The Full Federal Court agreed that a letter of request could be issued under s 581(4) of the *Corporations Law* as it was an "external administration matter" as defined, being a matter relating to the winding up of the company under the *Corporations Law*.

The discretion to assist a foreign court under s 581(2)(b) was considered by the Federal Court of Australia in *Rolfe v. Transworld Marine Agency Company NV*.²³ Tamberlin J refused to exercise the discretion to assist the foreign court under s 581(2)(b) on the ground that the laws of the foreign country may not be similar to ours.²⁴

Tamberlin J was of the view that:

the Court, in considering a letter of request [under s 581(2)(b)] has a discretion, not only as to the nature and extent or terms of the aid which should be provided, but also as to whether the request should be acceded to at all.²⁵

In refusing to grant the assistance requested, Tamberlin J considered:

- the proper law to be applied – all relevant connections were with Australia not Belgium.
- the avoidance of duplication – considerable time had been invested in the Australian hearing.
- the existence of security – the applicant had an equitable charge under Australian law.
- delay – there may be a considerable time lapse before the applicant could recover under a world-wide liquidation.

The factors in favour of granting assistance were:

- uniform administration was preferable for the Belgian trustees.
- mutual cooperation. That is:

The desirability that national courts should, where appropriate, act in aid of each other in a time of ever-increasing international interdependence, especially in relation to enforcement of insolvency laws.²⁶

The decision in *Re Dallhold Estates (UK) Pty Ltd; Dallhold Investments Pty Ltd v. Dallhold Estates (UK) Pty Ltd*²⁷ which applied s 581(4) will be considered subsequently. It comes closer to achieving the goal of "universality".

²³ (1998) 28 ACSR 117. The Belgian trustees made an application to the Belgian court requesting that the Australian court be petitioned for an order that moneys held in Australia be assigned to them.

²⁴ His Honour referred to the decision of *Re Ayres; ex parte Evans* (1981) 34 ALR 582 where Lockhart J considered s 29(b) of the *Bankruptcy Act* (which is substantially similar to s 581(2)(b)). Lockhart J (at 592) held that in relation to non-prescribed countries, the court had a discretion because "their bankruptcy laws may not be similar to ours".

²⁵ (1998) 28 ACSR 117 at 137.

²⁶ *Ibid.*

²⁷ (1992) 10 ACLC 1374.

3. The Powers Of Australian Courts to Wind up a Foreign Company

A recent decision of the Supreme Court of Western Australia has held that Australian courts do not have power to wind up a foreign company that is not registered under the *Corporations Law*.²⁸

3.1 Registration under *Corporations Law*

A foreign company can be registered under Part 5B.2 *Corporations Law*. Section 601CD prohibits a foreign company from carrying on business in this jurisdiction unless it has registered (or applied to be registered) under Part 5B.2.

In some circumstances, a company will be deemed to be carrying on business in Australia or in a State or Territory.²⁹ Section 21(3) lists factors which will not of themselves be sufficient to deem a company to be carrying on business, for example, merely holding property in Australia will not be sufficient.

3.2 Winding up

A foreign company that is a Part 5.7 body (which includes a company registered under Part 5B.2) can be wound up under the *Corporations Law*. Section 583 states that a Part 5.7 body can be wound up under Chapter 5 (External Administration). The section acknowledges that some adaptations may be required to enable the provisions to operate.³⁰

3.3 Does the court have power to wind up a foreign company that is not a Part 5.7 body?

According to *Davidson v Global Investments International Limited*³¹ the answer is no. The Supreme Court of Western Australia found that it did not have jurisdiction to wind up the company which was incorporated in the British Virgin Islands for the purposes of undertaking a project in Indonesia. Acting Master Chapman noted that for a company to be a Part 5.7 body it had to be registered under the *Corporations Law* or carrying on business in the jurisdiction. The company was not registered under the *Corporations Law* and the court was of the view that it was not carrying on business here.

²⁸ *Davidson v Global Investments International Limited* (1996) 14 ACLC 208.

²⁹ Refer *Corporations Law*, s 21. The circumstances include where the company:

- has a place of business;
- has a share transfer office or a share registration office; and
- is administering, managing or otherwise dealing with property situated in Australia or in a State or Territory as an agent, legal personal representative or trustee.

The factors are not exhaustive (*Davidson v Global Investments International Limited* (1996) 14 ACLC 208) and regard should be had to the common law position (*Luckins v Highway Motel (Carnarvon) Pty Ltd; Re Australian Trailways Pty Ltd* (1975-1976) CLC 40-225).

³⁰ Including the principal place of business of a Part 5.7 body which is deemed to be the registered office of the Part 5.7 body. Jurisdiction to wind up a foreign company is not excluded simply because the unregistered company does not have a place of business in the relevant jurisdiction: *In re Kailis Grootte Eylandt Fisheries Pty Ltd (No.3)* (1976-1977) CLC 40-363.

³¹ (1996) 14 ACLC 208.

Acting Master Chapman considered whether the court had power to wind up a foreign company on some other basis but concluded that there was not "any other law [other than Part 5.7 *Corporations Law*] which would vest jurisdiction in this court to wind up this [foreign] company".³²

Acting Master Chapman considered it fundamental that s 583 *Corporations Law* specifically applied to Part 5.7 bodies, whereas the legislation under consideration in the cases referred to dealt with "unregistered companies".

3.4 When should the jurisdiction to wind up a foreign company be exercised?

The criteria arising from the case law relating to whether a court has jurisdiction to wind up a foreign company are not consistent. A summary of the various tests that have been applied follows:

- there must be assets in the jurisdiction and persons submitting to the jurisdiction who are interested in the distribution of the assets: *Banque des Marchands de Moscou (Koupetschesky) v Kindersley*³³; *Re Compania Merabello San Nicholas SA*³⁴;
- the assets in the jurisdiction can be of any nature as long as they are of benefit to creditors: *Re Compania Merabello San Nicholas SA*³⁵; *Re Eloc Electro-Optieck and*

³² *Ibid* at 216. Acting Master Chapman considered the common law decisions in *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] 1 Ch 112, *In re Compania Merabello San Nicholas S.A.* [1973] 1 Ch 75 and *In re Kailis Grootte Eylandt Fisheries (No. 3)* (1976-1977) CLC 40-363.

³³ [1951] 1 Ch 112. Evershed MR noted (at 125-126):

as a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present, the exercise of the jurisdiction remains discretionary.

His Honour was of the view that if the local law of the dissolved foreign corporation was sufficient to provide adequately for the interests of all the creditors, the English courts would not interfere.

³⁴ [1973] 1 Ch 75. A proper connection with the jurisdiction must be established by sufficient evidence to show:

- that the company has some asset or assets within the jurisdiction, and
- that there are one or more persons concerned in the proper distribution of the assets over whom the jurisdiction is exercisable.

³⁵ *Ibid*. It suffices if the assets of the company within the jurisdiction are of any nature; they need not be "commercial" assets, or assets which indicate that the company formerly carried on business here.

*Communicatie BV*³⁶; *Re Buildmat (Australia) Pty Ltd*³⁷;

- it is not necessary for there to be assets in the jurisdiction as long as there is a sufficient connection: *Re A Company*³⁸;
- it is not crucial that there is no place of business or the carrying on of a business in the jurisdiction: *Re Compania Merabello San Nicholas SA*;
- there must be a reasonable possibility of benefit accruing to creditors: *Re Compania Merabello San Nicholas SA*³⁹; *Re Allobrogia Steamship Corporation*;⁴⁰
- there must be more than just creditors in the jurisdiction: *Re Kailis Groote Eylandt Fisheries Pty Ltd (No 3)*.⁴¹

A more recent Australian decision which is worth noting is that of Young J in *Re Norfolk Island Shipping Line Pty Ltd*.⁴² The company (which was incorporated in the Norfolk Islands, an external territory for the purposes of the *Corporations Law*) was not registered in NSW nor did it have any assets there. Justice Young held that the court had jurisdiction to wind up the company pursuant to the cross-vesting legislation.⁴³

³⁶ [1981] 2 All ER 1111. The court held that the assets did not have to be in the company's ownership but could come from a source outside the company (for example, the statutory fund). The benefit does not have to be obtained through the liquidator. Where the benefit is dependent upon the success of an independent action, it is sufficient if the petitioners can show a reasonable possibility of success: *Re Allobrogia Steamship Corporation* [1978] 3 All ER 423.

³⁷ (1981) CLC 40-714. The Supreme Court of New South Wales ordered the winding up of a foreign company although there were only negligible assets in New South Wales (approximately \$700). The court considered that it had jurisdiction because all of the creditors of the company were in New South Wales. See also *Mercantile Credits Ltd v Foster Clark (Australia) Ltd* (1964) 112 CLR 169 where a UK company was ordered to be wound up in South Australia on the ground that it was just and equitable to do so. It did not matter that the company had no assets in South Australia (other than some money which was being held in court), that it was no longer carrying on business in South Australia and that it was not in liquidation in any other place.

³⁸ [1988] Ch 210. All that is required is a sufficient connection with the jurisdiction and a reasonable possibility of benefit for the creditors from the winding up. The court noted that it would be proper to consider whether any other jurisdiction was more appropriate to wind up the relevant company but in this case concluded there was none.

³⁹ *Supra* n 34. The assets need not be assets which will be distributable to creditors by the liquidator in the winding up; it suffices if by the making of the winding up order they will be of benefit to a creditor or creditors in some other way.

⁴⁰ [1978] 3 All ER 423.

⁴¹ (1977-1978) CLC 40-363. Bray CJ concluded that it would be contrary to international comity if an order for winding up of a company was made in South Australia simply because there were creditors in South Australia (although the company did not have any assets in South Australia or conduct any business there). At 29,590, His Honour said:

Clearly it [the court] cannot, under the ordinary rules of private international law, order any company in the world to be wound up. There must be a sufficient nexus with South Australia."

⁴² (1988) 6 ACLC 990.

⁴³ *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), s 4(2). Young J was also required to consider a similar question in *Re Atlantic Isle Shipping Co. Inc* (1988) 6 ACLC 992. His Honour concluded that a company with a bank account in NSW and that had done some trading in NSW, had "just enough material to suggest that the company is one which carries on business in New South Wales" (at 993). In addition, the company had at least negligible assets in NSW (relying on *Buildmat*). See also *Re New Cap Reinsurance Corporation Holdings Ltd; Re New Cap Insurance Corporation (Bermuda) Ltd*, Unreported, Supreme Court of New South Wales (Equity Division), Young J, 3 June 1999.

His Honour considered whether, without the cross-vesting legislation, he would have had power to wind up the company and concluded he would not.⁴⁴ Although he was prepared to find that the company was carrying on business in NSW, the company did not have any assets there. His Honour considered that the English cases had established that:

there must be a proper commercial connection with the jurisdiction, normally that the company has some assets within the jurisdiction and that there are people in the jurisdiction concerned in the proper distribution of the assets and that there is some reasonable possibility of benefit accruing to creditors from making a winding up order.⁴⁵

All that is required to satisfy the definition of Part 5.7 body is for the company to be carrying on business in the jurisdiction. It does not need to have assets or interested creditors in Australia for Part 5.7 to apply.

The conclusion to be drawn out of this plethora of cases is that a foreign company cannot be wound up in Australia unless it is registered under the *Corporations Law* or it is carrying on business here. Mason submits that:⁴⁶

It also requires additional jurisdictional links by way of: (i) proof of a sufficient connection with the forum (for example, the presence of assets within the jurisdiction); and (ii) a reasonable possibility of benefit for the creditors from the winding up.⁴⁷

With respect, the writer disagrees. The latter factors⁴⁸ should be regarded as relevant to the exercise (not the existence) of the jurisdiction. Part 5.7 *Corporations Law* applies if the company is registered under Part 5B.2 or is carrying on business here. No additional factors are required. The factors considered as relevant by the cases should be used by the courts to determine if the jurisdiction to wind up a foreign company should be exercised.

3.5 Assistance from foreign courts

Part 5.6, Div 9 *Corporations Law* requires or allows Australian courts to provide assistance to, or seek assistance from, foreign courts of prescribed countries in relation to "external administration matters". The courts have a discretion whether to provide assistance to non-prescribed countries. Similar provisions exist in the United Kingdom and the United States.

The importance of inter-jurisdictional cooperation in these circumstances cannot be overstated. It is difficult enough for liquidators of international companies to collect assets and pay debts. It is even harder when those liquidators are faced with different insolvency laws and courts that might be reluctant to cooperate. The courts in all

⁴⁴ (1988) 6 ACLC 990 at 992.

⁴⁵ *Ibid.* at 991.

⁴⁶ Mason *supra* n 3 at 186.

⁴⁷ *Ibid.*

⁴⁸ See also factors listed at paragraph 3.4 of this article.

jurisdictions are at least endeavouring to apply an universality approach to the application of their insolvency laws.

United Kingdom – The decision in Dallhold Estates

The operation of ss 580 and 581 *Corporations Law* was considered by Gummow J in *Re Dallhold Estates (UK) Pty Ltd; Dallhold Investments Pty Ltd v Dallhold Estates (UK) Pty Ltd*.⁴⁹

The creditor wanted the assistance of the UK court so that it could apply the administration provisions contained in Part II of the *Insolvency Act 1986 (UK)* which, it argued, would produce a better result for all creditors. There were no equivalent provisions in the *Corporations Law*. Gummow J agreed saying that the:

administration offers the possibility that the value of the lease may be preserved for the benefit of the creditors as a whole of Dallhold Estates, whilst at this stage the making of a winding-up order either here or in England plainly would not do so.⁵⁰

In England, the case came before Chadwick J in the English High Court⁵¹ who considered the application of s 426 of the *Insolvency Act 1986 (UK)*. His Honour was of the opinion that an English court must give assistance under s 426 once the preliminary tests set out in s 8 are satisfied.⁵²

Practitioners should note that Chadwick J considered that the English court could only have regard to matters specified in the request. "It is not open to this court to engage in a far-ranging inquiry which goes beyond the matters specified in the request."⁵³ Requests should therefore be carefully drafted to ensure that the foreign courts can make all necessary orders.

⁴⁹ (1992) 10 ACLC 1374. The only significant asset held by Dallhold Estates was a leasehold property in England. Dallhold Investments brought an application before the Federal Court of Australia seeking a letter of request for assistance from the UK court. Gummow J ordered that a letter of request be issued.

⁵⁰ *Ibid* at 1378.

⁵¹ [1992] BCLC 621.

⁵² Section 8(1) reads:

... if the court: (a) is satisfied that a company is or is likely to become unable to pay its debts ..., and (b) considers that the making of an order under this section would be likely to achieve one or more of the purposes mentioned below, the court may make an administration order in relation to the company.

The purposes (set out in s 8(3)) include "(d) a more advantageous realisation of the company's assets than would be effected on a winding up". The domestic court is required to take the following steps:

- (1) identify the matters specified in the request;
- (2) determine what would be the relevant insolvency law applicable by it to comparable matters falling within its jurisdiction;
- (3) apply that insolvency law to the matters specified in the request;
- (4) if applicable, apply those provisions of the foreign insolvency law which the foreign court could apply to comparable matters falling within the jurisdiction of the foreign court": [1992] BCLC 621 at 626.

See also Mason *supra* n 3 at 189.

⁵³ *Supra* n 51 at 628.

Dallhold Estates provides some direction for courts faced with cross-border insolvency issues. However, the position is not entirely clear as courts must now determine which insolvency law to apply.

It is clear from the decision in *Dallhold Estates* that the English court has the power to apply a legal concept that does not have an equivalent in the jurisdiction from where the request originated. However, it is uncertain whether an English court can apply a provision of a foreign insolvency law that does not have an English equivalent⁵⁴ although Chadwick J (in obiter) stated:

of course the domestic court is authorised to apply those provisions of the foreign insolvency law which the foreign court could apply to comparable matters falling within the jurisdiction of the foreign court.⁵⁵

Chadwick J had argued that the proviso to subsection 426(5)⁵⁶ gave the requesting court a discretion whether or not to make a request but did not allow the requested court a discretion as to whether or not to assist. This is consistent with His Honour's conclusion that s 426 is mandatory. However, Bloxham and Baird submit that:

the proviso [to subsection 426(5)] is actually directed at identifying which law should be applied in giving the assistance. ... [I]t is quite proper for an English court to look at the difficulties identified in the request and consider the laws of both jurisdictions in deciding the order it should make.⁵⁷

This reasoning is to be encouraged as it endeavours to give the relevant court the power to consider the interests of all creditors and the debtor and determine which laws will produce the fairest result.

Unfortunately, the equivalent Australian provisions⁵⁸ do not allow an Australian court to apply a foreign insolvency law.⁵⁹ The English provision is mandatory⁶⁰, whereas the Australian provision states that the Australian court receiving the letter of request "may exercise such powers with respect to the matter as it could exercise if the matters had arisen within its own jurisdiction".⁶¹ The Australian courts are restricted in their ability to apply this "universal" approach.

⁵⁴ Bloxham and Baird 'Section 426 Insolvency Act 1986 and Re Dallhold Estates Ltd' (1992) 9 *JIBL* 373 at 375.

⁵⁵ [1992] BCLC 621 at 626.

⁵⁶ "(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law".

⁵⁷ Bloxham and Baird *supra* n 54 at 376.

⁵⁸ *Corporations Law*, ss 580 and 581.

⁵⁹ Mason *supra* n 3 at 190.

⁶⁰ Section 426 states that the English court *shall* assist the requesting court.

⁶¹ *Corporations Law*, s 581(3).

This problem will be minimised if a uniform law (such as the Model Law) is adopted. It will offer a consistent approach, taking into account different legal systems and different insolvency laws.

The United States - Bankruptcy Code

Section 304 *Bankruptcy Code* is intended to allow a foreign representative to ask a United States Bankruptcy Court for ancillary relief in aid of the administration of a foreign insolvency proceeding.

It is not clear who may apply to the US court for assistance. It was originally thought that the debtor had to have a place of business or property in the US, however, this no longer seems to be the case.⁶²

In *Interpool Ltd v Certain Freights of M/V Venture Star*,⁶³ an Australian liquidator sought relief under s 304 *Bankruptcy Code* requesting administration of the US assets under Australian bankruptcy law. The liquidator had entered into an arrangement with one of its major creditors to distribute the first \$6 million of the US asset (an arbitration award) to that creditor. The US creditors had not received any notice of this arrangement (none was required under Australian law). The US court was uncomfortable with that arrangement and ordered that KKL's US assets be administered under US laws. The s 304 petition was declined.

It is argued that the US District Court's ruling is correct as comity is only one of the six factors to be considered under s 304.⁶⁴ The writer agrees. Generally, s 304 applies the universality theory. Only one of the six factors in s 304(c) adopts a territorial approach (the requirement for the court to protect US claim holders). In this case it was considered important that the US courts protected the US creditors. This sort of rationale would not be necessary if the Model Law was adopted.

⁶² Glosband and Kalucki 'Current Developments in International Insolvency Law and Practice' (1990) 45 *The Business Lawyer* 2273 at 2274.

⁶³ 102 Bankr 373 (D.N.J. 1988), appeal dismissed, 878 F.2d 111 (3d Cir. 1989). KKL Kangaroo Lines ("KKL") was the subject of liquidation proceedings in Australia. It had substantial assets in the US and a number of US creditors. The US creditors filed a separate bankruptcy petition in the US bankruptcy court.

⁶⁴ Glosband and Kalucki *supra* n 62 at 2278.

Sec. 304. Cases ancillary to foreign proceedings

...

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with -

- (1) just treatment of all holders of claims against or interests in such estate;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
- (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

The decision had far reaching consequences for Australian practitioners as it "question[ed], in general terms, the notice procedures of Australian insolvency law, thereby suggesting that Australian proceedings should rarely be recognised by US bankruptcy courts".⁶⁵

These concerns have largely been removed by the decision in *Allstate Life Insurance Co v Linter Group Ltd.*⁶⁶ In this case, actions had been commenced in the Federal Court of Australia and in the Federal District Court in New York. The Linter companies asked the US District Court to dismiss the US actions on the grounds of comity. The orders were made and the US Court of Appeals upheld both decisions.⁶⁷

The court recognised that the Australian insolvency proceedings were fair even though they were not identical to US proceedings.

It seems the courts in the United States, like their United Kingdom counterparts, are attempting to apply the universality theory to cross-border insolvency issues.

The Court saw as more important the need to centralise all claims and enable assets of the debtor to be administered in an equitable, orderly and systematic manner.⁶⁸

4. The Powers Of Australian Courts to Order a Winding Up of a Foreign Company in Australia when a Winding Up Order has been Made, or is Being Sought, in Another Jurisdiction.

Australian courts will generally make an ancillary winding up order in respect of a foreign company to operate concurrently with, or even subsequent to, a foreign winding up where:

- the company has assets within the local jurisdiction and Australian creditors would suffer inequitable treatment if they were forced to pursue their claims in a foreign jurisdiction; or
- the foreign liquidation has been completed and local creditors could not otherwise prove for their debts.⁶⁹

4.1 Desirability of an ancillary order

An ancillary order may be desirable:

⁶⁵ *Ibid* at 2278.

⁶⁶ United States Court of Appeals for the Second Circuit, 2 June 1993.

⁶⁷ The court said the doctrine of comity is:

the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v Guyot, 159 US 113, 164 (1895).

⁶⁸ J Portis Hicks 'United States Courts Defer to Australian Insolvency Administrations' (1993) *JBFLP* 294 at 296.

⁶⁹ J O'Donovan *McPherson*, *The Law of Company Liquidation – Student Edition* (Law Book Company Limited, 1994) at 244.

- where the Australian liquidation provisions have a wider reach than the foreign legislation;⁷⁰
- if the foreign legislation does not have application in Australia; or
- if local creditors would suffer if an ancillary order is not made.

An Australian court may refuse to make an ancillary order where the principal liquidator can make appropriate orders.⁷¹

4.2 Appointment of a liquidator

Under s 601CL(14) *Corporations Law*, the local agent of a foreign company must notify the Australian Securities and Investments Commission if proceedings for the winding up, dissolution or deregistration of a registered foreign company are commenced in its place of origin. The court, upon application by the foreign liquidator or the Commission, must appoint a liquidator of the foreign company. If it is necessary to appoint an ancillary liquidator, it is desirable to appoint the same liquidator.⁷²

There are three pre-conditions to the appointment of a liquidator under s 601CL(14) which restrict the court's power:

- the foreign order must be in the nature of a winding up or dissolution in its place of incorporation;
- the foreign liquidator must have been appointed and not merely recognised by the law of the domicile of the foreign company; and
- the foreign company must be registered under the *Corporations Law*.⁷³

The duties of the liquidator are set out in s 601CL(15) and include:

- a requirement to advertise in each State or Territory where the foreign company carried on business within the last 6 years;
- a prohibition on paying out any creditor in priority to other creditors;
- an obligation to recover and realise the property of the foreign company in Australia and pay the net amount to the liquidator of the foreign company in its place of origin.⁷⁴

4.3 Relevant law to be applied

The primary function of an ancillary winding up is to assist the principal proceedings. However, it is appropriate that the assets are administered according to local law rather than the law of the place of incorporation of the company.⁷⁵

⁷⁰ For example, where Part 5.7B, Division 2 *Corporations Law* would assist creditors.

⁷¹ *Re The New England Brewing Company Limited* [1968] 49 QWN 123.

⁷² *Ibid* at 124-125.

⁷³ Sykes *supra* n 4 at 404.

⁷⁴ What is the "net amount"? Is it the surplus after paying the costs of the ancillary liquidator or is it the balance after paying local creditors out of local assets?

⁷⁵ McPherson *supra* n 6 at 465.

In *Re Suidair International Airways Ltd*⁷⁶, a South African company was placed into liquidation in South Africa. Ancillary liquidation proceedings brought in England came before Wynn-Parry J who concluded that the court had to apply English law to the assets of the South African company which are within the English court's jurisdiction. Any other decision would result in "the utmost possible confusion".⁷⁷

In Australia, if local law is applicable, creditors can obtain the benefit of Part 5.6 (including priority and set off provisions) and Division 2, Part 5.7B (voidable transactions).⁷⁸

4.4 Surplus assets

If there is a liquidation in the place of incorporation, any surplus assets are required to be transmitted to the foreign liquidator.⁷⁹ Under s 601CL(16), the local liquidator can apply to the court for directions regarding disposal of the surplus if there is no liquidator in the place of origin.

4.5 Priorities

The courts have not applied a consistent approach to the proper distribution of assets in the hands of liquidators appointed under ancillary proceedings. The court in *In re the Australian Federal Life and General Assurance Co*⁸⁰ required the principal liquidator to give a security to the local liquidator that the assets would be applied to all creditors of the same class equally.

However, this type of order was considered inappropriate by the Supreme Court of the Northern Territory in *Re Northland Services Pty Ltd*.⁸¹ The court ordered the Northern Territory liquidator to distribute the Northern Territory assets in accordance with Northern Territory law. Any creditor wanting to share in the assets had to prove in the ancillary proceedings.

Similarly, in *Air Express Foods*⁸² the Queensland Supreme Court ordered that Queensland law required local priority creditors (in this case, the Australian Taxation

⁷⁶ [1951] Ch 165.

⁷⁷ *Ibid* at 173. In *Re English Scottish & Australian Chartered Bank* [1893] 3 Ch 385 at 394, Vaughan Williams J said a court should:

... bear in mind the principles upon which liquidations are conducted, in different countries and in different courts, of one concern. One knows that where there is a liquidation of one concern the general principle is – ascertain what is the domicile of the company in liquidation; let the court of the country of domicile act as the principal court to govern the liquidation, and let other courts act as ancillary, as far as they can, to the principal liquidation. But although that is so, it has always been held that the desire to assist in the main liquidation – the desire to act as ancillary to the court where the main liquidation is going on – will not ever make the court give up the forensic rules which govern the conduct of its own liquidation.

⁷⁸ Part 5.6 applies to registered foreign companies by virtue of s 513 and the definition of "company". Part 5.7B applies by virtue of the definition of "company". In addition, s 583 applies Chapter 5 (External Administration) to a Part 5.7 body.

⁷⁹ *Re Standard Insurance Co Ltd* [1968] Qd R 118; *Corporations Law*, s 601CL(15).

⁸⁰ [1931] VLR 317 at 322.

⁸¹ (1978) 18 ALR 684.

⁸² (1977-1978) CLC 40-359.

Office and former employees) to be paid before the surplus assets were given to the liquidator in the place of domicile.⁸³

4.6 Summary

The difficulty in this area relates to the payment of creditors. Should local creditors have the benefit of local assets before the surplus is distributed to the principal liquidator? The answer may need to be determined on a case by case basis, depending upon the likelihood of those creditors' interests being protected in foreign proceedings. Whatever the answer, a consistent set of rules is needed under which the courts can make an appropriate decision. The Model Law provides that opportunity.

5. Harmer Report

The Australian Law Reform Commission Report No 45 - General Insolvency Inquiry ("the Harmer Report") considered the issue of cross-border insolvency. In relation to international cross-border insolvency issues, the Commission recommended that:

Australia should actively promote multilateral international treaties with respect to:

- the adoption of common basic elements of insolvency; and
- the recognition of insolvency laws between nations.

As an interim solution, the Law Reform Commission recommended the recognition and enforcement of foreign orders. The Commission criticised the current recognition provisions in the *Corporations Law* on the basis that they only apply to registered foreign companies and that it is necessary to appoint an Australian liquidator (thereby incurring additional costs and delays).

In relation to non-registered foreign companies, a full insolvency administration may be needed. The Harmer Report appears to consider that it may be possible for a non-registered foreign company to be wound up in Australia. The decision in *Davidson* would now appear to have removed this possibility.

Finally, the Harmer Report recommended that Australia's insolvency laws:⁸⁴

... contain provisions which facilitate the recognition of foreign insolvency administrations. Those provisions should:

- require the court to give aid to the administrator of a foreign insolvency initiated in a prescribed country...
- permit the court to give aid to the administrator of a foreign insolvency initiated in a country other than a prescribed country
- give the court a broad discretion to fashion the aid which is most appropriate in all of the circumstances; and

⁸³ See also *Re Oygevault International BV (in liq)* (1994) 12 ACLC 708 where the court ordered the local liquidator to pay a foreign tax debt to enable the remaining assets to be applied for the benefit of local creditors.

⁸⁴ Paragraph 975.

- specify the criteria to which the court will have regard when determining whether to grant aid to the administrator of a foreign insolvency initiated in a country other than a prescribed country.

In the author's view, the Model Law meets these criteria.

6. The UNCITRAL Model Law

6.1 Background

The Model Law was adopted by UNCITRAL in May 1997.⁸⁵ It is not intended to unify insolvency laws but is designed to be incorporated into relevant existing laws in an attempt to provide harmony and certainty.

Unlike international treaties, the provisions of the Model Law may be modified before enactment. This enables the Model Law to be tailored to different legal systems and encourages adoption by as many jurisdictions as possible. As the intention is to harmonise international insolvency laws, it is recommended that changes are kept to a minimum.

The Model Law is intended to facilitate judicial cooperation, enable court access for foreign insolvency administrators and provide a mechanism for recognition of foreign insolvency proceedings.⁸⁶

6.2 The Inherent Uncertainties

The problems associated with cross-border insolvency identified in this article include:

- jurisdiction;
- recognition of foreign liquidation orders;
- procedural difficulties;
- balancing the interests of local and foreign creditors; and
- identifying the appropriate insolvency laws to be applied.

6.3 Does the Model Law provide the Answers?

The Model Law applies to a "foreign proceeding" which is defined in Article 2 to mean

a collective judicial or administrative proceeding in a foreign State ... 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 reorganisation or liquidation.

⁸⁵ Credit for the Model Law can be attributed to UNCITRAL and the International Association of Insolvency Practitioners (INSOL) with assistance from Committee J (Insolvency) of the Section on Business Law of the International Bar Association. Other proposals including the Model International Insolvency Cooperation Act (MIICA), prepared by Committee J, were considered.

⁸⁶ Guide to Enactment of UNCITRAL Model Law on Cross-Border Insolvency, p 5.

The Model Law is not intended to override provisions already in operation in enacting jurisdictions, but is designed to assist in the application of those laws.⁸⁷

Jurisdiction

The Model Law classifies foreign proceedings as "main" proceedings and "non-main" proceedings. A "foreign main proceeding" is a proceeding that is taking place in the jurisdiction where the debtor has the centre of its main interests.⁸⁸ A "foreign non-main proceeding" is a proceeding in a jurisdiction where the debtor has an "establishment".⁸⁹

Where the court recognises the foreign proceeding as a "foreign main proceeding", a moratorium period commences. The moratorium is necessary to allow appropriate steps to be taken to organise an orderly and fair cross-border insolvency proceeding.⁹⁰ The risk of dissipation of local assets or the commencement of further actions by local creditors is deferred until after the foreign proceeding is resolved.⁹¹ The local court can then make orders consistent with the foreign proceeding. The moratorium period does not prevent the commencement of a local insolvency proceeding.⁹² This will ensure that local interests are protected.

A court also has power to assist in relation to a "foreign non-main proceeding" provided the court is satisfied that the proceeding relates to assets that should be administered in that proceeding.⁹³

Following recognition of a foreign proceeding as either a "main" or "non-main" proceeding, the court can grant any appropriate relief necessary to protect the assets of the debtor or the interests of creditors.⁹⁴ This could include entrusting administration of the debtor's assets to the foreign representative.

Interim relief can be granted on a discretionary basis by a court prior to recognition of a foreign proceeding if that relief is urgently needed to protect assets or interests of creditors.⁹⁵

Recognition of foreign orders and representatives

The Model Law sets out a defined procedure for recognising foreign liquidation

⁸⁷ Article 7 Model Law. Note also Article 3 which provides that any treaty or other agreement between the enacting States will prevail over the Model Law to the extent of any inconsistency.

⁸⁸ The debtor's registered office is presumed to be the centre of the debtor's main interests (in the absence of proof to the contrary): Article 16(3).

⁸⁹ "Establishment" is defined in Article 2(f) as any place of operations where the debtor carries out non-transitory economic activity with human means and goods or services.

⁹⁰ Guide to Enactment of the UNCITRAL Model Law on Cross-border Insolvency, p 39.

⁹¹ Under Article 20(3) a creditor may commence an action where necessary to preserve a claim against a debtor (for example, where the limitation period is due to expire) but it will then be stayed until resolution of the foreign proceeding.

⁹² Article 20(4) Model Law.

⁹³ Article 21(3) Model Law.

⁹⁴ Article 21 Model Law.

⁹⁵ Article 19 Model Law.

proceedings. Article 15 allows a foreign representative⁹⁶ to apply to the court for recognition of the foreign proceeding in which that foreign representative has been appointed. The application must be accompanied by appropriate evidence⁹⁷ of the existence of the foreign liquidation proceedings and appointment of the foreign representative and must identify all foreign proceedings in respect of the debtor of which the foreign representative is aware.⁹⁸

The foreign representative is entitled to apply directly to a court in an enacting State⁹⁹, however an application does not, of itself, subject the foreign representative or the foreign assets and affairs of the debtor to that jurisdiction.¹⁰⁰ A reciprocal right exists in Article 5 which authorises a local administrator or liquidator to act in a foreign jurisdiction in relation to a local liquidation proceeding as permitted by the foreign law. This provision makes it clear that provided the evidentiary requirements are met the foreign proceedings will be recognised, resulting in greater certainty and harmony.

The Model Law gives the foreign representative power to either commence a proceeding¹⁰¹ or participate in a proceeding that has been recognised as a foreign proceeding¹⁰² by the relevant jurisdiction. In addition, following recognition of a foreign proceeding, a foreign representative may intervene in any proceedings in which the debtor is a party.¹⁰³ Any disputes regarding standing are eliminated resulting in a more efficient, cost effective regime. It may not be necessary for a local liquidator to be appointed at all, saving time and money.

Interests of foreign and local creditors

A key objective of the Model Law is for the courts to have regard to the interests of creditors and other interested persons (including the debtor) when granting or refusing relief. Importantly, this includes foreign creditors.¹⁰⁴

Foreign creditors have the same rights as local creditors in relation to the commencement of, and participation in, a proceeding under the laws of the enacting jurisdiction.¹⁰⁵ At the same time, the priority of local creditors is protected without jeopardising the claims of foreign creditors. Article 13(2) states that, despite Article 13(1) (which gives foreign creditors the same rights), the ranking of claims is not

⁹⁶ Defined in Article 2 to mean a person or body authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

⁹⁷ A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative, a certificate from the foreign court affirming the foreign proceeding and appointing the foreign representative or any other acceptable evidence of the existence of the foreign proceeding and the appointment of the foreign representative.

⁹⁸ This requirement is designed to enable a court to tailor relief in the foreign proceeding to ensure it is consistent with other insolvency proceedings concerning the same debtor.

⁹⁹ Article 9 Model Law.

¹⁰⁰ Article 10 Model Law.

¹⁰¹ Article 11 Model Law provided the conditions for commencing a proceeding are otherwise met (for example, the debtor must be unable to pay its debts).

¹⁰² Article 12 Model Law.

¹⁰³ Article 24 Model Law.

¹⁰⁴ Article 22 Model Law.

¹⁰⁵ Article 13(1) Model Law.

affected except that foreign creditors will not be ranked lower than creditors with general non-preference claims.¹⁰⁶ This would clarify the uncertainty regarding priorities. The legislative provisions (for example, Part 5.6 *Corporations Law*) will apply to rank the claims of local creditors and foreign creditors with other non-preference creditors.

A creditor who has received part payment of its claim in a foreign proceeding cannot receive a payment for the same claim in a proceeding regarding the same debtor (provided the payment to other creditors of the same class is proportionately less than the payment the foreign creditor has already received).¹⁰⁷

This produces an excellent result. Where there are limited assets in a jurisdiction, local creditors can prove for their debt and recover what they can. If foreign proceedings are subsequently commenced, the creditor can also prove in those proceedings. Local creditors (of the foreign proceeding) are not prejudiced because no one creditor gets a higher payment. It prevents a creditor being left with a smaller payment simply because the jurisdiction in which the claim was being originally brought did not have the benefit of many assets.

Any notification required to be given to local creditors must also be given to creditors outside the jurisdiction.¹⁰⁸ This would avoid the type of problem that arose in *Interpool*.

Following recognition of a foreign proceeding, the court can order that all or any part of the debtor's assets located in the jurisdiction are provided to the foreign representative provided the court is satisfied that the interests of local creditors are adequately protected.¹⁰⁹ There is a necessary emphasis on the position of local creditors because foreign creditors will have automatic rights in the foreign proceedings.¹¹⁰

Cooperation with foreign courts and foreign representatives

If there is more than one foreign proceeding regarding the same debtor, Article 30 requires the courts to cooperate and coordinate the proceedings under Articles 25, 26 and 27. Any discretionary relief granted under Articles 19 and 21 in respect of a foreign main proceeding must be consistent with the foreign main proceeding (whether granted before or after recognition of the foreign main proceeding). If more than one foreign non-main proceeding is recognised, the relief must suit both proceedings.¹¹¹

The harmony and consistency produced by these provisions is obvious. The courts have a positive obligation to consider the orders made in a foreign proceeding and to ensure subsequent orders are compatible.

¹⁰⁶ An alternative wording of this Article is offered which addresses foreign tax and social security claims.

¹⁰⁷ Article 32 Model Law. Secured claims or rights in rem are not affected.

¹⁰⁸ Notice is generally required to be given on an individual basis. The contents of the notification are set out in Article 14(3).

¹⁰⁹ Article 21(2) Model Law.

¹¹⁰ Although the local creditor could also seek to prove in the foreign proceedings.

¹¹¹ Article 30 Model Law.

Articles 25 and 26 require courts¹¹² to cooperate as much as possible with foreign courts and foreign representatives. Article 27 provides a guide to the forms of cooperation required including:

- the communication of information;
- the coordination of administration and supervision of debtor's assets and affairs;
- the coordination of concurrent proceedings regarding the same debtor.

These provisions are more certain than the application of the "comity" principle as they require the courts to *cooperate*, not merely to *consider* the interests of other jurisdictions.

Concurrent proceedings

Even if a local court has recognised a foreign main proceeding, local proceedings can be commenced if the debtor has assets in this jurisdiction.¹¹³ The orders made by the court must be limited to the assets in the jurisdiction except where further orders are required to enable cooperation and coordination between the jurisdictions under Articles 25, 26 and 27.

Article 31 allows the court to presume the insolvency of the debtor where a foreign main proceeding has been recognised in the jurisdiction. This reduces delay and additional costs.

If a local proceeding has been commenced after a foreign proceeding has been recognised, the relief already provided in relation to the foreign main proceeding must be reviewed and modified if it is inconsistent with the local proceeding.¹¹⁴ This is another example of harmony and certainty.

7. Australian Government Response

In October 1998, the Government commissioned a taskforce¹¹⁵ to make recommendations on how Australia can contribute to international financial reform. The Report¹¹⁶ identified global insolvency law reform as an important element of international financial reform.

Eight key features were identified as important for an efficient insolvency framework. They included:

¹¹² Or other body administering the reorganisation or liquidation.

¹¹³ Article 28 Model Law. The Guide to the Enactment of the UNCITRAL Model Law (p 50) recognises that the mere presence of assets in the jurisdiction is not sufficient to allow an insolvency proceeding to be commenced in some jurisdictions. However, the Model Law opted for a broad ground for commencing an insolvency proceeding after a foreign main proceeding has been recognised. If there are no assets, there is no jurisdiction for commencing an insolvency proceeding.

¹¹⁴ Article 29 Model Law.

¹¹⁵ G22 Working Group on International Financial Crisis: Key Features of Insolvency Regimes, Annexure to Task Force on International Financial Reforms.

¹¹⁶ Presented in December 1998.

- provision for the equitable treatment of similarly situated creditors (whether foreign or domestic); and
- establishment of a framework for cross-border insolvency.

In this context, the Australian Government has indicated its support for the Model Law. Attachment G to the Report indicates that "the necessary consultative and parliamentary processes required to adopt the model law provisions in law" would commence by the end of 1998. The writer is not aware of any active steps taken by the Government to achieve this objective.

8. Conclusion

By way of background to the Model Law, UNCITRAL states:

The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws have by and large not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation, and hinder the maximisation of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment.¹¹⁷

The common law approach to whether a foreign company can be wound up has been inconsistent. Some courts have ordered the winding up of a company in circumstances where only negligible assets exist in the jurisdiction.¹¹⁸ Other courts have required both assets in the jurisdiction and creditors that are likely to obtain some benefit from the making of the order.¹¹⁹

Statutory provisions have been introduced which, on a jurisdiction by jurisdiction basis, are quite effective. However, the legislation provides little guidance on the private international law issues that necessarily arise. It has been left to the courts in each jurisdiction to attempt to apply quite different legislative provisions in a manner that produces a fair result for debtors and creditors in various jurisdictions. Often, courts have favoured local creditors especially where the foreign liquidation is unlikely to provide fairly for them.

The recommendation of various committees and associations (including the Harmer Report) has been to introduce uniform legislation which will allow the courts to recognise foreign proceedings and liquidators, protect against the dissipation of assets, satisfy the interests of all creditors and assist foreign courts.

¹¹⁷ Guide to Enactment of the UNCITRAL Model Law on Cross-border Insolvency, p 6.

¹¹⁸ *Re Buildmat (Australia) Pty Ltd* (1981) CLC 40-714.

¹¹⁹ *Re Compania Merabello San Nicholas S.A.* [1973] Ch. 75; *Mercantile Credits Ltd v Foster Clark (Aust.) Ltd* (1964) 112 CLR 169.

With this objective in mind, the Model Law has been approved by UNCITRAL. The Model Law will allow practitioners to provide more certain advice to internationally based companies, their financiers and creditors. The courts will have clearer guidelines under which to apply insolvency laws. The Model Law may not address all of the contingencies that could arise in these inevitably complex cases. However, in the words of the Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency, it will "constitute a major improvement in dealing with cross-border insolvency cases".¹²⁰ It is now the responsibility of the various governments to enact appropriate legislation to make the Model Law more than just a "model".

The initial support for the Model Law which has been given by the Australian government is encouraging. Lawyers and practitioners in this area should make further submissions to the government to ensure its provisions are enacted. Although the fate of creditors, debtors and their liquidators will ultimately still lie in the hands of the judiciary, the Model Law will provide a common starting point.

¹²⁰ Guide to Enactment of UNCITRAL Model Law on Cross-Border Insolvency, p 5.