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Canada-United States Cross-Border Insolvency Relations and the UNCITRAL Model Law

Jacob Ziegel

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CANADA-UNITED STATES CROSS-BORDER INSOLVENCY RELATIONS AND THE UNCITRAL MODEL LAW*

*Jacob Ziegel***

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* In preparing this Article I have drawn extensively on earlier writings by me in this area and in particular on a chapter on "Crossborder Insolvencies, the Model Law and Bill C-55" prepared by me for inclusion in a forthcoming book of essays on Bill C- 55. CANADIAN BANKRUPTCY AND INSOLVENCY LAW: BILL C-55, STATUTE C.47 AND BEYOND (Stephanie Ben-Ishai & A.J. Duggan eds., 2007).

** Professor of Law Emeritus, University of Toronto.

I. INTRODUCTION

Until recently, Canada, and the United States were each other's closest trading partners. Doing business with a neighboring country often implies that one of the parties has a place of business in that country, especially when setting up business is as easy as it is in both these countries, and given the fact that their citizens speak a common language and share a largely common culture, including a common-law-based legal system. It is therefore safe to assume that large numbers of Canadian companies of all sizes have U.S. subsidiaries or other affiliates of some description. The same applies to U.S. companies doing business in Canada. The significance of this close business connection is that when a Canadian-based company runs into serious financial difficulties, the ramifications are also likely to be felt in the United States. The same observation applies in the reverse situation when a U.S. parent company with a Canadian subsidiary faces insolvency.

The number of reported Canadian and U.S. cross-border insolvencies appears to have been very modest before the 1970s. It has grown substantially since then, both in number and in the size of companies involved. Before 1997, Canada's insolvency legislation¹ contained no conflict of laws provisions and Canadian courts had to resolve cross-border issues by invoking common law conflict rules.

The situation changed in 1997. The amendments adopted that year to the Canadian Bankruptcy and Insolvency Act (BIA)² and the Companies' Creditors Arrangement Act (CCAA)³ included a modest number of conflict of laws provisions. As I explain later, the 1997 amendments have had only a modest impact and Canadian courts largely continue to apply the common law rules.

In June 2005, the Canadian government introduced Bill C-55, a 147-page bill that comprised the proposed new Wage Earner Protection Program Act (WEPPA) and a massive number of amendments to the BIA and the CCAA. Among these amendments was a Canadian version of the UNCITRAL Model Cross-border Insolvency Law. Bill C-55 was enacted by the Canadian Parliament on November 25, 2005, after a House of Commons debate and House of Commons Committee hearings that were cut short by the dissolution of Parliament and the calling of a general

1. In Canada, the federal government has exclusive jurisdiction in the matter of bankruptcy and insolvency. Constitution Act 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

2. The Bankruptcy and Insolvency Act, 1997 S.C., ch. 27 (Can.) [hereinafter BIA].

3. *Id.* The CCAA amendments are reproduced in the Appendix to this Article. See *infra* Appendix 1.

election for the members of the House of Commons. The enacted Bill C-55⁴ provides that the Act does not come into effect until proclamation by Order in Council.⁵

That event has not yet occurred. The Martin government was defeated in the elections and was replaced by the Conservative government of Stephen Harper. The new administration has not so far disclosed its intentions with respect to Bill C-55, but there are many—sometimes conflicting—rumors. The common assumption is (unless new elections are forced on the government in the meantime) that Bill C-55 will be proclaimed sometime over the coming year, although probably with a substantial number of amendments.

Reactions in Canada to the Model Law provisions in Bill C-55 have been mixed. There are those who support adoption of the Model Law in principle but are concerned about the changes to the Model Law made in Bill C-55.⁶ Another group of lawyers would have preferred to retain the status quo. However, they have reluctantly accepted the fact that Canada has no option but to follow the U.S. lead given the fact that the Model Law was approved by the U.S. Congress in 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 (BAPCPA). A third group of Canadian insolvency lawyers worry that some of the key concepts in the Model Law may affect the balance of power between Canadian and U.S. courts and the ability of Canadian courts to effectively protect Canadian interests vis-à-vis other states that have adopted the Model Law.

To make these concerns intelligible to a non-Canadian audience, I need to describe the pre-2005 Canadian treatment of cross-border insolvencies as well as the changes to the Model Law appearing in Bill C-55. The balance of this Article proceeds as follows. Part II describes the common

4. Bill C-55, S.C., ch. 47 (Can.).

5. This compromise was hammered out between the then Liberal government and the Canadian Senate in return for the Senate approving the bill without studying it in committee. See also Jacob Ziegel, *The Travails of Bill C-55*, 42 CAN. BUS. L.J. 440 (2005) [*hereinafter* Ziegel, *Bill C-55*]. The federal elections were held in January 2006 and a Conservative government under the leadership of Stephen Harper was elected into office. The new government did not follow up on its predecessor's promise to refer the Act to the Senate for detailed study. Instead, the government gave Notice of a Ways and Means Motion on December 8, 2006 of its intention to introduce a large batch of amendments to the 2006 Act. The draft amendments were attached to the Notice. However, only two of them are relevant to the topic of this Article and they are referred to hereafter. Since the 2006 Act has not been proclaimed and will almost certainly not be proclaimed before Parliament has approved the 2007 amendments, the 2006 Act will continue to be referred to in this Article as "Bill C-55."

6. The author is a member of this group.

law position before the Supreme Court of Canada's decision in *Morguard Investments Ltd. v. De Savoye*⁷ and the impact of that case on the recognition of foreign insolvency orders in Canada. Part III summarizes the principal features of the 1997 conflict of laws provisions in the amending legislation, and Part IV describes the treatment of corporate groups under the 1997 amendments as interpreted by Justice Farley in *Re Babcock & Wilcox Canada Ltd.*⁸ Part V explains the techniques adopted by Canadian and U.S. courts to promote judicial cooperation in cross-border insolvencies involving Canada and the United States, and also draws attention to some cross-border cases that have caused irritation because of insufficient consultation between the U.S. and Canadian judges. Part VI explains the many differences that exist between the Model Law and Bill C-55's version of the Model Law. Finally, Part VII describes Canadian insolvency practitioners' concerns over the impact of the Model Law on the protection of Canadian interests and seeks to evaluate their merits.

II. COMMON LAW ANTECEDENTS

Nineteenth-century English courts were already quite familiar with the types of problems thrown up by cross-border insolvency cases and had established the following principles:⁹

1. The initiation of domestic insolvency proceedings involving foreign debtors was governed by statutory jurisdictional rules and, where there were none, by common law jurisdictional rules. Generally speaking, those rules did not discriminate between English and foreign debtors.
2. Foreign insolvency proceedings were recognized if they were initiated in the courts of the debtor's domicile and recognition was accorded foreign insolvency administrators appointed under the domiciliary law.
3. With the exception of real estate assets, foreign insolvency administrators were also granted access to the insolvent's assets situated in England. However, and importantly:

7. [1990] 3 S.C.R. 1077.

8. See *infra* Part IV. For a moderately detailed treatment of the corporate group insolvency problems in a comparative setting, see Jacob S. Ziegel, *Corporate Groups and Crossborder Insolvencies: A Canada-United States Perspective*, 7 *FORDHAM J. CORP. & FIN. LAW* 367 (2002) [hereinafter Ziegel, *Corporate Groups*].

9. See American Law Institute, *Transnational Insolvency: Cooperation Among the NAFTA Countries. International Statement of Canadian Bankruptcy Law* 65-69 (2003) [hereinafter *Canadian Statement*]. A shorter treatment appears in Jacob S. Ziegel, *Canadian Perspectives on Transborder Insolvencies*, 17 *BROOK. J. INT'L LAW* 539 (1991) [hereinafter Ziegel, *Transborder Insolvencies*].

4. The opening of insolvency proceedings in the foreign domiciliary jurisdiction did not preclude continuance or initiation of insolvency proceedings against the debtor in England, although it was said the English insolvency order would generally be restricted to assets of the debtor located in England.

5. Generally speaking, the English courts drew a clear distinction between jurisdictional and procedural issues involving cross-border insolvency issues (which were governed by English law) and substantive issues arising out of the administration of insolvent estates. The latter questions were governed by other choice of law principles.

This framework of rules identified England with those other jurisdictions that also adopted what has come to be known as a modified universalist approach to cross-border insolvencies.¹⁰ This is in contrast with the territorialist position of other countries that did not recognize foreign insolvency orders or only recognized them if they satisfied onerous and time consuming procedural requirements in the recognizing country.¹¹ The importance of this cursory exposition of nineteenth-century and early-twentieth-century English insolvency principles is that the same precedents were generally followed in Canada.¹²

10. University of Texas Law School Professor Jay Westbrook has established himself as the foremost and most articulate expositor of the modified universalist approach. *See, e.g.,* Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000). Professor Westbrook also served as general reporter for the American Law Institute's *Principles of Cooperation Among the NAFTA Countries* (2003).

11. There was however (and there may still be) a major exception to the generally liberal English approach and this was that a discharge of the bankrupt's debts recognized by the domiciliary law would not be recognized in England unless the discharge was also recognized by the proper law of the debt. Ziegel, *Transborder Insolvencies*, *supra* note 9, at 550; *Canadian Statement*, *supra* note 9, at 101–03. The exception generally only applied to personal insolvencies since most insolvency systems restrict discharge orders to personal insolvencies. The issue of the recognition and enforceability of foreign reorganization orders, which usually also involve at least a partial discharge of unsecured debts, is also unsettled in England. *See id.* at 103–05. *Cf.* Jay Lawrence Westbrook, *Chapter 15 and Discharge*, 13 AM. BANKR. INST. L. REV. 503 (2005). The Canadian position appears to be that the foreign reorganization order will be recognized in Canada if the appropriate jurisdiction and procedural requirements of notice, etc. are satisfied unless there are concurrent reorganizational proceedings in Canada. *See Re Cavell Insurance Co.*, [2005] O.J. No. 645, (aff'd 2006) (O.C.A.) (involving recognition of the reorganization of a solvent English insurance companies vis-à-vis Canadian policyholders). *Cf.* *Menegon v. Philip Services Corp.*, [1999] 11 C.B.R. (4th) 262 (Ont.).

12. Note however the refusal by early Maritime courts to enjoin Canadian creditors from levying execution against the Canadian based assets of foreign (usually U.S.) bankrupts. *See Canadian Statement*, *supra* note 9, at 98, n.323. This preferential treatment of local creditors, which had no source in English precedents, may have been influenced by the territorialist philosophy adopted before 1978 by many American state courts.

The early English and Canadian cases mainly involved individual bankrupts, partnerships and closely held companies. Problems engendered by the appearance of large multinational corporations did not seriously manifest themselves until the widespread economic recessions that struck Western Europe and North America in the 1980s and early 1990s. It was during this period that the British and American courts had to wrestle, among other mega cases, with the fallout from the collapse of the Maxwell Communications empire.¹³ Similarly, courts around the globe in several dozen countries had to address the problems generated by the multibillion dollar collapse of the Bank of Credit and Commerce International (BCCI) and its many subsidiaries.¹⁴ Canada too had its own multinational corporate group failures to grapple with, of which some of the most prominent were Olympia & York Developments, Bramalea Limited, Cadillac Fairview Inc., and Unitel Communications Inc.¹⁵

A striking feature of the British and Canadian approaches at this period was that there were no statutory rules to guide the courts in fashioning solutions to the cross-border aspects of the companies' operations. Nevertheless, on both sides of the Atlantic, the British, Canadian, and U.S. insolvency administrators generally managed to work out the problems harmoniously. At this time, Justice (later Lord) Hoffmann in England and U.S. Bankruptcy Judge Brozan in New York agreed on the appointment of joint administrators to direct the liquidation of the Maxwell conglomerate's assets and distribution of the proceeds. These judges also instituted the concept of direct court-to-court communication to address common problems that came to serve as an important precedent in later cases and strongly influenced provisions in the UNCITRAL Model Law.¹⁶ In a similar vein, Justice Blair in Toronto agreed with Bankruptcy

13. See Evan D. Flaschen & Ronald J. Silverman, *The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communication Corporation International Insolvency*, in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 621 (Jacob S. Ziegel, ed., 1994); see also Christopher K. Grierson, *Issues in Concurrent Insolvency Jurisdiction: English Perspectives*, in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 577, 592-93 (Jacob S. Ziegel, ed., 1994).

14. See Hal S. Scott, *Multinational Bank Insolvencies: The United States and BCCI*, in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 733 (Jacob S. Ziegel, ed., 1994); see also Grierson, *supra* note 13.

15. CASE STUDIES IN RECENT CANADIAN INSOLVENCY REORGANIZATIONS: IN HONOUR OF THE HONOURABLE LLOYD WILLIAM HOULDEN 11, 41, 151, 605 (J.S. Ziegel, & D.E. Baird eds. 1997) [hereinafter CASE STUDIES].

16. See UNCITRAL Model Law on Cross-Border Insolvency, G.A. Res. 52/158, arts. 25-27, U.N. Doc. A/RES/52/158 (Jan. 30, 1998) [hereinafter Model Law]; see also UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insol-

Judge Garrity in New York on a Protocol for communication between the judges and on Principles of Cooperation between the Canadian and U.S. representatives with respect to the corporate governance of Olympia & York's U.S. subsidiaries and the Canadian parent companies.¹⁷

A. The Morguard Factor

One surprising development in Canada over the past decade has been the use Canadian courts have made of the Supreme Court of Canada's decision in *Morguard Investments Ltd. v. De Savoye*¹⁸ to justify the recognition of U.S. bankruptcy proceedings in Canada, and the issuance of stay orders to protect the U.S. debtor's assets and to stay proceedings against the debtor in Canada. In *Morguard*, the Supreme Court reversed a century of Canadian precedents and held that personal presence of the defendant in the province at the time proceedings were initiated was not necessary to give the provincial court jurisdiction over the defendant.¹⁹ Instead, the Supreme Court substituted the test of a "substantial connection" between the province and the defendant as the appropriate basis for the provincial court's jurisdiction.²⁰ Lower courts subsequently extended the substantial connection test to the recognition of foreign judgments in Canada. In *Beals v. Saldanha*,²¹ decided in 2003, the Supreme Court confirmed the correctness of this interpretation of the ratio of the substantial connection test in the enforcement of a Florida money judgment.²²

Morguard did not involve an insolvency case and, historically, Anglo-Canadian courts always applied different jurisdictional tests for the recognition of foreign insolvency orders from the tests applicable to the recognition of foreign judgments. Nevertheless, starting with Justice Lederman's judgment in *Microbiz Corp. v. Classic Software Systems Inc.*,²³ Canadian courts have regularly applied the *Morguard* test in recognizing foreign bankruptcy proceedings in Canada.²⁴ Not only did these courts

veny, pt. 2, sec. V, ch. IV, U.N. Doc. A/CN.9/442 (1999) [hereinafter Guide to Enactment].

17. CASE STUDIES, *supra*, note 15, at 177.

18. [1990] 3 S.C.R. 1077, 1990 CanLII 29 (S.C.C.).

19. *Id.*

20. *Id.* (citing *Moran v. Pyle Nat'l (Can.) Ltd.*, [1975] 1 S.C.R. 393).

21. *Saldanha v. Beals*, [2003] 3 S.C.R. 416, 2003 S.C.C. 72.

22. *Id.*

23. *Microbiz Corp. v. Classic Software Sys., Inc.*, [1996] 45 C.B.R. (3d) 40 (Ont. Ct. J. (Gen. Div.)).

24. For the details, see Jacob S. Ziegel, *Corporate Groups and Canada-U.S. Cross-border Insolvencies: Contrasting Judicial Visions*, 35 CAN. BUS. L.J. 459, 477 (2002) [hereinafter Ziegel, *Judicial Visions*]. Importantly, a strikingly different approach to the recognition and enforcement of foreign insolvency orders was adopted in another Su-

change the traditional jurisdictional factor but, following the Supreme Court's lead in *Morguard*, they also emphasized the role of comity between trading nations to justify *enforcing* as well as recognizing U.S. bankruptcy proceedings in Canada.

III. PRINCIPAL FEATURES OF 1997 AMENDMENTS

Part XIII of the 1997 BIA amendments, introducing the new statutory conflict of law rules, comprises eight sections; section 18.6 of the CCAA amendments only contains five subsections. The dominant motifs of the drafters were to encourage dual insolvency proceedings in Canada and the United States where the debtor had assets in both jurisdictions and to say nothing explicitly that would encourage Canadian courts to authorize removal of Canadian based assets by a foreign representative. This cautious approach was urged upon the drafting committee by the banking representatives who were worried that the long arm of U.S. bankruptcy courts would attempt to reach out to Canadian assets pledged as security to Canadian banks and to have them removed or realized in accordance with United States rather than Canadian bankruptcy law principles.

The focus of this partiality for cooperative proceedings appears in BIA section 268(3) and CCAA section 18.6(3).²⁵ Further emphasis on the protection of Canadian sovereignty appears in section 268(6) (Canadian courts not obliged to give effect to foreign court orders) and in section 269 (no automatic enforcement of foreign stay of proceedings orders in Canada not endorsed by a Canadian court).²⁶

preme Court of Canada decision, *Holt Cargo Systems v. Containerline N.V. (Trustees of)*, [2001] S.C.R. 907. In particular, see Justice Binnie's judgment for the Court, at paragraph 80, in which he describes the Canadian position as a "middle position" or "plurality approach" in contrast to the universalist approach favored by scholars such as Professor Westbrook. Justice Binnie refers to *Morguard* in his judgment, but in a different context, and he emphasizes that the traditional Canadian approach has favored coordination of Canadian and foreign insolvency proceedings rather than subordination by Canadian courts to the foreign proceedings. *Id.* para. 80. Subsequent lower court Canadian judgments have overlooked Justice Binnie's important judgment in *Holt Cargo*, partly because the facts and issues were complex in that case and, more likely, because the post-*Holt Cargo* cases involved ex parte judgments in which no one opposed recognition of the foreign insolvency order in Canada and the relief sought by the debtor.

25. CCAA section 18.6(3) reads: "An order of the court under this section may be made on such terms and conditions as the court considers appropriate in the circumstances." Companies' Creditors Arrangement Act (CCAA), R.S.C. 1985, c. C-36, s. 18.6(3).

26. These aspects of Part XIII are also emphasized in Justice Binnie's judgment in *Holt Cargo*, [2001] S.C.R. 907, paras. 82-84.

On the other hand, section 270 authorizes a foreign representative to initiate straight bankruptcy and commercial proposal proceedings in Canada, but this is not much of a concession to a foreign representative who wants to avoid the expense and delay of full-fledged Canadian proceedings. Section 271(3) is somewhat friendlier to the foreign representative. This section empowers the Canadian court, where it is satisfied that it is necessary for the protection of the debtor's estate or the interests of a creditor or creditors, to appoint a trustee as interim receiver of all or part of the debtor's Canadian property and to direct the interim receiver, *inter alia*, to take possession of that property and to exercise such control over the property and over the debtor's business in Canada as the court considers appropriate. Unlike section 268(3), section 271(3) is not predicated on the existence of concurrent insolvency proceedings in Canada and the foreign jurisdiction. Nevertheless, the section does require the appointment of a Canadian trustee if the foreign representative wants to assert any kind of control over the Canadian based assets even if the costs of doing so exceeds the value of the assets.

Given the cautious character of these provisions, it is not surprising that Canadian courts applying the *Morguard* doctrine to the recognition of foreign insolvency proceedings in Canada after 1997 often make no reference to Part XIII of the BIA or section 18.6 of the CCAA. Rightly or wrongly, they seem to have preferred the flexibility of the *Morguard* doctrine to the circumlocution of the 1997 amendments. In fact, there are few reported decisions altogether based on the 1997 amendments.

IV. CORPORATE GROUPS AND *RE BABCOCK & WILCOX CANADA LTD.*²⁷

It is safe to claim that the treatment of corporate groups in cross-border insolvencies is among the most challenging issues in contemporary insolvency law. This is particularly true given that the issues are not addressed in the 1997 Canadian amendments, were not dealt with in section 304 of the U.S. Bankruptcy Code, and are not addressed in the UNCITRAL Model Law. Large multinational corporations are almost invariably organized in group form, and this for a variety of reasons—to facilitate compliance with national laws, for tax reasons, to shelter the parent company against liabilities incurred by its subsidiaries, and for administrative reasons. The degree of control exercised by the parent company over its subsidiaries will also vary considerably. It may be so complete that outsiders may not even realize that they are dealing with a separately incorporated entity. At the other end of the spectrum, the sub-

27. For a detailed discussion of *Babcock & Wilcock*, see Ziegel, *Judicial Visions*, *supra* note 24.

sidiary may enjoy almost complete autonomy and be subject to few restraints by the parent company.

Common law and civil law jurisdictions differ in their treatment of corporate groups. In common law countries, corporate groups are often treated for tax purposes as a single entity. In the insolvency context, it is customary to distinguish between procedural and substantive consolidation of members of the group. Procedural consolidation occurs where one or more members of the group are joined in the same insolvency proceedings for administrative convenience while maintaining the separate identity of the members of the group for other purposes. Common law courts will authorize or recognize a substantive consolidation where the judge is satisfied that the affairs of the group have been conducted as if its members constituted a single entity and that creditors of individual subsidiaries will not be prejudiced by ignoring the corporate veils separating the members of the group from each other.

In Canadian and U.S. insolvency proceedings, procedural consolidations are very common. Substantive consolidations, on the other hand, are rare. Much more common are *partial* substantive consolidations involving pooling of the group's assets and similar or identical treatment of unsecured creditors' claims. Such de facto consolidations usually occur because of the existence of cross-guarantees among members of the group or the difficulty of disentangling complex financial dealings among the group members. In such cases, it will be practical considerations, not legal theory, that will determine how much de facto consolidation will occur in addressing the group's insolvency problems.

There is no explicit language in Part XIII of the BIA or section 18.6 of the CCAA that endorses this practice in cross-border insolvencies. There is no doubt however that it occurs frequently in practice.²⁸ Seen from this perspective, Justice Farley's decision in *Re Babcock & Wilcox Canada (BW Canada)*²⁹ was atypical for a number of reasons. The issue before the court was whether to extend recognition in Ontario to a stay of proceedings order³⁰ issued by bankruptcy Judge Brown in Louisiana against asbestos tort claimants against BW Canada in Canada. Judge Brown's order was made in response to a Chapter 11 petition filed by BW Canada's U.S. parent company and its U.S.-based affiliates.³¹ The stay was

28. See Ziegel, *Corporate Groups*, *supra* note 8, at 386–87.

29. [2000] 18 C.B.R. (4th) 157, [2000] 5 B.L.R. (3d) 75 (Ont. S.C.J. [Commercial]).

30. The order did not arise automatically under section 362 of the U.S. Bankruptcy Code, but apparently was a separate order made by Judge Brown under section 105 of the Code. Section 105 authorizes U.S. bankruptcy courts to issue such additional orders as may be necessary to carry out the provisions of the Code.

31. *Re Babcock & Wilcox Canada Ltd.*, [2000] 18 C.B.R. (4th) 157.

sought even though BW Canada, a Canadian incorporated entity, was not a party to the U.S. proceedings and was not involved in any Canadian bankruptcy proceedings.³² Justice Farley recognized the chapter 11 proceedings and issued the requested stay order against potential Canadian tort claimants.³³

Justice Farley followed his BW Canada judgment in two later cases, *Re Grace Canada Inc.*³⁴ and *Re Matlack Inc.*³⁵ On the other hand, Justice Molloy refused to apply the U.S. stay of proceedings order in *Braycon International Inc. v. Everest & Jennings Canadian Ltd.*³⁶ Similarly, in *Re Singer Sewing Machine Co. of Canada*,³⁷ Registrar Funduk, applying well established Anglo-Canadian precedents, expressed himself forcibly in declining to enforce the US stay order against Singer Sewing Co.'s subsidiary in Canada.³⁸

In reaching the conclusion that he did in *BW Canada*, Justice Farley had to overcome a number of hurdles. One was that CCAA section 18.6 does not explicitly authorize the enforcement in Canada of foreign stay of proceedings orders.³⁹ Justice Farley resolved this difficulty by invoking (probably correctly) section 18.6(4) of the CCAA, which allows Canadian courts to continue to apply common law and equitable principles in cross-border insolvency proceedings.⁴⁰ Using this approach, Justice Farley was able to invoke the *Morguard* doctrine discussed earlier in this article. However, *Morguard* was a dubious precedent since it involved the enforcement of a money judgment in a private law setting involving two parties, not a collective insolvency proceeding with many ramifications. Furthermore, *Morguard* provides even less support for the notion that a foreign insolvency order (assuming it enjoyed equal status with a

32. *Id.*

33. *Id.*

34. [2001] CarswellOnt 2886 (Ont. S.C.J. [Commercial]).

35. [2001] 26 C.B.R. (4th) 45, 2001 CarswellOnt 1830 (Ont. S.C.J. [Commercial]).

36. [2001] 26 C.B.R. (4th) 154, 2001 CarswellOnt 396 (Ont. S.C.J.).

37. [2000] 6 W.W.R. 598, (2000), 79 Alta. L.R. (3d) 95, [2000] 18 C.B.R. (4th) 127, 2000 CarswellAlta 155, 259 A.R. 364 (Alta. Q.B.).

38. "Comity does not require me to recognize a chapter 11 order over a Canadian company carrying on business only in Canada and whose assets are all in Canada. Who the shareholders are is irrelevant and who the creditors are is irrelevant. Under Alberta law neither gives an American bankruptcy court jurisdiction over Singer Canada." *Id.* at para. 26. In Canada's bankruptcy system, registrars in bankruptcy exercise limited judicial powers and have considerable jurisdiction in procedural matters. By agreement, registrars may also acquire jurisdiction they would not otherwise enjoy. See BIA s. 192(1).

39. CCAA section 18.6 contains no counterpart to BIA section 269.

40. The provenance of this provision is discussed in Ziegel, *Judicial Visions*, *supra* note 24, at 470-71.

foreign judgment for recognition and enforcement purposes) was binding on a corporation that was not even a party to the foreign proceedings.

The other difficulty Justice Farley had to confront was that Part XIII of the BIA only applies to the recognition of foreign proceedings involving an insolvent debtor. The applicants in *BW Canada* did not claim that the Canadian subsidiary was insolvent. Justice Farley's answer was that "debtor" is not defined in the CCAA, only "debtor company" is, and that the section 18.6 drafters had drawn a conscious distinction between a debtor company and a debtor for the section 18.6 purposes. This author has explained elsewhere⁴¹ why Justice Farley's distinction is incompatible with the drafting history of Part XIII and section 18.6.

Even if Justice Farley's distinction had been on solid ground, it would still have left unresolved the difficulty that the Canadian government's insolvency power under section 91(21) of the Constitution Act has long been held to be confined to insolvent debtors. One could make the argument that in the modern commercial environment the federal insolvency power should be construed flexibly to at least cover the members of a corporate group if the group as a whole is clearly insolvent even if there may be doubts about the solvency of individual members of the group. Justice Farley did not make the argument. If the argument had been made, the answer would not have been a foregone conclusion.

The foregoing critique of *BW Canada* may seem academic given Bill C-55's adoption of a modified version of the Model Law. The answer is that the discussion is far from academic because of important recent decisions of English and French courts and the European Court of Justice (ECJ)⁴² addressing comparable corporate group problems under the EC Insolvency Regulation 2000.⁴³

V. JUDICIAL COOPERATION IN CROSS-BORDER INSOLVENCIES

As noted above, the 1997 BIA and CCAA amendments strongly endorsed cooperative cross-border insolvency proceedings between Canadian and foreign insolvency representatives. The cooperation had long preceded adoption of the amendments and continues to occur, usually

41. Ziegel, *Judicial Visions*, *supra* note 24, at 471–72.

42. See *Re Daisytek-ISA Ltd.* [2003] B.C.C. 562, [2004] BPIR 30 (Ch.); *Chambre commerciale et financière* [Cass. com.] [Commercial and Financial Chamber], Jun. 27, 2006, Ref. No. 03-19.683; *Case C-341/04, Eurofood IFCS Ltd. v. Bank of America, N.A.*, 1999 E.C.R. I-3813 (2006).

43. Council Regulation 1346/2000, 2000 O.J. (L 160) (EC). The Regulation replaced the EEC Draft Bankruptcy Convention of 1995, which failed to secure the support, first, of the United Kingdom and, later of Spain, for reasons unrelated to the merits of the Convention.

without even a reference to the 1987 amendments. In the larger cases, the cooperation has often been accompanied by Memoranda of Understanding on Court to Court Communication and protocols on cooperation between the Canadian and (almost invariably) U.S. administrators in the management of the joint estates.⁴⁴

There is no hard data on how often Canadian and U.S. bankruptcy judges actually communicate with one another. Given the formalities and expense involved in making the arrangements and the need to notify the parties before the judges do the talking, one suspects it is not very often.⁴⁵ There is clear evidence, however, that the protocols have proved very useful, and are perhaps indispensable, in dealing with such common issues as the setting of dates to bar claims, the sale of assets and the distribution of proceeds from such dispositions, the classification of creditor claims, and the structure of chapter 11 and CCAA plans of reorganization for approval by the creditors and the courts. An economist would predict that the level and frequency of cooperation will depend on the efficiency gains both parties anticipate from the cooperation, which will in turn depend on the parties' bargaining strengths. If the assets are fairly evenly divided between the two jurisdictions (almost invariably Canada and the United States), one would expect the insolvency administrators to cooperate closely with each other. If, as is often the case, the Canadian operations are small in relation to the size of the U.S. operations, there will probably be great pressure on the Canadian administrator to fall into line with the U.S. proceedings. There may even be a temptation for the U.S. administrator to bypass consultation with his Canadian counterpart altogether.⁴⁶

This no doubt explains the occasional friction that has arisen between Canadian and U.S. courts or between Canadian and U.S. insolvency administrators. The following are some examples:⁴⁷

44. For recent examples, see the Cross-Border Insolvency Protocols adopted in *In Re Laidlaw, Inc.*, Order, August 10, 2001, *Livent Inc.*, June 11, 1999, *Philip Service Corp.*, June 1999, *Psinet Limited*, July 10, 2001 (unpublished decisions, on file with author).

45. *But see* Jay Lawrence Westbrook, *The Duty to Seek Cooperation in Multinational Insolvency Cases*, in ANNUAL REVIEW OF INSOLVENCY LAW 2004 (Janis Sarra ed., 2005) [*hereinafter* Westbrook, *Multinational Insolvency Cases*]. Professor Westbrook emphasizes the value of court to court communication to enable the judges to acquire a better understanding of each other's bankruptcy laws and the treatment of foreign creditors' claims.

46. For such examples, see *infra* notes 47–48.

47. The examples are drawn from the outline of an unpublished presentation titled "Striving for a Level Playing Field in Canada-U.S. Cross-border Insolvency Proceedings" at an ABI Panel Discussion held in Toronto on February 11, 2005 (on file with author).

1. *Section 363 Sales.* Canadian courts have complained on a number of occasions over the past five years that U.S. bankruptcy courts have approved auction sales of assets, partly located in Canada and involving the interests of Canadian creditors, without prior notice to Canadian creditors and without the prior approval of the Canadian court.⁴⁸ There is no suggestion that U.S. counsel intended to slight Canadian counsel in such cases, although there may have been a lack of sensitivity about Canadian interests and Canadian sovereign rights. It has also been suggested to the author by U.S. counsel that some of the difficulties may have arise because of reluctance by U.S. creditors' committees to approve Canadian proceedings where this would involve additional costs.⁴⁹

2. *Classification of Claims.* A recurring challenge is the reconciliation of conflicting treatment of creditor claims in concurrent insolvency proceedings. The classic case in Canada is *Menegon v. Philip Services Corp.*⁵⁰ Here, Justice Blair in Toronto (then a member of the Ontario Superior Court of Justice and now a member of the Ontario Court of Appeal) refused to approve a Chapter 11 plan.⁵¹ He did so because the plan would have demoted Canadian creditors' claims to section 510(b) status without the creditors having a right to vote on the plan in the Canadian plenary proceedings as provided for in the CCAA.⁵² The issue of conflicting characterization of securities claims is also addressed in the Third Circuit's important judgment in *Stonington Partners Inc. v. Lerner Speech Products NV.*⁵³ A striking example of a U.S. court bending over backwards in section 304 proceedings to assist in the sale of Canadian assets occurred in *Starcom Services Corp.*⁵⁴ In *Starcom*, the Seattle-based bankruptcy court ordered that U.S. creditors' rights be determined

48. See, e.g., *Corporate Restructuring*, THE UPDATE (Goodmans LLP, Toronto, Ont.), Sept. 25, 2003, at 2-3, available at <http://www.goodmans.ca/pdfs%5CCorporateRestructuringUpdate.pdf> (discussing *Divine Corp./Delano Technology Corp.* proceedings and *Heller Financial Inc. v. Recoton Can. Ltd.*).

49. These difficulties would not arise in the reverse situation because Canadian creditors' committees—where they exist—exercise much less control over the administration of Canadian estates than do their counterparts in the United States in chapter 11 proceedings.

50. [1999] 11 C.B.R. (4th) 262 (Ont. S.C.J. [Commercial List]). For further discussion, see Pamela L.J. Huff & Lisa S. Corne, *Recent Developments in Cross-border Insolvencies: Application of the Proper Law in the Sale of Assets and the Claims Process* 17 NAT'L INSOLV. REV. 6, 71-75 (2000).

51. *Id.*

52. *Id.*

53. 310 F. 3d 118 (3d Cir. 2002). For further discussion, see Westbrook, *Multinational Insolvency Cases*, *supra* note 45, at 187.

54. See Huff & Corne, *supra* note 50, at 70-71; see also *US Creditors Ordered to Have Rights Determined in Canada*, OSLER UPDATE, Jan. 20, 1999 (on file with author).

in accordance with Canadian law because it would promote the just and expeditious disposition of proceedings in Canada.

3. *Denial of Section 304 Status to Canadian Corporate Group Proceedings.* This denial occurred in the *Teleglobe Inc.* case because, on the intervention of the U.S. Trustee, the U.S. bankruptcy court held that the definition of “foreign proceeding” in the U.S. Code, section 101(23), was not satisfied with respect to the U.S.-based subsidiaries.⁵⁵

These examples are not intended to throw any doubt on the importance of cooperation between cross-border representatives to maximize gains in the realization of assets and to deal fairly with the various classes of creditors. They do, however, signal the need for realism in evaluating the amount of cooperation that can be expected in particular circumstances, and particularly in those cases where little cash remains for distribution among unsecured creditors after the claims of secured and preferred claimants have been satisfied.

IV. BILL C-55’S TREATMENT OF THE MODEL LAW⁵⁶

For analytical purposes, the Part XIII provisions in Bill C-55 fall under three headings: (1) provisions that substantially replicate those in the Model Law; (2) Model Law provisions that have no counterpart in Part XIII; and (3) Part XIII provisions that depart substantially from the Model Law provisions.

A. Replicated Provisions

The replicated provisions are the following and, with one possible exception, appear to be uncontroversial: section 269, Application for recognition of Foreign Main Proceedings (FMP) and Foreign Non-Main Proceedings (FNMP); section 270, Order recognizing FMP and FNMP; section 278, Coordination of domestic and foreign proceedings and concurrent foreign proceeding; section 279, Appointment of person by Ca-

55. J.A. Carfagnini & Melaney J. Wagner, *Insolvency in the Telecommunications Industry: A Canadian Perspective*, (Goodmans LLP, Toronto, Ont.), Feb. 23, 2003, at 14–15, available at http://www.goodmans.ca/pdfs/Insolvency_in_the_Telecommunications_Industry.pdf (comparing *Re Teleglobe Inc.* in which the corporate was denied section 304 status because its “U.S. subsidiaries did not have a domicile, residence, principle location or business or location of principle assets in a ‘foreign’ country” with *GT Group Telecom*, where the court granted section 304 relief despite the absence of any “officers or employees” in the United States).

56. For the text of revised Part XIII of the BIA as adopted in Bill C-55, see *infra* Appendix 1. As previously noted, the provisions in Bill C-55 replacing Part XIII of the BIA and Part IV of the CCAA are substantially identical. For this reason, the following analysis in the text is confined to a comparison of the Model Law and the Part XIII provisions.

nadian court to represent Canadian proceedings outside Canada for recognition purposes; and section 283, Adoption of Hotchpot rule in cross-border proceedings.

The exception involves article 16(3) of the Model Law, which is reproduced in section 268(2) of Bill C-55. Article 16(3) provides that, in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests, or COMI. It is arguable that the presumptions are fictitious given the ease, in the case of companies, with which a company can be incorporated or reincorporated in a jurisdiction without ever doing any business there.⁵⁷ Similarly, in the case of individuals, it is unlikely that an individual engaged in international trade or commerce will be conducting the business from the individual's home.⁵⁸

B. Model Law Provisions Not Replicated in Part XIII

There are twelve such Model Law provisions which have no counterpart in Part XIII and they are as follows: article 3 (Conflicting treaty obligations); article 4 (Court or other authority competent to deal with recognition of foreign proceedings); article 6: (Public policy exceptions); Article 8 (Interpretation of Model Law); article 9 (Foreign representative's right of direct access to courts of forum state); article 11 (Application by foreign representative to commence proceedings under law of enacting state); article 12 (Participation of foreign representative in proceedings under law of enacting state); article 13 (Access by foreign creditors to proceedings under law of enacting state); article 14 (Notification to foreign creditors of proceedings under law of enacting state); article 22 (Protection of Interests of Creditors and Other Interested Parties); article 23 (Avoidance of acts detrimental to estate); and article 24 (Inter-

57. A recent, but far from uncommon example, is *Re BRAC Rent-A-Car International Inc.*, [2003] 1 W.L.R. 1421, 1422. Professor Lynn LoPucki, a critic of universalist theories of recognition of cross-border insolvencies, is particularly critical of the COMI test in the EU Regulation and the Model Law, and argues that an astute lawyer looking for an hospitable insolvency climate for his client can easily cobble together the COMI ingredients to satisfy the EU Regulation and Model Law tests. *See* LYNN LOPUCKI, *COURTING FAILURE*, ch. 8 (2005). Professor LoPucki may have underestimated the value of the COMI test but he is surely right in criticizing the retention of the place of incorporation or registration test even as a first approximation.

58. To be sure, in the Internet age, it is easy enough for an entrepreneur to conduct international trade from home and, in North America, an increasing number of individual enterprises are being run from the proprietor's residence. To recognize this changing pattern is not the same, however, as suggesting that, in the absence of contrary evidence, the debtor's residence should be presumed to be the center of the debtor's main interests.

vention by foreign representative in domestic proceedings in forum state.)

Unhappily, the federal government provided no published explanation for these omissions and I can only speculate what the reasons were. Assuming my surmises are correct, I find the explanations unconvincing in several cases and antithetical to the spirit of the Model Law in a number of others. Articles 3 and 4 were presumably omitted because they are not relevant in the Canadian context. However, in my view, the exclusion of article 6 was a bad mistake. Public policy plays an important role in insolvency law and particularly so with respect to the enforcement of foreign insolvency judgments.⁵⁹ The same observation applies to the exclusion of article 8. Article 8 reflects a standard provision in UNCITRAL Conventions and Model Laws and is designed to promote uniform interpretation of international texts among adopting states.

Articles 11, 12, and 13 may have been omitted because the drafters perceived them to be redundant in the Canadian context, but this is sheer surmise on the author's part. Even if the Bill C-55 drafters were correct in assuming that Canadian courts would confer the rights mentioned in these articles without the rights being spelled out, there was surely no harm in making explicit what the drafters deemed to be implicit.

The omission of article 22 is even more puzzling. Article 22(1) provides that in granting relief under articles 19 or 21, the court must be satisfied that the interests of creditors and other interested parties, including the debtor's interests, are adequately protected. The omission of this article flies in the face of the long-established mantra of Canadian courts that the interests of Canadian creditors must be protected as a condition

59. See, e.g., *Re Teleglobe Inc.* [2005] 17 C.B.R. (5th) 256. In *Teleglobe*, Justice Farley refused to enforce an order by the Superintendent of Corporations in Columbia requiring Teleglobe Inc. (T Can), the Canadian parent company of Teleglobe Columbia (T Col), to return the sum of US\$700,000 paid to it by T Col in satisfaction of a debt on the eve of T Col's insolvency proceedings on the grounds that it would be contrary to Canadian public policy to make such an order. The evidence was that the Columbian Superintendent had issued the order at the request of a major creditor of T Col. Justice Farley was of the view that an order requiring the parent company to return the money would result in a distorted distribution of the estate assets and therefore violate the basic rule of equal treatment of creditors.

It seems, moreover, that the drafters of the proposed 2007 amendments may have had second thoughts about the exclusion of article 6. See Ziegel, *Bill C-55*, *supra* note 5. The proposed amendments to section 248(2) of the 2005 BIA amendments and section 61(2) of the CCAA amendments would insert the following subsection in place of the 2005 amendments: "Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy."

of the recognition of foreign insolvency orders in Canada, particularly where the debtor has Canadian-based assets.⁶⁰

Just as troubling is the omission of article 23, authorizing the foreign representative to initiate proceedings in the enacting state to set aside pre-bankruptcy transactions between the debtor and a third party that violate the rule of equal treatment of creditors. Conceivably, the Canadian drafters were concerned that conferring standing on the foreign representative might be construed by a Canadian court as an invitation to apply foreign avoidance rules (particularly the U.S. Bankruptcy Code rules) that are much more draconian than are the Canadian avoidance rules. If this surmise is correct, the drafters' fears were ill founded since it is well established that standing to bring an avoidance suit and the law to be applied to determine the voidability of the transaction are quite separate issues.⁶¹

C. Provisions that Deviate From or Have No Model Law Counterparts

There are eleven such provisions, several of them of considerable significance. The deviating provisions are the following:

(a) Section 268(1)—the definition of FNMP in this subsection differs substantially from the definition in the Model Law. Article 2(c) of the Model Law requires the debtor to have an “establishment” in the place of the foreign proceedings. “Establishment” is defined in article 2(f) as any place of operations where the debtor carries out a non-transitory economic activity with human means and involving goods or services. Section 268(1) does not require the debtor to have an “establishment” in the foreign jurisdiction. Instead, it defines FNMP as “a foreign proceeding *other than* a foreign main proceeding.”⁶² This suggests that a Canadian court will or may be obliged to cooperate with or recognize a foreign proceeding even if the debtor has no place of business in the foreign jurisdiction. This open-ended provision is at odds with the standard *Morguard* test adopted by Canadian courts in many recent cross-border proceedings⁶³ that there must be a substantial connection between the debtor and the foreign jurisdiction before the Canadian court will extend its assistance to the foreign order.

60. As noted earlier, protection of Canadian creditor interests was a dominant concern of the drafters of Part XIII of the BIA in 1995.

61. *Cf. Canadian Statement, supra* note 9, at 91–92.

62. Emphasis added.

63. *See* discussion *supra* Part II.A.

(b) Section 270 deals with an order recognizing a foreign proceeding. Section 270 is more concise than Model Law article 17, but appears to impose the same essential requirements as the Model Law provision.

(c) Section 271 deals with the effect of recognition of an FMP. Section 271(2) has no counterpart in article 20 of the Model Law.⁶⁴ It excludes subsection (1) of article 20 entirely if BIA proceedings are in progress in Canada at the time of the foreign representative's application. Subsection (3) also has no Model Law counterpart. It makes the recognition of an FMP subject to exceptions that would apply if the foreign proceedings had taken place in Canada under the BIA. It is not clear what types of exclusions the Bill C-55 drafters had in mind. Section 271(4) also has no Model Law counterpart and may conflict with article 28 of the Model Law, which deals with proceedings in the enacting state after recognition of an FMP. Section 271(4) retains the right of parties to commence or continue proceedings under the BIA, the CCAA, or the WURA. Subsection 271(4) conflicts with the Model Law philosophy that the locus of the debtor's main interests should govern all proceedings against the debtor and that non-main proceedings against the foreign debtor in the enacting state should be confined to proceedings involving locally situated assets. Section 271(4) may need to be amended to reflect the same policy.

(d) Section 272 deals with the orders a Canadian court can make on recognition of the foreign proceedings. Section 272 has no counterpart to article 21(2) of the Model Law authorizing the forum court to approve "distribution"⁶⁵ of all or part of local assets to the foreign representative if the court is satisfied that the assets [sic] of local creditors are adequately protected. Presumably, the Canadian drafters were concerned that the Model Law power might be abused, but this could be said of all discretionary powers under the Model Law or the BIA. There appears to be no good reason to exclude article 21(2) of the Model Law.

64. Section 271(2) of the Bankruptcy and Insolvency Act reads:

On application by a foreign representative in respect of a foreign proceeding commenced for the purpose of effecting a composition, an extension of time or a scheme of arrangement in respect of a debtor or in respect of the bankruptcy of a debtor, the court may grant a stay of proceedings against the debtor or the debtor's property in Canada on such terms and for such period as is consistent with the relief provided for under sections 69 to 69.5 in respect of a debtor in Canada who files a notice of intention or a proposal or who becomes bankrupt in Canada, as the case may be.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 271(2).

65. Query whether "distribution" should read "release" of the debtor's assets in the enacting state?

(e) Section 274 has no Model Law counterpart and provides that if a recognitional order is made respecting the foreign representative, the foreign representative may commence or continue proceedings under BIA sections 43, 46–47.1, 49, 50(1), and 50.4(1) as if the foreign representative were a creditor of the debtor. These provisions seem unobjectionable and reflect the partiality shown in existing Part XIII for Canadian initiated proceedings over recognition of foreign proceedings and foreign insolvency orders. However, section 274 *would* be objectionable if the courts used these provisions as an excuse not to recognize the foreign proceedings or for refusing the court's assistance to the foreign representative.

(f) Section 275 deals with forms of cooperation between Canadian and foreign courts. Section 275 is not as explicit as are articles 25–27 of the Model Law in spelling out the forms of cooperation between Canadian and foreign courts. It is not obvious what objections the Canadian drafters found in the more detailed Model Law provisions. It is suggested that the fuller Model Law provisions should have been retained in the interests of uniformity of the Model Law provisions among enacting countries.⁶⁶

(g) Section 281 has no counterpart in the Model Law provisions. Section 281 provides that the foreign representative may make an application to the Canadian court under Part XIII, even though an appeal is pending in a foreign court. Section 281 does not state what type of appeal the drafters had in mind. Presumably it must implicate the foreign representative's standing in the Canadian proceedings since otherwise there would be no reason why the Canadian court should be concerned about the foreign representative's entitlement to bring the proceedings.

(h) Section 284(1) is another troubling provision in Bill C-55 which has no counterpart in the Model Law. Subsection 1 provides that nothing in Part XIII prevents the court on the application of a foreign representative or other interested person from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives "that are not inconsistent with the provisions of this Act." Section 284(1) is a reincarnation of existing BIA section 268(5), the CCAA counterpart of which was invoked by Justice Farley in *BW Canada*⁶⁷ to recognize the Chapter 11 order in Canada without requiring the US debtor to initiate new insolvency proceedings under the

66. Happily the drafters of the proposed 2007 amendments to the BIA and the CCAA, Ziegel, *Bill C-55*, *supra* note 5, appears to have reached the same conclusion. See Proposed Draft § 59 (amending section 275(3) of the BIA) and Draft § 80 (amending section 52 of the CCAA) (on file with author).

67. *Re Babcock & Wilcox Canada Ltd.*, [2000] 18 C.B.R. (4th) 157, paras. 16–17.

BIA. The author has explained the origin of section 268(5) elsewhere and its weakening effect on sections 268(2) and (3) of the BIA.⁶⁸ Will section 284(1) have a similar diluting effect in new Part XIII? Can it be used to undermine the careful structure of the Model Law provisions? We cannot be sure because everything will depend on whether the court will perceive the requested order to be inconsistent with the other provisions in new Part XIII.

(i) Section 284(2) is also a carry-over from existing Part XIII, in this case, section 268(6). Section 284(2) provides that nothing in new Part XIII requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court. Section 268(6) was designed to prevent giving per se effect to foreign insolvency orders in Canada and to require the Canadian court's imprimatur before a foreign insolvency order could be implemented in Canada. Is there a conflict between section 284(2) and the other new Part XIII provisions? One hopes not, though one cannot be sure. The drafters of Bill C-55 would surely have done better to leave this relic of an earlier age behind them and to have shown sufficient confidence in the capacity of the new Part XIII provisions to stand on their own feet and to strike a fair balance between the interests of Canadian-based creditors and the interests of the foreign-based debtor and its foreign creditors.

VII. THE MODEL LAW AND CANADIAN INSOLVENCY PRACTITIONERS' REACTIONS

As noted in Part I of this Article, Canadian practitioners' reactions to the prospect of Canada adopting the Model Law have been mixed, with only a very small minority supporting the move strongly. The lack of enthusiasm by the others should be viewed not as hostility to the Model Law per se nor as disinterest in UNCITRAL's work in the international trade area. The contrary is true. Canada has been a keen supporter of UNCITRAL's goals for many years and has adopted a substantial number of the Conventions and Model Laws sponsored by UNCITRAL.⁶⁹

68. See Ziegel, *Judicial Visions*, *supra* note 24, at 470–71.

69. Some examples of these are the UNCITRAL Convention on Contracts for the International Sale of Goods, the Model Law on International Commercial Arbitrations, and the Model Law on Electronic Commerce. See, e.g., Status 1980—United States Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (the treaty entered into force in Canada on May 1, 1992). Canada has also signed and is in the course of ratifying the Capetown Convention on International Interests in Mobile Equipment, although the Convention was the brainchild of UNIDROIT and not UNCITRAL.

Rather, the coolness is due to two main factors. The first is that Canadian practitioners believe that Canadian and U.S. insolvency courts have established a good working relationship to resolve common cross-border insolvency problems and that the Model Law will complicate rather than simplify this rapport in the future. The second factor is that Canada is not in the same position as the United States in seeking to promote a friendlier environment world wide for the recognition of foreign insolvency orders and cooperation with foreign insolvency administrators. The United States is a global power and has many world-class companies that operate in many overseas jurisdictions. The United States therefore has strong economic and legal incentives to ensure that U.S. insolvency orders are recognized and enforced in other jurisdictions. In contrast, Canada has a very small number of world-class business enterprises and, up to now, most of its cross-border insolvency relations have been with the United States. This scenario is unlikely to change in the foreseeable future. What matters most, therefore, to Canadian insolvency practitioners is the treatment that Canadian bankruptcies and business reorganizations receive in the United States.

Among Canadian commentators on the Model Law, the critique offered by Andrew Kent, Stephanie Donaher, and Adam Maerov⁷⁰ is probably the most perceptive and trenchant, and is likely also to reflect the consensus of many Canadian insolvency practitioners with active experience in cross-border insolvencies. These authors could have noted that the Model Law is much longer (32 articles) than both the eight sections in BIA Part XIII and the five sections in the CCAA. However, this is not the gravamen of their complaint. Rather, their principal concerns rest on two pillars. The first is that since the 1990s, Canadian and U.S. insolvency practitioners and bankruptcy courts have established a generally very amicable and successful rapport in resolving cross-border insolvency issues and have been able to do so with skeletal or no statutory provisions to assist or guide them. The authors are concerned⁷¹ that Canada's adoption of the Model Law, with its own concepts and terminol-

70. Andrew J.F. Kent, Stephanie Donaher & Adam Maerov, *UNCITRAL, eh? The Model Law and Its Implications for Canadian Stakeholders*, in ANNUAL REVIEW OF INSOLVENCY LAW 187 (Janis Sarra ed., 2005). Mr. Kent is a senior partner at McMillan Binch Mendelsohn in Toronto and has been actively involved in many of the large cross-border insolvencies occurring in Canada over the past fifteen years. Stephanie Donaher and Adam Maerov are associates at the firm.

71. *Id.* at 196–200. For a later insightful Article, published after this Article was presented at the Brooklyn Law School symposium, see Kevin P. McElcheran & Karen S. Park, *Canadian Cross-Border Corporate Group Insolvencies: Lessons to be Learned from Europe*, in ANNUAL REVIEW OF INSOLVENCY LAW 145 (Janis Sarra ed., 2006).

ogy, will usher in a new era of uncertainty and they are not sure about the outcome. They concede that the Model Law may make little difference in the end but argue that it may take the courts some time to reach this conclusion. In the meantime, uncertainty will prevail. Given the fact that most major cross-border insolvencies involve corporate groups, the authors express particular concerns that the Model Law fails altogether to acknowledge this fact or to provide guidance as to how the Model Law provisions are to be adapted to corporate groups.

In a similar vein, the authors lament the fact that the Model Law provides no guidance as to how a company's main center of interests is to be determined when there is a dispute over whether the proceedings which the Canadian court is asked to recognize is a foreign main proceeding or a foreign non-main proceeding. In the end, however, the authors resign themselves to the likelihood of Canada adopting the Model Law because the United States has done so, and that this will make it necessary in any event for Canadian judges and insolvency practitioners to familiarize themselves with the Model Law concepts and provisions.

I agree with the authors' conclusions. I also believe, however, that the authors' concerns about the Model Law's failure to address the needs of corporate groups and the uncertainty concerning a company's center of main interests are exaggerated and are unlikely to engender the great uncertainty they fear. It is true that adoption of the Model Law will require Canadian courts and insolvency practitioners to master a new set of rules and procedures, but this should not be difficult. Procedurally and substantively, the Model Law rules are quite consistent with the cross-border practices developed between Canadian and U.S. courts and between Canadian and U.S. insolvency practitioners. There is no reason why that cooperation cannot proceed as effectively under the Model Law as it has proceeded up to now outside the Model Law; on the contrary, articles 25–30 of the Model Law place great emphasis on the importance of close cooperation between courts, administrators, and insolvency practitioners in cross-border insolvencies.

Canadian creditors should also feel reassured that article 28 makes it clear that Canada will not have to surrender its own insolvency jurisdiction with respect to Canadian-based assets even if an FMP is in progress in the United States or elsewhere.⁷² Equally important is the fact that the

72. Model Law, *supra* note 16, article 28 reads:

After recognition of a foreign main proceeding, a proceeding under [*identify laws of the enacting State relating to insolvency*] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent

only mandatory consequence flowing from an FMP is that Canadian courts will have to recognize the proceedings, to order a stay of proceedings, and to cooperate with the foreign court and the foreign administrator.⁷³

In this author's view, the concerns expressed by Kent, Donaher, and Maerov⁷⁴ over the difficulties of establishing an insolvent debtor company's COMI are inflated. The E.U. cases reported so far are consistent with the results Canadian and U.S. courts might have been expected to reach under similar circumstances. Significantly, Justice Farley, a leading and very experienced Canadian insolvency judge, encountered no difficulty in applying the COMI test in one of the last decisions rendered by him in early 2006, before his retirement from the bench.⁷⁵

The Model Law's failure to deal explicitly with the status and treatment of corporate groups is not surprising. Nor is it fatal. Canadian, British, U.S., and many other insolvency laws are equally silent on this question and it would have been surprising if the Model Law had ventured into this complex area. There is no single, simple solution. A procedural consolidation will be appropriate in some cases, a partial consolidation in others, and a complete consolidation in a third set of cases. What is important to note is that the *Daisytek* litigation⁷⁶ conducted under the E.U. Insolvency Regulation shows that the COMI concept is capable of addressing an important facet of corporate group problems without the

necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

73. I believe these Model Law provisions go a long way to answering the concerns of McElcheran & Park, *supra* note 71, that the distinction emphasized in the Model Law between recognition of FMP and NFMP may militate against Canadian and U.S. bankruptcy courts continuing to address cross-border insolvency problems in the same pragmatic way as in the past. Canadian courts will not be obliged to accept the U.S. court's finding with respect to the debtor's COMI, but will be free to make its own determination, and even if the Canadian court accepts the U.S. court's COMI determination, the Canadian courts will still be left with ample Model Law powers to protect the interests of Canadian creditors with respect to Canadian-based assets, to authorize Canadian insolvency proceedings, and to encourage close cooperation between the Canadian and U.S. insolvency administrators.

74. Kent, Donaher & Maerov, *supra* note 70.

75. *Re MuscleTech Research & Development Inc.*, [2006] O.J. No. 167 QUICKLAW, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]). The case involved the granting of an initial CCA order for a Canadian-based corporate group with assets in the United States. Justice Farley anticipated the parties applying to a U.S. bankruptcy court for recognition of the Canadian proceedings as a FMP under Chapter 15 and therefore presumably thought it helpful for him to express his own view about the corporate group's COMI.

76. *Re Daisytek-ISA Ltd.* [2003] B.C.C. 562, [2004] BPIR 30 (Ch.).

Regulation even mentioning the words “corporate group!” There is no reason to think that the definition of FMP in article 2 of the Model Law is not just as amenable to reaching the same result. However, the results will be different. The Model Law contains no choice-of-law rules, as the E.U. Regulation does, for determining substantive issues and priorities among competing creditors in the distribution of debtor’s assets. It may be expected, therefore, that Canadian courts will continue to be as protective as they have been up until now to safeguard the interests of Canadian creditors and to ensure that Canadian-based assets are not liquidated with the proceeds disbursed to the detriment of Canadian creditors.

APPENDIX 1: SECTION 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT AS ADDED BY THE 1997 AMENDMENTS

18.6 (1) In this section,

“foreign proceeding”

« *procédures intentées à l'étranger* »

“foreign proceeding” means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;

“foreign representative”

« *représentant étranger* »

“foreign representative” means a person, other than a debtor, holding office under the law of a jurisdiction outside Canada who, irrespective of the person's designation, is assigned, under the laws of the jurisdiction outside Canada, functions in connection with a foreign proceeding that are similar to those performed by a trustee in bankruptcy, liquidator or other administrator appointed by the court.

Powers of court

(2) The court may, in respect of a debtor company, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

Terms and conditions of orders

(3) An order of the court under this section may be made on such terms and conditions as the court considers appropriate in the circumstances.

Court not prevented from applying certain rules

(4) Nothing in this section prevents the court, on the application of a foreign representative or any other interested person, from applying such legal or equitable rules governing the recognition of foreign insolvency

orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act.

Court not compelled to give effect to certain orders

(5) Nothing in this section requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.

Court may seek assistance from foreign tribunal

(6) The court may seek the aid and assistance of a court, tribunal or other authority in a foreign proceeding by order or written request or otherwise as the court considers appropriate.

Foreign representative status

(7) An application to the court by a foreign representative under this section does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this section conditional on the compliance by the foreign representative with any other order of the court.

Claims in foreign currency

(8) Where a compromise or arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency shall be converted to Canadian currency as of the date of the first application made in respect of the company under section 10 unless otherwise provided in the proposed compromise or arrangement.

APPENDIX 2: PART XIII OF THE BIA AS SUBSTITUTED BY BILL ***

CROSS-BORDER INSOLVENCIES

Purpose

267. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors;

(d) the protection and the maximization of the value of debtors' property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

Interpretation

268. (1) The following definitions apply in this Part.

"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor has the centre of the debtor's main interests.

"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.

"foreign proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

"foreign representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to

*** See also *supra*, notes 59 & 66, with respect to proposed 2007 amendments to these provisions.

- (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or
 - (b) act as a representative in respect of the foreign proceeding.
- (2) For the purposes of this Part, in the absence of proof to the contrary, a debtor's registered office and, in the case of a debtor who is an individual, the debtor's ordinary place of residence are deemed to be the centre of the debtor's main interests.

Recognition of Foreign Proceeding

269. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

(2) Subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

(5) The court may require a translation of any document accompanying the application.

270. (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

271. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding,

(a) no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;

(b) if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada; and

(c) if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.

(2) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor at the time the order recognizing the foreign proceeding is made.

(3) The prohibitions in paragraphs (1)(a) and (b) are subject to the exceptions specified by the court in the order recognizing the foreign proceeding that would apply in Canada had the foreign proceeding taken place in Canada under this Act.

(4) Nothing in subsection (1) precludes the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act* or the *Winding-up and Restructuring Act* in respect of the debtor.

272. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, imposing the prohibitions referred to in paragraphs 271(1)(a) to (c) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations;

(c) entrusting the administration or realization of all or part of the debtor's property located in Canada to the foreign representative or to any other person designated by the court; and

(d) appointing a trustee as receiver of all or any part of the debtor's property in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,

(i) to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and

(ii) to take any other action that the court considers appropriate.

(2) If any proceedings under this Act have been commenced in respect of the debtor at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act* or the *Winding-up and Restructuring Act* in respect of the debtor.

273. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

274. If an order recognizing a foreign proceeding is made, the foreign representative may commence or continue any proceedings under sections 43, 46 to 47.1 and 49 and subsections 50(1) and 50.4(1) in respect of a debtor as if the foreign representative were a creditor of the debtor, or the debtor, as the case may be.

Obligations

275. (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

(2) If any proceedings under this Act have been commenced in respect of a debtor and an order recognizing a foreign proceeding is made in respect of the debtor, every person who exercises any powers or performs duties and functions in any proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

276. If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

(a) without delay, inform the court of

(i) any substantial change in the status of the recognized foreign proceeding,

(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and

(iii) any other foreign proceeding in respect of the same debtor that becomes known to the foreign representative; and

(b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

Multiple Proceedings

277. If any proceedings under this Act in respect of a debtor are commenced at any time after an order recognizing the foreign proceeding is made,

(a) the court shall review any order made under section 272 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order; and

(b) if the foreign proceeding is a foreign main proceeding, the court shall make an order terminating the application of the prohibitions in paragraphs 271(1)(a) to (c) if the court determines that those prohibitions are inconsistent with any similar prohibitions imposed in the proceedings under this Act.

278. (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor, an order recognizing a foreign main proceeding is made in respect of the debtor, the court shall review any order made under section 272 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor, an order recognizing another foreign non-main proceeding is made in respect of the debtor, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 272 in respect of the first recognized proceeding and amend or revoke that order if it considers it appropriate.

Miscellaneous Provisions

279. The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

280. An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other court order.

281. A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

282. For the purposes of this Part, if a bankruptcy, an insolvency or a reorganization or a similar order has been made in respect of a debtor in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor is insolvent and proof of the appointment of the foreign representative made by the order.

283. (1) If a bankruptcy order, a proposal or an assignment is made in respect of a debtor under this Act, the following shall be taken into account in the distribution of dividends to the debtor's creditors in Canada as if they were a part of that distribution:

(a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the debtor; and

(b) the value of any property of the debtor that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if the transfer were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

284. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency

orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

(2) Nothing in this Part requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.

APPENDIX 3. TABLE OF CONCORDANCE OF UNCITRAL MODEL LAW,
BAPCA CH. XV, AND BILL C-55'S VERSION OF MODEL LAW

Model Law	BAPCPA 2005, ch. 15	Bill C-55	
		<i>BIA</i> , Part XIII	<i>CCAA</i> , Part IV
Preamble	s. 1501(a)	s. 267 Preamble (minor verbal changes)	s. 44 Preamble
CH. I. GENERAL PROVISIONS			
Article 1 Scope of application	s. 1501(b)	—	—
Article 2 Definitions (a) "Foreign proceeding" (b) "Foreign main pro- ceeding" (c) "Foreign non-main proceeding" (d) "Foreign representa- tive" (e) "Foreign court" (f) "Establishment"	s. 1502	s. 268(1) Definitions (definition of "establishment;" Art. 2(f) of ML is omitted) s. 268(2) Presumption re centre of main interest	s. 45(1) Definitions (definition of "foreign repre- sentative" is different from definition in s. 268(1); ditto. s. 45(2))
Article 3 International obligations of this state	s. 1503	—	—
Article 4 Competent court or au- thority	—	—	—

Article 5 Authorization of <i>[insert the title...]</i> to act in a foreign state	s. 1505	s. 279	s. 56
Article 6 Public policy exceptions	s. 1506	—	No provision in Bill C-55 but see text, <i>supra</i> , note 59.
Article 7 Additional assistance under other laws	s. 1507	—	—
Article 8 Interpretation of Model Law	s. 1508	—	—
CH. II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE			
Article 9 Right of direct access	s. 1509	—	—
Article 10 Limited jurisdiction	s. 1510	s. 280 Foreign representative status	s. 57 Foreign representative status
Article 11 Application by a foreign representative to commence a proceeding under <i>[identify laws of enacting state...]</i>	s. 1504	s. 274 Foreign representative may bring proceedings under BIA ss. 43, 46-47.1, 49, 50(1) & 50.4(1)	—
Article 12 Participation of foreign representative	s. 1512	—	—
Article 13 Access of foreign creditors	s. 1513	—	—

to a proceeding under <i>[identify laws of the enacting state relating to insolvency]</i>			
Article 14 Notification to foreign creditors of a proceeding under <i>[identify laws of the enacting state relating to insolvency]</i>	s. 1514	—	—
CH. III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF			
Article 15 Recognition of a foreign proceeding and of a foreign representative	s. 1515	ss. 269 & 270 Application for recognition of a foreign proceeding	ss. 46 & 47 Application for recognition of a foreign proceeding
Article 16 Presumptions concerning recognition	s. 1516	—	—
Article 17 Decision to recognize foreign proceedings	s. 1517	—	—
Article 18 Foreign representative's duty to report subsequent information	s. 1518	—	—
Article 19 Relief upon application for recognition of a foreign proceeding	s. 1519	—	—
Article 20 Effects of recognition of a foreign main proceeding	s. 1520	s. 271 Effects of recognition of an FMP	s. 48 Order relating to recognition of an FMP
Article 21 Relief that may be granted upon recognition of a foreign proceeding	s. 1521	s. 272 Orders	s. 49 s. 272(d) is omitted

Article 22 Protection of creditors and other interested persons	s. 1522	—	—
Article 23 Actions to avoid acts detrimental to creditors	s. 1523	—	—
Article 24 Intervention by a foreign representative in actions in this state	s. 1524	—	—
CH. IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES			
Article 25 Authorization of cooperation and direct communication with foreign courts	s. 1525	s. 275 Cooperation between courts	s. 52 Cooperation between courts
Article 26 Cooperation and Direct communication between . . .	s. 1526 Cooperation between trustee & foreign courts & with foreign representative	s. 276 Obligations of foreign representative	s. 53 Obligations of foreign representative
Article 27 Forms of Cooperation	s. 1527 Forms of cooperation	No details, but see text, <i>supra</i> , note 66	Same
CH V. CONCURRENT PROCEEDINGS			
Article 28 Concurrent proceedings	s. 1528 Commencement of case after recognition of FMP	ss. 277 & 278 Concurrent proceedings	ss. 54 & 55 Concurrent proceedings
Article 29 Coordination of proceedings under...and a foreign proceeding	s. 1529	s. 278	s. 54

Article 30 Coordination of more than one foreign proceeding	s. 1530	s. 278	s. 55
Article 31 Presumption of insolvency based on FMP	s. 1531	s. 282	s. 59
Article 32 Rule of payment of creditors	s. 1532	s. 283	s. 60
—	—	s. 284(1) Preservation of legal/ equitable rules re recognition of FP	s. 61(1)
—	—	s. 284(2) No per se effect of foreign orders in Canada	s. 61(2)

Abbreviations:

ML—Model Law

FR—Foreign Representative

FMP—Foreign Main Proceeding

FP—Foreign Proceedings