

Implementation of UNCITRAL Model Law on Cross-  
Border Insolvency in Great Britain  
**Summary of Responses and Government Reply**

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# Foreword

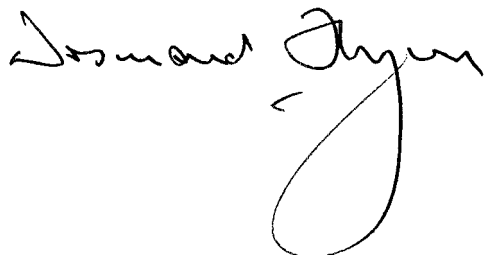
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On 22<sup>nd</sup> August 2005, we issued our consultation paper – ***“Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain”*** which provided background and explanatory information on how we proposed to implement the Model Law and sought views on this from interested parties.

The Model Law is intended to provide effective mechanisms for dealing with cases of cross-border insolvency, including cases where the debtor has assets in more than one country or where some of the debtor’s creditors are located in a different country to where the insolvency proceeding is taking place.

This paper is our response to the replies we received to our consultation, and sets out how we intend to proceed taking into account these responses and other information we have received.

We are grateful to everyone who responded to this consultation and for the assistance their responses have given us in framing this implementing Regulation.

A handwritten signature in black ink, appearing to read 'Desmond Flynn', with a large, stylized flourish at the end.

**Desmond Flynn**  
**Inspector General and Agency Chief Executive**

# Executive Summary

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1. On the 22<sup>nd</sup> August 2005, we issued a consultation paper entitled *“Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain<sup>1</sup>”* which sought views on how The Insolvency Service proposed to implement the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border insolvency. The Model Law is intended to provide effective mechanisms for dealing with cases of cross-border insolvency, including cases where the debtor has assets in more than one country or where some of the creditors of the debtor are not from the country where the insolvency proceeding is taking place.
2. There were an encouraging number of responses to the consultation paper, which were very well thought out and of high quality, and we are grateful to everyone who took the trouble to express a view. Overall the responses were in favour of our proposals and it is our intention that, subject to the relevant Parliamentary procedure, the Regulations giving effect to the Model Law should come into force on 6th April 2006.
3. Following consultation with the Treasury and in light of the extensive EC legislation regarding the winding up and reorganisation of credit institutions and insurance companies, we have decided to exclude these bodies from the ambit of the Regulations for the time being. However, we will consider their inclusion, as soon as it is practicable and possible.
4. It is important for reasons of preserving consistency on a global level that as few changes as possible should be made to the text of the Model Law. Accordingly, we have left the definitions largely unchanged.
5. We have not added any further detailed provisions on the coordination of proceedings under the Model Law and those under the EC Regulation on Insolvency Proceedings 2000. We believe there will be a beneficial effect in giving the courts maximum flexibility in applying the Model Law.
6. Applications under the Model Law will be dealt with by the specialist Chancery District Registries as well as the High Court, Chancery Division in London. There will, however, be provisions for transferral of proceedings between courts.
7. We have decided not to make any changes to Section 426 of The Insolvency Act 1986. We wish to afford a choice to applicants of the different procedures available to them, be it the EC Regulation, the Model Law, section 426 or case law. We believe the courts will be fully informed about any concurrent proceedings and will co-operate with each other and tailor relief accordingly.

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<sup>1</sup> Available at [http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con\\_doc\\_register/closedindex.htm](http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/closedindex.htm)

8. In keeping with our decision wherever possible to leave the Model Law text as drafted, we have not defined 'participate' or 'intervene' with regard to Articles 12 and 24 respectively. We believe the Guide to Enactment and other working papers will enable the courts to decide on whether a particular intervention is permitted.
9. We have redrafted Article 13 to highlight that foreign tax and social security authority claims cannot be challenged on public policy grounds, but may be challenged on other grounds.
10. We have redrafted paragraph 2 of Article 14 to give the British officeholder the same option for informing overseas creditors as local creditors, i.e. if notification to creditors in Great Britain is by advertisement only, then this method may also be used for foreign creditors.
11. We will leave it to the courts to interpret the meaning of 'COMI' (centre of main interests), taking into account relevant case law.
12. We have clarified that the automatic stay and suspension in Article 20 does not affect the specified security rights, which have been validly created, or the exercise of set-off rights, insofar as these are exercisable in a British winding-up or bankruptcy. This should provide adequate protection to secured creditors and enable them to have greater predictability on the likely returns and outcomes in a cross-border insolvency.
13. We have specifically included in paragraph 1(g) of Article 21, the relief available in administration under paragraph 43 of Schedule B1 to the Insolvency Act 1986, to highlight that this relief is available to the court in a rescue type situation if necessary.
14. Again, in Article 22, we have amended paragraph 1 to include a specific reference to secured creditors and parties to hire-purchase agreements, in the list of those persons whose rights the court must be satisfied are adequately protected when granting relief. Secured creditor and hire-purchase agreement have been defined in Article 2.
15. With regard to Article 23, we believe that before a court hears an application, it will consider if the British court is the relevant forum to hear an application and if there is sufficient connection to this jurisdiction before unwinding any transaction.
16. Paragraph 4 of article 23 defines when a foreign proceeding commences (for the purpose of calculating hardening off periods) and was based on an equivalent provision in the EC Regulation on Insolvency Proceedings. We have amended paragraph 4 so that the law of the State where the proceeding is taking place should determine the date of commencement of the foreign proceeding. We have also clarified that any doctrine of relation back under the foreign law should be applied.

17. We have added a provision in article 23(5), which provides that on making an order on a successful article 23 application, the court can give directions as to the distribution of the proceeds of the claim.
18. We have also added a new sub-paragraph (b)(iii) to Article 29 to highlight that any proceedings brought by the foreign representative under the claw back provisions of Article 23 will be reviewed by the court following the commencement of British proceedings.
19. In Article 26, we have added some words to make it clear that the requirement on the British insolvency officeholder to cooperate with the foreign courts or foreign representatives is only a duty to cooperate to the extent consistent with his duties under British insolvency law (e.g. his duties towards British creditors).
20. In relation to Article 28, we have decided to amend the article to preserve the current position under British insolvency law (for non-EU cases) as to when proceedings can be commenced in Britain. However, we have retained part of article 28 so that following recognition of a foreign main proceeding, the effects of a local proceeding would, as far as the assets of the debtor were concerned, be limited to assets in Britain.
21. The procedural rules will remain in their current format and we have decided to preserve the requirement for an affidavit in support of the principal applications under the Regulations. However, the rules will be reviewed in the light of the ongoing project to consolidate and modernise the Insolvency Rules 1986.
22. The procedural rules for Scotland are now detailed in Schedule 3 to the Regulations. The difference in size between Schedule 2 for England and Wales and Schedule 3 for Scotland is due to the fact that much of Schedule 2 relates to material more apt in Scotland for insertion in court rules. These rules are the responsibility of the Lord President of the Court of Session and are being developed separately, with a view to implementation to coincide with the implementation of the Regulations.

# Consultation Activities

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## **Pre consultation activities**

23. Before issuing our formal consultation paper, we carried out a pre-consultation, by contacting other government departments, Scottish colleagues and other representative groups, outlining the basic ideas and policy aims of the UNCITRAL Model Law on Cross-Border insolvency and our intentions for implementation.

24. We have held meetings with various government departments and agencies to listen to their views on how implementation could be best achieved.

## **Consultation activities**

25. Our consultation paper was sent to approximately 100 interested parties, which included a wide range of individuals, organisations and other government departments. It was also available on our website.

26. Whilst the consultation was open we attended further meetings with representative groups, the Department for Constitutional Affairs and senior members of the judiciary to discuss the implementation proposals contained in the consultation document.

27. Since the end of the formal consultation period, we have held meetings with another representative group and have continued to work on our proposals, taking into account the views expressed to us at these meetings or by direct response to the consultation exercise.

## Introduction and background

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28. Our consultation paper *“Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain”* was issued on 22<sup>nd</sup> August 2005 and the closing date for responses was 14<sup>th</sup> November.

29. The paper was sent to approximately 100 individuals, organisations and other government departments and we received 12 replies, in a variety of formats, including several who chose to answer in the form of a general letter with comments on each article of the Model Law rather than give separate answers to each question. We also received comments on specific parts of the Regulations from other government departments and agencies.

30. We are grateful to everyone who took the trouble to reply and for the overall quality of the responses, which have been very helpful in assisting us to clarify and finalise the Regulations.

# Respondents

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31. We received 12 replies from a range of respondents, including representative groups.

32. We have listed at Annex 1 (at the end of this paper) everyone who responded. Some respondents have asked that their replies be kept confidential and they have been marked accordingly in the Annex.

33. The types of respondent can be categorised as follows:

| <b>Category</b>                         | <b>Number</b> |
|---|---------------|
| Insolvency Practitioners (including R3) | 2             |
| Representative Organisations            | 7             |
| Individuals (Academic)                  | 1             |
| Individuals (legal profession)          | 1             |
| Government Departments                  | 1             |

# Responses

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34. We have set out below details of the answers we received to each question in the consultation document, and also other comments, which were made in relation to the articles of the Model Law. As much of the detailed responses dealt with each article separately, we structured our response in the same way. We have highlighted the main issues raised by the respondents and how we intend to proceed taking account of these comments and other pertinent information obtained since the consultation was published.

## **Article 1 – Scope of Application**

**Q1. Are the exceptions to the use of the Model Law clear, do you agree with the exclusions and do you believe any other entities should be excluded, if so why?**

### Responses

| <b>Answer</b>       | <b>Number</b> |
|---------------------|---------------|
| Agree               | 6             |
| Disagree            | 1             |
| Additional entities | 2             |
| No view specified   | 3             |

35. Two respondents, Price Waterhouse Coopers and the Insolvency Lawyers' Association (ILA), asked that credit institutions and insurance undertakings be included within the scope of the Regulations, rather than be excluded. They argued that in principle, credit institutions and insurance undertakings have just as much, if not more, of a requirement for international cooperation in respect of reorganisation and insolvency proceedings as other debtors. They conduct business worldwide and it is likely that an acceptance of this approach would be beneficial to Great Britain in terms of both outgoing and incoming requests for assistance.

36. After further consultation with the Treasury and the FSA, we agree that there could be benefits in bringing these entities within the ambit of the Model Law. However, given the current extensive European legislation in relation to the winding up and reorganisation of credit institutions and insurance undertakings, it will take time for suitable provisions relating to their inclusion to be drafted. Therefore we have decided not to include them within the Model Law at this stage, but will consider their inclusion by means of a further instrument under section 14 of the Insolvency Act 2000 as soon as it is practicable and possible.

37. The Law Society proposed that corporate bodies, which were not companies, should be excluded in order to be consistent with Government policy and to avoid a repeat of the circumstances leading to the decision in *Re Salvage Association* [2003] EWCH 1028 (Ch). We do not believe that there is any policy inconsistency in including other kinds of corporate body, given that the Model Law is essentially concerned with the relief to be given in relation to foreign bodies or in connection with foreign proceedings.

38. The Department for Transport have requested that Channel Tunnel concessionaires be added to bodies excluded from the Model Law given the special nature of their position and they have therefore been excluded from the Model Law.

### **Other comments by respondents in relation to Article 1 (Scope of application)**

39. Two respondents expressed concern that the provisions of article 1(4) protecting financial market transactions were not drawn widely enough to protect financial collateral takers. Accordingly we have amended the provision so that the British courts may not order any relief or give any assistance which is inconsistent with the rights conferred on a party under Part 4 of the Financial Collateral Arrangements (No. 2) Regulations 2003.

40. The Law Society noted that the procedures, rights and remedies provided under the Regulations would be available to courts and persons in all jurisdictions, whether or not such jurisdiction has adopted the Model Law itself. The Law Society requested that consideration be given to incorporating the Model Law into British law on a basis which would require reciprocity or which would exclude certain specified countries. By implementing the Model Law, we hope to provide an example to other countries, which will encourage them to implement the Model Law. As such we have decided not to make reciprocity a pre-requisite for granting assistance under the Model Law. As far as 'non-friendly' states are concerned, we believe the court's powers under Article 6 will be sufficient to prevent the court giving any assistance in a particular case, which would be contrary to British public policy.

41. Following further discussions with the Land Registry, amendments have been made to article 1 to widen the protection afforded to purchasers in relation to dispositions of land by a debtor following recognition of a foreign proceeding.

## Article 2 - Definitions

### Comments by respondents in relation to Article 2 (Definitions)

42. Some respondents commented on and requested changes to the definitions of “**foreign proceeding**” and “**establishment**”. As these are key definitions within the Model Law, it is important for reasons of preserving consistency on a global level that as few changes as possible should be made. Accordingly, we have left the definitions largely unchanged.

43. As far as the definition of an “**establishment**” is concerned, however, it was felt appropriate to substitute the word “assets” for the word “goods” as this is not a change of substance and could help to avoid some of the concerns that have arisen in the case of the equivalent definition in the EC Regulation on Insolvency Proceedings.

44. Paragraphs 23-24 and 71 and 74 of the Guide to Enactment of the Model Law produced by UNCITRAL cast some light on how the definition of “**foreign proceeding**” is to be interpreted and no doubt future case law will expand on this area.

45. Again for reasons of consistency, the word “body” has been reinstated into the definition of “**foreign representative**”, even though in normal legislative drafting in this country, the definition of “person” in the Interpretation Act 1978 would have rendered the word “body” redundant.

46. The ILA and R3 commented on the definition of “**British insolvency law**” requesting that it be expanded to include not just statutory provision but case law and other general principles of insolvency law and R3 queried the use of the term “provision” in this context. The definition is taken from section 426 of the Insolvency Act 1986, which allows British courts to apply “British insolvency law” at the request of foreign courts. This same definition is used in section 14 of the Insolvency Act 2000 under which the Regulations are to be given effect and which allows the Secretary of State to apply/modify “British insolvency law”, as so defined.

47. We do not believe such a change to the definition is necessary. The term “**British insolvency law**” is used in the Model Law almost exclusively as part of the phrase “a proceeding under British insolvency law”. This means proceedings such as winding up, bankruptcy etc. For these purposes the definition of “British insolvency law” is entirely adequate as it stands. In the instances where it is used on its own, i.e. in articles 14, 23(2)(a), 28(2) and 31, we are also of the opinion that there is no need to use an expanded definition.

48. The ILA asked for the provisions of the Company Directors Disqualification Act 1986 to be included in the definition of “**British insolvency law**” in order to allow a foreign liquidator to seek enforcement against any breaches of the CDDA in Britain. However, given the way the phrase “British insolvency law” is used in the Model Law, inclusion of those provisions in the definition would not have the desired effect.

49. We believe that the only way in which the court could be given the power under the Regulations to disqualify a director of a foreign company under the CDDA for dubious acts carried out in this country would be by the Regulations applying specified provisions of the CDDA to Model Law cases with specified and detailed textual amendments. Moreover, even were this to be done there would be significant difficulties as regards the enforcement of the relevant provisions. In addition there could be difficulties in obtaining the necessary evidence, particularly from outside this jurisdiction. We would also have to introduce a reporting regime for foreign representatives, which could be difficult to enforce if the foreign representative refused to report.

50. It seems to us in any event that the creation of such a regime is not essential as it would always be open to any foreign representative who considered he had come across acts warranting disqualification to commence British insolvency proceedings, which would allow a British insolvency officeholder to take action. This option would obviously also be open to any disgruntled creditor.

51. Furthermore, we do not believe that it was intended that the Model Law should be used as a tool for regulatory action.

52. Finally, the ILA proposed that “the rules of private international law” should be added to the definition of “**the law of Great Britain**” and we agree that this would be a useful clarification.

### **Article 3 – International Obligations of Great Britain under the EC Insolvency Regulation**

**Q2. What are your views on the way in which the interaction between the Model Law and the EC Regulation has been dealt with and have you any suggestions for alternative approaches that may provide greater clarity?**

#### Responses

| <b>Answer</b>     | <b>Number</b> |
|-------------------|---------------|
| Agree             | 4             |
| Disagree          | 1             |
| Alternative views | 5             |
| No view specified | 2             |

53. None of the respondents preferred the more restrictive alternative for dealing with the interaction between the Model Law and the EC Regulation on Insolvency Proceedings proposed in the consultation document, namely excluding the operation of the Model Law in any case where the debtor had its centre of main interest in an EU member State other than the UK or Denmark.

54. However, five respondents, including the City of London Law Society (CLLS), the Law Society and Price Waterhouse Coopers, whilst welcoming the statement in the Regulations that the EC Regulation prevails, expressed concern about the approach in the Regulations of simply allowing the Model Law to apply to the extent there is no conflict with the EC Regulation. They pointed out that there could be difficulties in ascertaining whether there was a conflict between the Model Law and the EC Regulation sufficient to prevent a foreign representative from obtaining assistance under the Model Law. In particular questions were asked about what would happen in a case where relief was granted under the Model Law in respect of a foreign proceeding and proceedings subsequently opened in the EU that were subject to the EC Regulation. One respondent suggested that the coordination provisions of articles 29 and 30 should be applied in such a case.

55. It is our view, that in the great majority of cases there will be no real difficulty in determining whether the EC Regulation prevents relief being given under the Model Law. For example, where the debtor's centre of main interests is in an EU Member State (other than the UK and Denmark) it is very unlikely that the court will be able to assist a foreign representative, unless he is from outside the EU and wishes relief in respect of specific assets which it is clear ought to be dealt with in his non-main proceeding. If proceedings in the EU subsequently open, the court can review and either terminate or modify recognition (article 17(4)) or modify the relief granted (articles 20(6) and 22(3)). These provisions could also be used should recognition as a foreign main proceeding have been granted under the Model Law in respect of a proceeding outside the EU and an EU court subsequently determines for the purposes of the EC Regulation that main proceedings are instead within the EU.

56. We believe that the courts will quickly and easily develop an understanding of the interaction between the two regimes; that any period of uncertainty will be relatively short and that there will be a beneficial effect in giving the courts maximum flexibility in applying the Model Law.

57. Accordingly, we do not consider that it is necessary to add in detailed provisions on the coordination of proceedings under the Model Law and those under the EC Regulation. As a matter of EU law, the court will have a duty to review any relief granted under the Model Law should there be subsequent EU proceedings (which would be reported to the court under article 18) to ensure that there is no breach of the EC Regulation, which has to prevail. The court has the power to do so under the existing articles of the Model Law as mentioned above.

58. Three respondents suggested an alternative approach of excluding from the operation of the Model Law any proceedings in the EU to which the EC Regulation applied. A fourth suggested excluding cases where all the parties involved are domiciled in the EU and all the assets are located in the EU. We do not consider that this would in fact be of any great assistance. If there are proceedings in the EU to which the EC Regulation applies, it is hard to imagine how the representative in those proceedings could use the Model Law to

obtain relief. We do not believe therefore that excluding those proceedings adds anything in terms of clarity to the Regulations.

#### **Article 4 – Competent court**

**Q3. What are your views on restricting applications to the High Court in London and Court of Session in Edinburgh and the drafting of Article 4 with regard to which courts should have jurisdiction in connection with the subject matter of the Regulations?**

#### **Responses**

| <b>Answer</b>     | <b>Number</b> |
|-------------------|---------------|
| Agree             | 5             |
| Alternative views | 4             |
| No view specified | 3             |

59. The majority of respondents agreed with the approach set out in the consultation document, namely to restrict proceedings under the Regulations to the High Court in London and the Court of Session in Scotland. The reasons cited were that it was important to have a consistency of approach to decisions regarding the Regulations and to build up a centre of expertise. However, four respondents, including Price Waterhouse Coopers and R3, commented that it would be useful to have the flexibility to transfer cases to the Chancery district registries of the High Court in the event that the volume of cases under the Regulations turned out to be higher than expected.

60. Subsequently, the Insolvency Service has held meetings with the Department for Constitutional Affairs (DCA) and senior members of the Judiciary to discuss the draft regulations. One of their major concerns, too, was whether the Royal Courts of Justice would have the resources to deal with all proceedings under the Regulations in England and Wales. Because the volume of cases to be heard would be hard to predict, the DCA and judiciary want maximum flexibility, with applications being dealt with by the specialist Chancery district registries as well as the High Court in London.

61. They are aware of the comments made in response to the consultation favouring restricting the hearing of proceedings to the Royal Courts of Justice in London, but prefer the above option, which should give them the maximum flexibility. They also pointed out that the Chancery district registries have experience of dealing with cross-border insolvencies within Europe under the EC Regulation on Insolvency Proceedings and accordingly they see no reason why the Chancery district registries should not be able to deal with applications under the Regulations.

62. Accordingly, the Regulations and in particular, article 4(1) have been redrafted to allow applications to the Chancery district registries as well as to the High Court in London. The Regulations also provide for the transfer of proceedings between the district registries and the RCJ where appropriate (see paragraph 38 of Schedule 2). This should allow cases of unusual

complexity to be transferred to the RCJ, if necessary. In Scotland the Court of Session in Edinburgh will remain the competent court.

63. In response to technical drafting points made by some respondents, article 4(2) has been amended to clarify that the courts referred to in that paragraph are the same as those referred to in paragraph 1.

64. There were no adverse comments on the option chosen to allow the courts a complete discretion as to whether they take on jurisdiction to hear an application under the Regulations, bearing in mind the location of any existing or future proceedings under British insolvency law.

65. The Law Society commented that as drafted article 4(3) would not require the court to give any consideration to an administrative receivership in deciding whether or not it was the correct forum. However, under paragraph 21 of Schedule 2 to the Regulations, any administrative receiver appointed in relation to the debtor and anyone who might be able to appoint an administrator of the debtor under paragraph 14 of Schedule B1 to the IA1986 (i.e. the holder of a qualifying floating charge) would receive notice of any of the principal applications under the Regulations. They would also have the right to attend the hearing and make representations about whether the court was the appropriate forum. As a result, we do not consider it necessary to make any changes to article 4(3).

**Q4. What are your views on the interaction between the different laws dealing with cross-border insolvency? Do you believe it is practical to allow the Model Law and section 426 to operate in parallel? Do you believe any amendments are required to section 426 in the light of the implementation of the Model Law and, if so, what amendments would you propose?**

Responses

| Answer            | Number |
|-------------------|--------|
| Agree             | 8      |
| Disagree          | 2      |
| Alternative views | 1      |
| No view specified | 1      |

66. All respondents but the CBI and one other thought that the Model Law and the regime under section 426 of the Insolvency Act 1986 should be allowed to operate in parallel. The two dissenting respondents were of the view that the regime under section 426 should be limited to the three UK jurisdictions, thus making the Model Law and the EC Regulation the main avenues for relief for the rest of the world.

67. Three respondents thought that whilst the section 426 regime should be retained, amendments should be made.

68. The Law Society and one other respondent suggested that section 426 should be amended to require a foreign court making a request to a British court under section 426 to notify the British court of any relevant applications under the Model Law. The Law Society also queried whether a remedy should be available to a particular foreign representative through the application of his home court under section 426 where his application for recognition has already been rejected by the High Court or Court of Session under the Regulations (except where new evidence concerning the foreign proceedings is being presented by that court).

69. As mentioned in the consultation document, we believe that it would be unlikely that a foreign representative in one of the relevant section 426 territories/countries would apply to his local courts to make a request to the British courts under section 426 without revealing that there were proceedings under the Regulations in relation to the same debtor, if that were the case. We believe that were there to be concurrent proceedings under the Model Law and under or by virtue of section 426 in relation to the same debtor, the courts handling those proceedings would be able to cooperate under their inherent powers and tailor relief appropriately. We also note that there are no provisions currently in section 426 to deal with the possibility of concurrent applications under section 426 from courts in different jurisdictions.

70. As regards the Law Society's second proposal, we note that the court has some discretion under section 426 as to whether to grant relief and believe that in appropriate cases, where recognition has been refused under the Model Law, the court could also refuse relief under section 426. However, we believe that it is necessary to allow the court to make this decision on a case-by-case basis. There could be reasons why relief under section 426 should be granted even where recognition or particular relief under the Model Law has been refused. We do not therefore propose to amend section 426 in line with the Law Society's suggestions.

71. The ILA proposed that

- (a) any country which has adopted the UNCITRAL Model Law be designated as a "relevant country or territory" by the Secretary of State by way of a statutory instrument for the purposes of section 426(11) IA86, and
- (b) that section 426(4) be amended so that in the case of countries adopting the UNCITRAL Model Law, the UK courts "**may** assist the courts having the corresponding jurisdiction in any relevant country or territory."

72. The rationale for the ILA's proposal is that it is confusing to have so many different and overlapping regimes dealing with cross-border insolvency and their suggestion is in effect a merging of the section 426 regime and the Model Law.

73. We do not believe the ILA proposal will assist in reducing any potential for confusion. At the moment only a relatively small number of countries are designated for the purposes of section 426 and so the countries which could take advantage of both the Model law and section 426 are correspondingly few. Opening up section 426 to all countries adopting the Model Law would widen the overlap. Moreover, the countries currently designated were chosen in part because their legal systems were similar to ours. This is significant given the ability of the British courts under section 426 to apply the law of the country making the request for assistance. The ILA have proposed that the duty of the courts in this country to cooperate should be amended to a power only in the case of countries which have adopted the Model Law, which is presumably intended to mitigate the problem of requests for a very different legal approach to be applied. However, it would be difficult for a British court to work out on what basis assistance should or should not be granted in such cases.

74. We believe that the section 426 regime works well as it stands and that given its special nature it should be allowed to continue to operate unchanged.

75. We therefore propose to allow the two regimes to operate in parallel without making any substantive amendments to section 426.

76. Separately, the Law Society pointed out that the reference to the section 426 regime in article 7 was confusing as that article refers to “additional” assistance available under British law, whereas section 426 and the Model Law are essentially intended to be independent remedies. Accordingly we have deleted the reference to section 426 in article 7. Our policy in this area is to afford a choice to applicants of the different procedures available to them, be it the EC Regulation, the Model Law, section 426 or case law. We believe the courts will be fully informed about any concurrent proceedings and will cooperate with each other and tailor relief appropriately.

### **Comments from respondents on articles 8 (interpretation) to 11 (access of foreign representatives to courts in Great Britain)**

#### **Article 8 – Interpretation**

77. The ILA suggested adding the words “The courts may have regard to case law outside of Great Britain” to the end of article 8 on the grounds that it would be useful for the courts to have the right to have regard to foreign case law in the interpretation of the Model Law.

78. We believe that the addition of these words is unnecessary. It is clear from the UNCITRAL Guide to Enactment of the Model Law (paragraphs 91-92) that article 8, as it stands, is intended to achieve precisely that objective. The Guide states that the provision is modelled on provisions in treaties and other model laws where it is recognised that enacting States have an interest in a harmonised interpretation of the text. The Guide adds that a harmonised interpretation of the Model Law will be facilitated by the Case Law on

UNCITRAL Texts (CLOUT) information system under which judicial decisions interpreting the Model Law will be published by UNCITRAL.

79. As a result, we think that the courts in Great Britain will have the power to look at case law from other jurisdictions in any event. Accordingly no change is needed to article 8.

**Articles 9-11 (access of foreign representatives to courts in Great Britain)**

80. Comments from the ILA highlighted that Article 9 (right of direct access), Article 10 (limited jurisdiction), Article 11 (application to commence), and Article 12 (participation) could (given the definition of “foreign proceeding”) apply to foreign representatives appointed in foreign proceedings, which were not exclusively foreign main or foreign non-main proceedings. In other words, they could apply to a foreign representative appointed in a foreign proceeding that had been commenced in a foreign State on the basis of the presence of mere assets or a sufficient connection with the jurisdiction in that state.

81. We agree with the ILA that there might be cases where it is desirable to allow a foreign representative to have access to courts to make representations, especially if there is a dispute as to the true location of the COMI (centre of main interests) and/or establishment. However, paragraphs 98-99 of the Guide makes it clear that the right in Article 11 to commence an insolvency proceeding in the enacting State was intended only to apply to foreign representatives of foreign main or foreign non-main proceedings. We agree with this interpretation, as we believe that the standing to commence a proceeding under British insolvency law is a significant right and should only be given to a representative from a jurisdiction where the debtor has a substantial presence.

82. Therefore, we have clarified the drafting of Article 11 to ensure that the right only applies to foreign representatives of foreign main or foreign non-main proceedings.

**Article 12- Participation of a foreign representative in a proceeding under British insolvency law**

**Q5. Do you agree with our approach to Article 12 of the Model Law or do you believe we should attempt to define participation in greater detail?**

Responses

| <b>Answer</b>     | <b>Number</b> |
|-------------------|---------------|
| Agree             | 6             |
| Greater clarity   | 5             |
| No view specified | 1             |

83. Respondents were evenly balanced in their response to Question 5 with similar numbers agreeing and disagreeing with our decision to leave the term “participation” undefined.

84. Given the importance of harmonised global interpretation of the Model Law, we remain reluctant to define “participation”. Moreover, as one respondent pointed out, no other country enacting or proposing to enact the Model Law has defined the term.

#### **Comments on article 13 (access of foreign creditors to a proceeding under British insolvency law)**

85. The consultation document set out the policy intention of allowing claims by foreign tax or social security authorities to be admitted in a British insolvency proceeding, bringing the rest of British insolvency law into line with cases where the EC Regulation on Insolvency Proceedings applies.

86. The ILA argued that the drafting of article 13 created potential uncertainty as to whether the claims of tax and social services authorities could be challenged on other public policy grounds. We agree with their analysis and have amended article 13 to clarify that although such claims cannot be challenged solely on the grounds that they are claims by tax and social services authorities, they can be challenged on other grounds, e.g. that they constitute a penalty.

87. R3 agreed with the policy approach but suggested that the change to the law would be better placed in primary legislation. However, there is no possibility of primary legislation in this area at this point in time and accordingly such a change can only be implemented as part of the enactment of the Model Law under the power contained in section 14 of the Insolvency Act 2000.

#### **Comments on article 14 (notification to foreign creditors of a proceeding under British insolvency law)**

88. Six respondents commented on article 14. Four of these (including the Law Society, Price Waterhouse Coopers and R3) considered that the requirement that foreign creditors in all British insolvency proceedings should always receive individual notification in the absence of a court order dispensing with such notification, was too onerous. A typical comment was “I do not see why the British insolvency officeholder should be required to give foreign creditors individual notice of the commencement of insolvency proceedings in circumstances where notice can be given to British creditors in the form of an advertisement. Not only will this create discrimination between local and foreign creditors but it will also increase costs (as an application to court will be required in order to disapply the individual notice provisions)”.

89. In the light of these comments, we have decided to amend article 14 to the effect that where notification to British creditors is by advertisement only, then known foreign creditors can be notified by advertisement in appropriate foreign newspapers.

90. Article 14(2) of the Model Law provides that no letters rogatory or other similar formality is required in relation to notice to foreign creditors. We had added “*save where necessary or desirable to comply with law of the State where the notice is to be served*”. The Law Society and the CLLS both suggested deleting the additional wording on the grounds that they considered it created an additional burden for the British insolvency officeholder who would have to investigate foreign law to discover the appropriate service requirements.

91. We had included the extra wording because it would not be possible for British legislation to dispense with a requirement for letters rogatory, if these were required by the law of the country where the notice is to be served. The provision could not therefore remain as originally drafted and the additional words were intended simply to reflect the realities of the situation.

92. A British insolvency officeholder should in any event comply with the service requirements of any country where he is purporting to serve a notice. In that sense we do not believe that we are creating a new burden. However, in the light of the confusion the added wording clearly caused, we have decided that the best course is to delete the entire reference to letters rogatory. As no letters rogatory are required as a matter of British law, we are not acting against the policy intentions of the Model Law.

93. Three respondents suggested that the Model Law should be amended to include requirements as to the language to be used in any notices to foreign creditors. Again because different countries may have different requirements as to the language to be used and the need for translations of official notices served in their jurisdiction, it would be difficult to legislate for this. The position is different under the EC Regulation as obviously the terms of the Regulation bind all EU States to which it applies. We believe that insolvency practitioners will develop sensible practices in this regard, probably similar to those under the EC Regulation, without the need for legislation.

94. One respondent commented on the wording of article 14(3), which provides that where notification of the commencement of a proceeding is to be given to foreign creditors, certain details regarding the lodging of claims should be given. The respondent pointed out that not all British proceedings would require claims to be lodged at the commencement of the process. Accordingly we have amended article 14(3) to ensure that when notice of a right to lodge a claim is given to foreign creditors, it should include the specified requirements.

## **Article 15 – Application for recognition of a foreign proceeding**

**Q6. Do you agree that the foreign representative should provide details of all insolvency proceedings and that any supporting documents in their application to court should be in or translated into English?**

### Responses

| <b>Answer</b>                          | <b>Number</b> |
|--|---------------|
| Agree                                  | 8             |
| Agreed, but expressed additional views | 3             |
| No view specified                      | 1             |

95. There was no disagreement with our approach on this issue.

### **Other comments on article 15**

96. The Law Society and the CLLS both commented that the obligation imposed on the foreign representative in article 15 to provide information should not be limited to information relating to foreign proceedings (which are collective insolvency proceedings). In their view it should cover any relevant matter affecting the debtor that may have an impact on the court's exercise of its discretion to grant relief. This would include any enforcement of security over the debtor, the adjustment of debts and any other action or proceeding concerning the debtor's assets or liabilities, including action taken by the debtor.

97. Article 15 deals with the process of obtaining recognition itself and is intended to be as streamlined as possible. However, in drafting the procedural rules for applications to the court for relief (as opposed to recognition) we have imposed certain obligations on the foreign representative to provide additional information in the affidavit in support. Reference in particular should be made to paragraphs 7 and 10 of Schedule 2.

98. Finally, it should be noted that the procedural rules require notice of an application for relief (and for recognition) to be served on a wide range of potentially interested parties who are able to make representations at any hearing of the applications. Therefore we do not propose to make any amendments to article 15.

## **Article 16 – Presumptions concerning recognition**

**Q7. Are you content for the court to decide the debtor’s COMI (centre of main interests) based on the limited definitions in the Model Law or do you think some further guidance should be provided?**

### Responses

| <b>Answer</b>    | <b>Number</b> |
|------------------|---------------|
| Agree            | 8             |
| Further guidance | 4             |

99. The great majority of respondents agreed that no further guidance as to the meaning of the term “centre of main interests” (COMI) should be given in the Regulations. A number commented that it would be dangerous to attempt to define the term in the Model Law as that could lead to inconsistency with case law on the meaning of the term for the purposes of the EC Regulation.

100. Some respondents wanted the courts to be given an express obligation to take into account the EU case law on the issue. However, we believe that the courts will do so without any such obligation and should also be able to look at case law from outside the EU on the meaning of the term in the Model Law.

101. Two respondents, including the Law Society, noted that the Model Law contains no mechanism for dealing with a situation where both the British courts and those of another country assert that the debtor’s COMI is in their respective jurisdictions. Comparison was made with the EC Regulation under which the British courts would have to recognise and respect any decision regarding COMI of the foreign court (if made prior to any COMI determination of the British court) and where there is an overarching court, the ECJ (European Court of Justice), which can determine disputes.

102. The Model Law is not the same in its approach as the EC Regulation. When a foreign proceeding has been opened outside the EU, there may very well not be a determination by the foreign court as to where the COMI is. The decision by the British court as to the debtor’s COMI will determine only what relief is available to the foreign representative under the Model Law in this jurisdiction and (by virtue of article 28) what assets can be dealt with in any subsequent British proceeding, should the foreign proceeding be a foreign main proceeding. Unlike the EC Regulation, it does not affect the status of the foreign proceeding in its own jurisdiction nor does it affect what law applies to assets located here, as the Model Law never contemplates that foreign law should apply to assets in the enacting State. Therefore we do not see any reason why a dispute, as to the debtor’s COMI for the purposes of the Regulations, cannot be dealt with by the British courts.

103. Moreover, articles 29 and 30 deal with the coordination of proceedings in different jurisdictions and protect a British proceeding, whether or not it is commenced before recognition of a foreign proceeding and even where the foreign proceeding is a foreign main proceeding.

104. The ILA were concerned that article 16 as currently drafted would require a foreign court giving a certificate about the foreign proceeding in its jurisdiction to state that the proceeding was one which fell within article 2(i) of our Regulations. They were of the view that a foreign court would naturally be reluctant to do this. However we believe that this is too literal a view of the meaning of article 16. In our opinion the certificate from the foreign court need only refer to the existence and nature of the proceeding within its jurisdiction and it would be up to the British court to take a view as to whether this indicated that the proceeding was one which fell within article 2(i) of the Regulations.

### **Article 17 – Decision to recognise a foreign proceeding**

**Q8. Do you agree with the inclusion of the additional words in paragraph 4 of Article 17 detailing how a recognition order can be modified or revoked?**

#### Responses

| <b>Answer</b>     | <b>Number</b> |
|-------------------|---------------|
| Agree             | 9             |
| Disagree          | 1             |
| No view specified | 2             |

105. The majority of respondents agreed with the inclusion of the additional words in article 17(4).

#### **Further comments on article 17**

106. The ILA made various suggestions for drafting changes to article 17. The first related to clarifying that recognition could only be granted to a foreign main or non-main proceeding. However, we do not believe that the current drafting will cause any real uncertainty in this area.

107. The ILA also asked for the inclusion of a provision requiring security from a foreign representative where the recognition application is made without notice to other parties and for parties who did not receive notice to be able to apply to set the decision aside. However the procedural rules require notice to be given of all recognition applications. The court would have the power in a case of urgency (see paragraph 24) to set aside the notice requirements but we feel confident that the court would not take such a step without considering the need for security especially given the analogy, in British insolvency law, with the appointment of a provisional liquidator.

108. In fact, in an urgent case, it is more likely that the foreign representative would apply for interim relief without notice to other parties on the grounds set out in article 19. The actual application for recognition would, however, still have to be served on all interested parties who would then get a chance to appear at the recognition hearing and make representations and/or an

application for the relief granted under the Model Law to be modified or terminated.

109. Article 22 of the Model Law makes it clear that the court can require security as a condition of granting relief under article 19. We, therefore, believe no change to article 17 is required.

110. One respondent was concerned that the court might be asked to modify or terminate recognition on the grounds that following commencement of the foreign main proceedings, the debtor's COMI had moved to a different jurisdiction. We believe that it would be very rare for a COMI to move following the commencement of main proceedings, as the main part of the business would be in the hands of the foreign representative. If the COMI did move, then we believe the court would take the pragmatic view that the main proceedings were still main proceedings.

### **Article 19 – Relief that may be granted upon application for recognition of a foreign proceeding**

**Q9. Do you agree that the details of how to make the application and notice requirements should be in the procedural rules rather than the body of the text, i.e. Article 19?**

#### Responses

| <b>Answer</b>     | <b>Number</b> |
|-------------------|---------------|
| Agree             | 7             |
| Disagree          | 1             |
| No view specified | 4             |

111. All but one respondent agreed with our approach or did not comment on the issue. Accordingly, we propose to leave procedural matters in connection with applications under article 19 to procedural rules either in Schedule 2 to the Regulations or in Scottish court rules.

### **Other comments on article 19**

112. The ILA requested that the words "subject to article 22" be inserted at the beginning of article 19 and that the word "any" be added before the words 'relief of a provisional nature' in paragraph 1.

113. We believe that both these changes would be cosmetic only. Article 22 clearly states that it applies to relief granted under article 19 and we consider that the court could already grant any relief of a provisional nature without the addition of the word "any". Given our desire not to change the wording of the UNCITRAL text unless necessary, we do not propose to implement these two minor drafting changes.

## **Article 20 – Effects of recognition of a foreign main proceeding**

**Q10. What are your views on the drafting of Article 20 and in particular the moratorium provisions and the role of the court? Do you feel this can work well with the discretionary provisions of Articles 19 and 21?**

### Responses

| <b>Answer</b>     | <b>Number</b> |
|-------------------|---------------|
| Agree             | 7             |
| Disagree          | 3             |
| No view specified | 2             |

114. A common theme with respondents, even those in broad agreement with the approach in article 20, was that for the sake of clarity it would be helpful if article 20 could be amended to state expressly that the stay and suspension imposed in article 20(1) did not affect the enforcement of certain rights, particularly those of secured creditors. The rationale for such an amendment was the importance of certainty relating to security (and other proprietary rights) and the right of set off, to the smooth operation of financial markets. We agree that these are important issues and have therefore drafted an additional paragraph in article 20 clarifying that the stay and suspension do not affect rights to enforce security, rights to repossess goods under a hire-purchase agreement (which includes retention of title agreements), rights in relation to financial market transactions or rights of set off. The only proviso is that the rights in question must be rights that would be exercisable in the case of a British winding up or bankruptcy (or the Scottish equivalent). We believe that this will give banks and other financial institutions greater predictability on the likely returns and outcomes in a cross-border insolvency.

115. The Law Society and the Institute for Credit Management questioned whether the stay and suspension in article 20 should be automatic and preferred that the court should be given a discretion as to what relief should be given. In particular, the Law Society was concerned that it was excessive for the stay under article 20 to be automatic where the foreign main proceeding was intended to be a rescue/reorganisation. The automatic imposition of a suspension of the right to dispose of assets (i.e. the imposition of a stay equivalent to section 127 of the Insolvency Act 1986) could be damaging, in their view. The ILA also commented on this issue and proposed that the automatic stay should be the same as that triggered upon administration under Schedule B1 of the Insolvency Act and not the winding-up one, or that the court should impose whichever of the stays is best suited to the circumstances of the foreign main proceeding, i.e. foreign restructuring proceedings should be granted the administration stay and foreign liquidation proceedings should be granted the winding-up stay.

116. We believe that the imposition of an automatic stay under article 20 is one of the fundamental elements of the UNCITRAL Model Law and that to remove it would be to stray too far from the policy and drafting of the Model Law. However, paragraph 6 of article 20 does give the court some flexibility. Where a foreign representative has been appointed in a foreign main proceeding that is a rescue/reorganisation, and he is applying for recognition in this country, he would have the option of applying at the same time for the stay and suspension under article 20 to be modified (see article 20(6)) and for relief more appropriate to a reorganisation to be granted (articles 20(6) and 21).

117. Another respondent suggested that the stay in article 20 should apply to foreign non-main proceedings as well as main proceedings and that it might be preferable for the stay to be triggered by an application for recognition rather than the recognition order to avoid the need for the court to consider the issue of relief twice, once under article 19 and then again under article 20(6) or 21(1). In our view, the stay and suspension is too sweeping to be imposed in the case of a foreign non-main proceeding (where the foreign representative is likely to be interested only in specific assets) and limiting it to a foreign main proceeding was a deliberate decision of the UNCITRAL Working Group. We also believe that the stay has too big a potential impact on a business for it to be triggered on an application alone. Relief should only be granted prior to actual recognition, where there are special circumstances and the court has had a chance to consider them (as in the case of an article 19 interim application).

118. One respondent suggested that the power of the court to modify the relief provided for by paragraph 1 of article 20 should be made subject to some restrictions, such as exceptions for rights in rem or security interests. We agree that there should be some protection for the holders of such rights and have therefore amended article 22 so that it also applies to the power of the court in article 20(6) to modify the relief in article 20(1). This means that in modifying that relief the court must be satisfied that the interests of creditors (including secured creditors and those party to hire purchase agreements as defined) are adequately protected.

119. Two respondents, the CLLS and the Law Society, were of the opinion that article 20(5), which provides that the moratorium imposed by article 20(1) does not affect the right to “request” the commencement of a proceeding under British insolvency law should be clarified to ensure that it covered British insolvency proceedings commenced by out of court routes. We agree that there could be some ambiguity as to out of court procedures and have therefore amended article 20(5) to refer to the right to “request or otherwise initiate the commencement of a proceeding under British insolvency law”.

120. The Law Society also requested clarification of the term “suspension” in article 20(1), as in their view it could mean either that anything purported to be done in breach of the suspension was void or that breach amounted possibly to contempt but a third party purchaser would be protected. In the case of article 20(1), the effect of the suspension will be the same as in the case of a British winding up or bankruptcy (see the provisions of article 20(2)). The

position would be different in the case of a court order under article 21 – see our comments on article 21 below.

### **Article 21 – Relief that may be granted upon recognition of a foreign proceeding**

#### **Q11. What are your views on the discretionary provisions of Article 21?**

##### Responses

| <b>Answer</b>     | <b>Number</b> |
|-------------------|---------------|
| Agree             | 9             |
| Disagree          | 1             |
| No view specified | 2             |

121. The majority of respondents agreed that the powers of the court in article 21 were sufficient and/or sensible.

122. Two respondents, including the Law Society, had reservations, in particular about the power of the court to grant the foreign representative the power to distribute assets located in Great Britain. They were concerned that this could lead to a reduction in the rights of British creditors, notwithstanding the provisions of article 21(2) which require the court to be satisfied that the interests of British creditors are “adequately protected”. This is because the foreign representative might be able to distribute realisations of British assets on a basis different to that applying under British insolvency law.

123. Whilst we understand their concern, we would point out that it is open to British creditors who feel that they are being prejudiced, to apply to the court asking for the relief granted to be modified or made subject to conditions (article 22(3)). In addition, where the conditions under domestic law are satisfied, it is open to a British creditor to commence a proceeding under British insolvency law. In that case, according to article 29, any relief granted under article 21 would have to be reviewed by the court and modified or terminated if inconsistent with the British proceeding.

124. One respondent considered that the court had too much discretion under article 21 and that a provision prescribing the effect of the relief that could be granted along the lines of article 20(2) was necessary. However, such a provision would not be possible in that it would not give the court enough flexibility to tailor relief to the particular circumstances of each case, including rescues/reorganisations.

125. The Law Society were also concerned that there might be a suggestion that the court’s powers under article 21 would extend to applying foreign insolvency law. In our view, however, it is clear from the Guide to Enactment (e.g. paragraphs 154 and 159) that it is intended that the court applies relief available under domestic and not foreign law.

126. R3 favoured making it explicit in article 21 that the court could give relief equivalent to that afforded in an administration, which would include restrictions on enforcement of security and landlords' rights of re-entry. We agree that this clarification would be helpful and have amended article 21(g) accordingly.

127. R3 further suggested that the power of the court to entrust distribution to a person designated by the court other than the foreign representative should be limited to a person who would be qualified to act as an insolvency practitioner. However, we do not wish to limit the court in this way and in any event the court should take considerations such as the person's qualifications and bonding into account when exercising this power.

128. Three respondents (including R3 and the CBI) suggested that although under article 21 the court has the power to make orders suspending the right of the debtor to dispose of property, any dispositions in breach of the order would not be void, contrary to the assumption in paragraph 64 of the consultation document. Instead, the debtor and anyone knowingly assisting in the breach would be guilty of contempt of court. On reflection we agree that this must be the case. However, this puts court orders of this kind under article 21 on a par with freezing orders (formerly known as Mareva injunctions). It means that the onus will be on the foreign representative to ensure that anyone in possession of relevant assets, e.g. the debtor's bank, is put on notice of the order. It is worth noting, however, that in the case of a foreign main proceeding, the foreign representative would not need to rely on an order under article 21 freezing asset disposals because of the terms of article 20(1) and a foreign representative of a foreign non-main proceeding is likely to get relief only in respect of specific limited assets that ought to be dealt with in his proceeding (article 21(3)).

### **Article 22 (protection of creditors and other interested parties)**

129. In responding to the questions relating to articles 19, 20 and 21, respondents also made comments about article 22, which is clearly important to the functioning of those articles.

130. Again, in response to the concerns expressed by respondents as regards the rights of secured creditors including those with retention of title rights, we have amended article 22 to include a specific reference to such creditors in the list of those persons whose rights the court must be satisfied are adequately protected when granting relief.

131. The Law Society suggested further amendments to clarify whether it is the interests of particular creditors, or the creditors as a whole that the court should take into account when granting relief under articles 19 and 21. However we are reluctant to be prescriptive as regards such matters and believe the court will be able to make such judgements on a case-by-case basis. Moreover, we are reluctant to depart from the provisions of the original UNCITRAL text as to do so potentially creates problems as regards global harmonisation in interpretation of the text.

132. The Law Society also pressed for it to be mandatory for the foreign representative to give a bond or security (on recognition of the foreign proceedings) of similar value to that which would be required from a British licensed insolvency practitioner acting in relation to that debtor. The Law Society considers this necessary for the protection of creditors and to prevent unsubstantiated claims by persons purporting to be foreign representatives. The Law Society is particularly concerned that this restriction should apply in a case where the court grants permission to the foreign representative to administer the distribution of realisations of assets located in Great Britain under Article 21. We have already amended the UNCITRAL text to include an express reference to the power of the court to require bonding. We do not wish to make this a mandatory requirement but believe that the court will be alive to the issues and will impose such a requirement where prudent.

### **Article 23 – Actions to avoid acts detrimental to creditors**

#### **Q12. What are your views on the drafting of Article 23 and is it clear how this article will apply?**

133. All but two respondents raised a specific concern in relation to the drafting or intended effects of article 23.

134. Three respondents, the Law Society, the CLLS and the ILA, thought it would be undesirable for article 23 to be used as a means to ‘forum shop’ by relevant parties seeking to obtain an advantage by resolving issues under the provisions of British insolvency law mentioned in article 23(1), in circumstances where there is no substantial connection between this jurisdiction and the underlying transaction called into question.

135. We believe this is not a real concern. Article 23 merely gives the foreign representative procedural standing to make the relevant applications and does not give him any substantive rights. He still has to make out the case on its merits. That would include persuading the court that it was the ‘*forum conveniens*’, in other words, that under applicable conflicts of law rules, the British courts could hear the case. We note that under section 426 of the Insolvency Act 1986, the courts have refused assistance in relation to such claw back provisions where there was insufficient connection with this jurisdiction and we see no reason why the same should not apply in the case of applications under article 23.

136. The Law Society remarked that the overlap between the rights of the foreign representative and a British insolvency office holder to bring an application under one of the identified sections in relation to the same matter might create hardship for the persons subject to any investigation in relation to such matter and might cause administrative difficulties for the court. The CLLS made a similar comment and suggested that in such a case the action by the British insolvency officer should prevail. To help address these issues, we have included a provision in article 29(b)(iii) to the effect that where a British insolvency proceeding commences after recognition, any existing article 23 proceedings brought by the foreign representative must be reviewed by the

court and the court can give what directions it thinks fit regarding the continuance of those proceedings. Article 23(6) already provides that where a British insolvency proceeding is taking place, the foreign representative can only bring article 23 proceedings with the permission of the court.

137. A further point made by the Law Society was that where a foreign representative brings a successful claim, which results in recoveries available for creditors, the variations in status of the foreign representative in different jurisdictions could result in differences in the manner of distribution. On this basis, the Law Society suggested it might be preferable to make specific provision as to which law is to apply to the distribution of the proceeds of any successful claim. We have some sympathy with the Law Society's view and have added a new article 23(7), which provides that on making an order on a successful article 23 application, the court can give directions as to the distribution of the proceeds of the claim.

138. The Law Society considers that the use of the date of commencement of the foreign proceeding as the date for calculating the hardening off periods for the transactions subject to attack by the foreign representative under article 23 is undesirable. They are of the view that this means that parties to vulnerable transactions have to consider two different risk periods in deciding whether or not a transaction can be attacked. We cannot see how this can be avoided in some cases and in any event, we do not think that there would be any harm caused.

139. Firstly, if there are no British proceedings and a foreign representative has commenced an article 23 application following recognition, then time periods relating to the onset of a British insolvency could not be used.

140. Secondly, we have not in any event changed the actual length of the period during which the transaction is vulnerable. In the case of a floating charge granted to a connected person for no consideration, for example, the parties to the transaction would still need to wait two years from the date of the transaction to see whether the charge could be declared void. All that has changed is that if a foreign representative obtains recognition of a proceeding which commenced within the two year period and British insolvency proceedings commence after it, the charge could be declared void in the event of an application by the foreign representative even if the transaction could not be attacked by the British insolvency officeholder. This seems to us entirely within the spirit and intention of the Model Law and nor does it really create different risk periods from the point of view of the parties to a transaction.

141. Six respondents, including the CLLS, Price Waterhouse Coopers and R3 commented on the drafting of paragraph 4 of article 23. This provision defines when a foreign proceeding commences (for the purpose of calculating hardening off periods) and was based on an equivalent provision in the EC Regulation on Insolvency Proceedings. However, as respondents point out, this imports some of the uncertainties surrounding what the EC Regulation definition means in practice. In particular, in the context of the Model Law, respondents were not happy that the date of commencement of the foreign

proceeding should be related to the date of the “judgment or decision” of the “foreign court” as this could be seen as excluding proceedings started out of court. Accordingly we have adopted a suggestion by R3 that the law of the State where the proceeding is taking place should determine the date of commencement of the foreign proceeding. We have also clarified that any doctrine of relation back under the foreign law should be applied. It will then be up to the foreign representative to provide expert evidence as to when proceedings commenced.

142. The CBI and one other respondent thought that paragraph 8 (now renumbered as paragraph 9) of article 23 should be deleted. This is the transitional provision preventing the foreign representative from attacking transactions etc. entered into prior to the coming into force of the Regulations. They argued that since the transactions would in any event have been vulnerable under British law, it was not clear why a foreign representative could not also attack them. We believe, however, that since at the point they were entered into, the transactions could only have been attacked in the event of British insolvency proceedings, that it was not appropriate to change this retrospectively. A British insolvency officeholder can still attack any relevant transactions in the normal way.

143. Finally we have amended paragraph 2(a) of article 23 to clarify its meaning which some respondents found obscure. In addition, following comments from R3, we have added references to sections 35 and 61 of the Bankruptcy (Scotland) Act 1985 and section 343 of the Insolvency Act 1986. We have also deleted the original paragraphs 2(b) and (c) because they were essentially redundant and in the case of sub-paragraph (c) could have prevented the court from applying the sections listed in paragraph 1 in respect of bodies such as partnerships and LLPs to which those provisions have been extended under British law.

**Article 24 – Intervention by a foreign representative in proceedings in Great Britain**

**Q13. Do you agree that it is not necessary to define ‘intervene’ in relation to Article 24?**

Responses

| <b>Answer</b>     | <b>Number</b> |
|-------------------|---------------|
| Agree             | 6             |
| Greater clarity   | 5             |
| No view specified | 1             |

144. Whilst 6 respondents (including the Law Society, the CLLS, the ILA and Price Waterhouse Coopers) agreed with our approach of leaving article 24 as drafted, five requested some amplification.

145. Of these only 2 gave full reasons for their comments. One was of the view that it would be helpful to clarify whether the power of intervention was to be exercised by way of an application to court and/or was in respect of any court proceedings through which the insolvency proceedings were supervised or whether the power was intended to enable the foreign representative to interfere with the day to day administrative decisions of the British insolvency officeholder. However, from paragraphs 168-172 of the Guide to Enactment, it is clear that whereas the right to “participate” in article 12 is intended to apply “to cases where the foreign representative makes representations in a collective insolvency proceeding”, the right to “intervene” under article 24, “covers cases where the foreign representative takes part in proceedings concerning an individual action by or against the debtor”, i.e. proceedings other than insolvency proceedings.

146. The other respondent was of the view that not merely should the foreign representative have the right to intervene in the sense of being heard in court but that he should have a right to apply to the court in cases where he needs to do so, to protect an interest in assets in respect of which he has been granted relief. However, we believe that this is dealt with in part by article 9, which confirms that the foreign representative has the right of direct access to the courts in this country, and by the existing law of this country, which would allow a person to be joined as a party if they had an interest in a case (Civil Procedure Rules 1998 Part 19).

147. Accordingly, we have decided to follow other countries enacting the Model Law and to leave article 24 as drafted.

**Q14. Do you believe using the word ‘may’ cooperate in Articles 25, 29 and 30 instead of ‘shall’ is sufficiently strong in the context of these articles, whilst not wanting to impose a duty on the court?**

Responses

| Answer            | Number |
|-------------------|--------|
| Agree             | 9      |
| Disagree          | 2      |
| No view specified | 1      |

148. Most respondents agreed that using the word “may” in article 25 achieved the right balance and allowed the courts ultimate flexibility, depending on the circumstances, whilst encouraging co-operation. However, two respondents disagreed, suggesting that where a foreign court or foreign representative had actually made a request for cooperation, the court should have a duty to cooperate. One respondent who had no objection to our approach also made this point.

149. We consider that it is preferable to give the court some discretion as to whether to cooperate and believe that the court will only refuse cooperation in response to an actual request where it has good reasons for doing so.

150. Four respondents (including the Law Society, the CLLS and R3) made an additional comment on article 26, which places a duty on a British insolvency officeholder to cooperate to the maximum extent possible with foreign courts or representatives. One respondent commented on the potential situation where the British insolvency officeholder perceived a conflict of interest between his own position and that of a foreign representative. He was of the view that the duty under article 26 would mean that the British insolvency officeholder might be forced to seek directions from the court before he considered it safe to refuse to exercise his functions in a particular manner (requested by a foreign representative or court) or give less than maximum cooperation.

151. We agree that the current wording might cause unintended difficulties for British insolvency officeholders and have therefore amended article 26(1) so that the duty on the British officeholder is to cooperate "to the extent consistent with his other duties under the law of Great Britain".

152. The Law Society queried the use of the phrase "subject to the supervision of the court" in article 26. However we have left those words as drafted, as we believe the Guide to Enactment makes it sufficiently clear that they are not intended to impose a duty on an officeholder to seek directions from the court before extending cooperation.

153. In commenting on paragraph 2 of article 25, the ILA suggested that the court should be directed to have regard to The Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases as adopted by the American Law Institute (at Washington, D.C., 16 May 2000) and the International Insolvency Institute (at New York, 10 June 2001). We believe that this would be too prescriptive an approach and the courts should be allowed to develop their own practices as regards such communications. It would always be open to those involved in a case to bring the US guidelines to the court's attention.

### **Article 27 – Forms of cooperation**

**Q15. Do you believe it would be beneficial to add any other specific forms of cooperation to Article 27 and, if so, what would you propose adding?**

#### **Responses**

| <b>Answer</b>                   | <b>Number</b> |
|---------------------------------|---------------|
| Additional forms of cooperation | 2             |
| No change                       | 7             |
| No view specified               | 3             |

154. Most respondents were content that the list of possible forms of cooperation in article 27 should be left as currently drafted, on the basis that it was clearly not intended to be exhaustive.

155. The ILA suggested that the court be directed to refer to the US guidelines referred to in their proposed amendment to Article 25, which in their view lists some useful forms of co-operation. Another respondent suggested that the following should be added: the appointment of a translator, some form of arbitration to sort out rights to assets where there are concurrent British and foreign proceedings and, finally, cooperation to sort out against which proceedings creditors' claims are to be lodged.

156. In addition, the Law Society considered that it would be preferable to state what type of "person" is capable of being appointed by the court under Article 27(a), for example a licensed insolvency practitioner, an officer of the court or a foreign representative of equivalent standing. In the view of the Law Society, such person should be bonded on an equivalent basis to a British insolvency practitioner to protect the creditors and the estate from any negligence, loss or misfeasance in carrying out his duties.

157. We believe that the terms of article 27 are broad enough to allow the court to develop its own practices in relation to cooperation and coordination and we are not persuaded of the need to add any further specific examples to article 27.

#### **Article 28 – Commencement of a proceeding under British insolvency law after recognition of a foreign main proceeding**

**Q16. Do you believe the current drafting of Article 28 will pose any particular problems or would you prefer if it were amended to preserve the current position under British Law (for non-EU cases)?**

#### Responses

| <b>Answer</b>     | <b>Number</b> |
|-------------------|---------------|
| No amendment      | 3             |
| Modify to GB law  | 6             |
| No view specified | 3             |

158. Article 28 as drafted in the UNCITRAL text, provides that after recognition of a foreign main proceeding, a proceeding under British insolvency law can only be commenced if the debtor has assets in this jurisdiction. Six respondents (including the Law Society) requested that article 28 be amended to preserve the current position under British law for non-EU cases, namely that a foreign company with a sufficient nexus with the UK may be wound up as an unregistered company. The concept of nexus encompasses more than just the presence of assets and extends to (among other things) the presence of creditors; it also permits consideration of whether a liquidation in the jurisdiction would be of benefit to UK creditors.

159. The respondents pointed out that there could be circumstances in which it would be desirable for there to be a British winding up notwithstanding the absence of assets here. One respondent gave the example of a debtor that currently has no assets in Britain (perhaps because the directors have just

transferred all of the assets to another entity) but where there could potentially be wrongful or fraudulent trading claims against the directors in Britain. The foreign representative would not be able to bring claims under section 213 or 214 of the Insolvency Act 1986 without there being a liquidation in Britain, as these types of recovery action are not covered by Article 23.

160. In the light of these comments, we have decided to amend article 28 to preserve the current law as to when a proceeding can be commenced in Britain. However, we have retained part of article 28 so that following recognition of a foreign main proceeding the effects of a local proceeding would, as far as the assets of the debtor were concerned, be limited to assets in Britain. However, this should leave a British officeholder free to bring claims in respect of rights and remedies that could accrue for the benefit of creditors even where there are no assets as such.

### **Article 31 – Presumption of insolvency based on recognition of a foreign main proceeding**

161. The Law Society, R3 and the ILA all commented on article 31.

162. The Law Society and the ILA were concerned that the presumption of insolvency in article 31 could create problems. The Law Society were concerned that the terms "proof" and "absence of evidence to the contrary" were too strong and that the concept of a mere presumption of insolvency would be preferable. We believe that notwithstanding the actual language used, the title of the article and the Guide to Enactment make it clear that what is intended is only a rebuttable presumption of insolvency.

163. The ILA thought that unduly aggressive creditors might abuse the provision. They cited the example of an order recognising a foreign main proceeding that was a solvent proceeding. They were concerned that in such a case, a creditor might use article 31 to commence British insolvency proceedings and thus trigger events of default, and possibly cross defaults in loan agreements etc. We would hope that as the article only provides for a rebuttable presumption, the courts would be able to apply it sensibly and if the foreign main proceeding was not an insolvent proceeding, the degree of evidence required to rebut it should presumably be less.

164. R3 had no problem with the concept of article 31 but pointed out that the term "unable to pay its debts" was inappropriate for Scotland and we have amended article 31 accordingly.

### **Q17. Do you agree with the approach taken in the drafting of the procedural rules? What alternative approaches would you suggest?**

#### Responses

| <b>Answer</b>     | <b>Number</b> |
|-------------------|---------------|
| Agree             | 7             |
| No view specified | 5             |

165. Seven respondents agreed with our overall approach in drafting the procedural rules and there were no objections. Accordingly the rules will remain as they were originally drafted.

**Q18. Do you believe we should use an affidavit in support of the principal applications under the Regulations?**

Responses

| Answer            | Number |
|-------------------|--------|
| Agree             | 3      |
| Disagree          | 3      |
| No view specified | 6      |

166. The response to this question was finely balanced. Some respondents agreed that the use of an affidavit added extra weight whilst others disagreed, believing that a witness statement would be adequate and also less bureaucratic.

167. This issue will be looked at again when Schedule 2 of the Regulations is reviewed in the light of the consolidation and modernisation of the Insolvency Rules 1986 which is currently being undertaken.

168. In the meantime, however, we have decided to preserve the requirement for an affidavit in support of the principal applications under the Regulations.

**Q19. What are your views on the contents of the affidavit in support of a recognition of foreign proceedings application and who is notified of an application?**

169. Five respondents made some comment in response to this question.

170. The Law Society and the CLLS thought that the reference in paragraph 22 (now numbered 21) to notice being given to a debtor who was of interest to the FSA should be expanded to make it clear when the obligation applied. In fact the term “debtor who is of interest to the FSA” is already defined in paragraph 1 (interpretation) of Schedule 2.

171. The CLLS and R3 both considered that a requirement should be added to paragraph 4 of Schedule 2 to ensure that other relevant information in the hands of the foreign representative was placed before the court so that the court could make an informed decision upon hearing the application whether to modify the automatic stay that would take effect under Article 20. We do not believe that this information should go in the affidavit in support of the recognition application. If the foreign representative wishes the automatic stay under article 20 to be modified, he would need to make an application for that under article 20(6) (previously numbered 20(6)), which would be a “review application” as defined in Schedule 2 and any relevant information should therefore be included in his affidavit in support of that application (see

paragraph 16 of Schedule 2). We would not expect the court as a matter of course to consider reviewing the automatic relief under article 20 in the case of every recognition application.

**Q20. What are your views on the costs and benefits of implementing the Model Law and would you be able to quantify them?**

172. Seven respondents made some comment in response to this question. All but one respondent felt there were benefits in implementing the Model Law, which would outweigh any additional costs incurred, but acknowledged that these are difficult to quantify directly.

173. In particular the ILA, CLLS and another respondent felt that by Britain leading the way in adopting the Model Law, other countries are likely to be encouraged to follow suit, including many of Britain's trading partners. They all felt that there would be considerable benefits in having clear, ascertainable conflict rules in insolvency cases falling outside the scope of the EC Insolvency Regulation.

174. The Law Society felt that there was no obvious substantial benefit in adopting the Model Law at this time, given their concerns over the interaction with the EC Insolvency Regulation and the fact that foreign courts can already obtain assistance to the extent consistent with English Law under principles of comity. As per our response in question 2, we believe the courts will quickly and easily develop an understanding of the interaction between the EC Insolvency Regulation and the Model Law and that by implementing the Model Law, Britain will have a formal structure for international recognition of insolvency proceedings outside of the EU.

**Q21. Do you have any other comments or suggestions?**

**Comments on regulation 3**

175. The Law Society, CLLS and R3 all commented on regulation 3, which provides that British insolvency law is modified to the extent necessary to give effect to the Model Law. The CLLS and R3 queried the need for the regulation and suggested that it be deleted entirely. However, regulation 3 is required in order for us to be able to "graft" the model law on to existing British insolvency law without the need for detailed textual amendment. It is needed, for example, to give effect to the right granted to the foreign representative in article 11 of the Model Law to commence insolvency proceedings in Great Britain and to give effect to the rebuttable presumption of insolvency in article 31.

176. The Law Society was concerned that this provision might appear to purport to override the EC Regulation on Insolvency Proceedings (on the grounds it is effectively part of British insolvency law), but since article 3 of the Model Law itself makes it clear that the Model Law is not intended to prevail over the EC Regulation, we do not believe that this concern is valid.

## **Annex 1**

### **LIST OF RESPONDENTS**

Association of Business Recovery Professionals (R3)  
Association of Chartered Certified Accountants (ACCA)  
British Bankers' Association (BBA)  
City of London Law Society, Insolvency Law Committee (CLLS)  
CBI, Company Affairs  
Confidential (Legal profession)  
Confidential (Academic)  
Insolvency Lawyers' Association (ILA)  
Institute of Credit Management (ICM)  
The Law Society, Company Law Committee  
Northern Ireland Insolvency Service  
PriceWaterhouseCoopers LLP