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Application of the Public Policy Exception in the UNCITRAL Model Law on Cross-Border Insolvency: Issues and Challenges

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INSOL International is pleased to publish this new technical paper, "Application of the Public Policy Exception in the UNCITRAL Model Law on Cross-Border Insolvency: Issues and Challenges", authored by Kristy Zander, Principal of LK Law.

This paper has been adapted from the work originally submitted by the author as part of INSOL's Global Insolvency Practice Course.

The paper provides an overview of the nature and scope of the public policy exception to the recognition of a foreign insolvency proceeding set out in article 6 of the UNCITRAL Model Law on Cross-Border Insolvency. A jurisdictional comparative analysis is provided on how the exception has been applied in the United States, Australia, Singapore and the United Kingdom before the author canvasses some of the key issues and challenges with the exception, including the potential for the inconsistent application of the exception to undermine the modified universalist goal of the Model Law.

The paper will be of great use to INSOL's global membership as attention now turns to the more widespread adoption and implementation of the Model Law on Cross-Border Insolvency, as well as the two new Model Laws on the Recognition and Enforcement of Insolvency Related Judgments and on Enterprise Group Insolvency.

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Application of the Public Policy Exception in the UNCITRAL Model Law on Cross Border Insolvency: Issues and Challenges

By Kristy Zander, INSOL Fellow and Principal, LK Law*

1. Introduction

Article 6 of the UNCITRAL Model Law on Cross Border Insolvency (Model Law) provides that a court can refuse to grant recognition to a foreign proceeding if doing so would be "manifestly contrary to public policy". The intention behind the inclusion of article 6 was to provide comfort to countries implementing the Model Law that they would not be required to act in a manner that was antithetical to their cultural norms of justice or morality. In accordance with the spirit of comity and the desire for predictability underpinning the Model Law, article 6 was intended to be used only in exceptional and limited circumstances.[1]

However, in practice, the public policy exception has sometimes been applied more expansively than the exceptional circumstances originally envisaged. This paper considers some of the practical issues that have emerged from cases concerning the application of the public policy exception, such as cultural differences between countries as to what constitutes fundamental public policy, the inconsistent application of the public policy exception between and within jurisdictions, and a lack of transparency about the public policy reasons behind decisions. These issues impact upon achievement of the aims of international insolvency cooperation and modified universalism at the heart of the Model Law.

2. Interpretation and implementation of article 6 of the Model Law

2.1 Article 6 of the Model Law

The Model Law sets out a series of procedural guidelines to facilitate the recognition of foreign insolvency proceedings, including a framework by which local courts may recognise and, where appropriate, assist foreign insolvency practitioners. It is not compulsory, and countries who choose to adopt it do so by incorporating some or all of the Model Law (with any modifications they consider appropriate) into their local law.

Article 6 of the Model Law provides that:

> Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

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1 UNCITRAL Secretariat, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (United Nations, New York, 2014), Part 2: Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, 28 [30].

2.2 Intended approach to the implementation of article 6

As Mund has noted, it was necessary for the Model Law to include a public policy exception to "reassure adopting countries that the Model Law would not undermine their law in a way repugnant to those countries' fundamental principles."[2]

The Model Law Guide to Enactment and Interpretation (Model Law Guide) explains that UNCITRAL has not attempted to provide a uniform definition as to what constitutes public policy, as notions are likely to vary from country to country. The Model Law Guide recognises that, in some countries, public policy exceptions are restricted to fundamental principles of law (such as constitutional requirements), while other countries take a broader approach. The Model Law Guide suggests that public policy exceptions should be more restricted in an international context than where they are to be applied in a purely domestic context (where issues such as comity do not arise).[3]

The Model Law Guide makes it clear that the intention is for article 6 to be used only in exceptional and limited circumstances. Differences in insolvency schemes between States do not themselves justify invocation of the public policy exception.[4]

In that regard, the use of the word "manifestly" was a deliberate attempt to emphasise UNCITRAL's intention that article 6 ought to be interpreted restrictively and only be invoked "under exceptional circumstances concerning matters of fundamental importance for the enacting State."[5] The use of the word "manifestly" to provide emphasis of this type in international conventions is well known.[6] However, several jurisdictions omitted the word "manifestly" when adopting the Model Law into domestic legislation.[7] The impact of this is discussed below.

2.3 Implementation of article 6 in selected jurisdictions

2.3.1 United States

In the United States, article 6 of the Model Law has been implemented substantively unchanged as section1506 of the US Bankruptcy Code. Adopting UNCITRAL's warnings about the limited scope of article 6 of the Model Law, the word "manifestly" has been interpreted as a qualifier which limits the exception to only the most fundamental policies of the United States.[8]

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2 S Mund, "11 USC 1506: US Courts Keep a Tight Rein on the Public Policy Exception, but the Potential to Undermine International Cooperation in Insolvency Proceedings Remains" (2010) 28 *Wisconsin International Law Journal* 325, 333.

3 Model Law Guide, 52 [101]-[103].

4 *Idem*, 28 [30].

5 *Idem*, 52 [104].

6 *Idem*, 52 [104]. See also *Re Agrokor DD* [2017] EWHC 2791 (Ch), [2018] 2 BCLC [109], and also note the Convention on Choice of Court Agreements concluded on 30 June 2005 at The Hague, art 6.

7 Singapore, Chile, Japan, Canada, Serbia and South Korea among others.

8 See, for example, *In re Tri-Continental Exchange Ltd* 349 BR 627 (Bkrtcy EDCal 2006) 638-39; *In re ABC Learning Centres Ltd* 728 F3d 301 (3d Cir 2013) 309; *In re Iida* 377 BR 243 (9th Cir BAP 2007) 259; *In Re Gold & Honey, Ltd* 410 BR 357 (Bkrtcy EDNY 2009) 372; *In re Qimonda AG Bankruptcy Litigation* 433 BR 547 (ED Va 2010) 565-71; *In re Ephedra Products Liability Litigation* 349 BR 333 (SDNY 2006) 336; and *In re Fairfield Sentry Ltd; Morning Mist Holdings Ltd v Krys* 714 F3d 127 (2d Cir 2013) 139-40.

The public policy exception has been more widely litigated in the United States than in the other jurisdictions considered in this paper.[9] The United States courts have, in principle, taken a narrow view of the public policy exception, but there have been cases where section1506 has been applied to deny relief.

According to the interpretation of the courts in the United States, the guiding principles are as follows:

(a) the mere fact of conflict between foreign law and United States law, absent other considerations, is insufficient to support the invocation of the public policy exception;

(b) deference to a foreign proceeding should not be afforded in a Chapter 15 proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections; and

(c) an action should not be taken in a Chapter 15 proceeding where taking such action would frustrate a United States court's ability to administer the Chapter 15 proceeding and / or would impinge severely on a United States constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceedings.[10]

2.3.2 Australia

Like the United States, Australia has implemented article 6 substantially unchanged through the Cross-Border Insolvency Act 2008 (Cth). There have been comparatively few cases in Australia in which the public policy exception has been invoked and none in which relief has been denied on public policy grounds. For an Australian court to invoke the public policy exception, "essential principles of justice or morality generally need to be at stake."[11]

2.3.3 United Kingdom

The United Kingdom has also implemented article 6 substantially unchanged through the Cross Border Insolvency Regulations (2006)[12] and takes a similarly restrictive approach to the circumstances in which it is possible to invoke the public policy exception.[13]

2.3.4 Singapore

The Model Law was adopted by Singapore in 2017. The enacting Singapore law differed from article 6 of the Model Law by omitting the word "manifestly".[14] This omission has

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9 E Buckel, "Curbing Comity: The Increasingly Expansive Public Policy Exception of Chapter 15" (2013) 44 *Georgetown Journal of International Law* 1281, 1294-1295.

10 *In re Qimonda AG Bankruptcy Litigation* 433 BR 547 (ED Va 2010) page 570. See also *Re ABC Learning Centres Ltd* 728 F3d 301 (3d Cir 2013) page 309.

11 R McDougall, "Recognition of Foreign Insolvency Proceedings: An Australian Perspective" (2018) LawAsia Conference 31, Siem Reap, November 2018, 11.

12 Cross-Border Insolvency Regulations 2006 (UK) sch 1, art 6.

13 *In the matter of OGX Petroleo E GassA and in the matter of the Cross-Border Insolvency Regulations* [2016] EWHC 25, [2016] Bus LR 121, [2017] 2 All ER 217 [45].

14 Insolvency, Restructuring and Dissolution Act 2018 (SG) sch 3, s 252.

been interpreted by the Singapore Court as a "deliberate and conscious" decision on the part of the Singapore Parliament, with the effect that:

> The standard of exclusion on public policy grounds in Singapore is lower than that in jurisdictions where the Model Law has been enacted unmodified.[15]

3. Issues with the public policy exception

While it is clear from the cases and commentary that article 6 of the Model Law is intended to impose a high threshold for the refusal of relief on public policy grounds, there remain differences between jurisdictions (and even within jurisdictions) as to what circumstances meet this threshold. This paper focuses on practical issues that have arisen in the implementation of the public policy exception such as cultural differences between jurisdictions, the inconsistent application of the exception within jurisdictions and a lack of transparency about the influence of public policy factors.

3.1 Cultural differences between jurisdictions

Understandably, there are differences in what countries regard as important matters of public policy. Examples discussed in this paper, drawn from the cases, include allegations of bad faith on the part of the debtor and telecommunications interception.

3.1.1 Bad faith

The effect of what might loosely be grouped together as bad faith actions on the part of the debtor (including lack of full and frank disclosure, proceedings commenced for an improper purpose and actions taken to circumvent local laws) are an area where cultural differences have emerged between jurisdictions. For example, bad faith actions by a debtor, such as an action to circumvent a local proceeding, was not manifestly contrary to public policy in Australia[16] but similar situations were deemed to be contrary to public policy in Singapore[17] and the United Kingdom,[18] with mixed results in the United States.[19]

- Australia

  In *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc*,[20] an Australian court found that filing a United States Chapter 11 proceeding expressly to circumvent a pending Australian application for compulsory liquidation was not so "manifestly contrary" to Australian public policy as to trigger article 6. The court considered that it should be "slow" to invoke the public policy exception.[21] Instead of

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15 *In the Matter of Zetta Jet Pte Ltd & Ors* [2018] SGHC 16, [2018] 4 SLR 801 [22]-[23].
16 *In the Matter of Legend International Holdings Inc; Indian Farmers Fertiliser Cooperative Ltd & Anor v Legend International Holdings Inc* [2016] VSC 308, (2016) 52 VR 1.
17 *In the Matter of Zetta Jet Pte Ltd & Ors* [2018] SGHC 16, [2018] 4 SLR 801.
18 *In the matter of OGX Petroleo E GassA and in the matter of the Cross-Border Insolvency Regulations* [2016] EWHC 25, [2016] Bus LR 121, [2017] 2 All ER 217.
19 *In Re Gold & Honey, Ltd* 410 BR 357 (Bkrtcy EDNY 2009); *In re Creative Finance Ltd* 543 BR 498 (Bkrtcy SDNY 2016), *In re Black Gold SARL* 635 BR 517 (9th Cir. 2022).
20 (2016) 52 VR 1, (2016) 113 ACSR 568, [2016] VSC 308.
21 *Idem*, [52]-[54].

invoking the public policy exception, the court declined recognition on the ground that the debtor company had no centre of main interests (COMI) or establishment in the United States. To the extent that public policy considerations influenced this decision, it gives rise to the issue of a lack of transparency (see further in section 3.3 below).

- Singapore

  In the Singapore case of *Re Zetta Jet Pte Ltd & Ors*,[22] the Singapore court declined to grant general recognition of a United States Chapter 7 proceeding in Singapore since the United States order had been obtained in breach of a Singapore court-ordered injunction. The court granted recognition to the United States Chapter 7 trustee for the limited purpose of applying to discharge the Singapore injunction. The trustee did so, and then reapplied for recognition in Singapore.

  When the case came back before the Singapore court, it found that there was no longer a public policy issue because the Singapore injunction had been discharged. Therefore, "recognition no longer undermine[d] the administration of justice in Singapore".[23] Indeed, once the injunction had been discharged, the most important public policy considerations were to: (a) "ensure the orderly and efficient recovery of assets for the benefit of Zetta Jet Singapore's creditors"; and (b) "have regard to the international basis of the Model Law and the promotion of its uniform application".[24]

  The court nevertheless commented that:

  > The objectives of facilitating the uniform and orderly distribution of assets cannot override the paramount public policy of upholding the administration of justice in Singapore.[25]

  Interestingly, although the Singapore court described the omission of the word "manifestly" in Singapore's implementation of article 6 as demonstrating Parliament's intention to adopt a lower standard,[26] the court's conclusion in this case was not necessarily consistent with the application of any lower standard. Indeed, as discussed below, the United States court declined relief in similar circumstances,[27] even under the notionally higher "manifestly contrary" standard.

- United Kingdom

  In *Re OGX Petroleo E GassA*,[28] the English court considered it strongly arguable that it had a residual discretion to refuse recognition if the applicant is attempting to abuse the recognition process for an illegitimate purpose. The behaviour under consideration was a lack of full and frank disclosure in the recognition application

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22 [2018] SGHC 16, [2018] 4 SLR 801.
23 *Re Zetta Jet Pte Ltd & Ors (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53, [2019] 4 SLR 1343 [121].
24 *Idem*, [17].
25 *Idem*, [124].
26 *In the Matter of Zetta Jet Pte Ltd & Ors* [2018] SGHC 16, [2018] 4 SLR 801, [22]-[23].
27 *In Re Gold & Honey, Ltd* 410 BR 357 (Bkrtcy EDNY 2009).
28 *Re OGX Petroleo E GassA* [2016] EWHC 25, [2016] Bus LR 121, [2017] 2 All ER 217.

and an improper attempt to apply the automatic stay of proceedings to an arbitration that fell outside the restructuring plan for which recognition and relief was sought.[29] Although the parties had settled and it was not necessary to decide this issue, Snowden J commented:[30]

> Further, and notwithstanding the clear intention that the public policy exception in article 6 should be interpreted restrictively, I consider that it is strongly arguable that the court must have a residual discretion to refuse recognition if satisfied that the applicant is abusing that process for an illegitimate purpose. On the exceptional facts of this case, I think that Mann J might well have been justified in rejecting the application for recognition altogether.

Similarly in *Cherkasov v Olegovich, the Official Receiver of Danyaya Step LLC*,[31] on appeal, recognition of a Russian receivership was overturned on public policy grounds. The receiver had failed to inform the court of the highly political nature of the case that he intended to pursue in the United Kingdom and of the United Kingdom public policy issues the case was likely to raise.[32]

- United States

In *Re Gold & Honey, Ltd*,[33] Chapter 11 proceedings had been commenced in the United States and an automatic stay was in force. A receivership order was subsequently made in Israel. A United States court declined to recognise the Israeli proceedings under Chapter 15 on public policy grounds, namely the importance to United States public policy of the Chapter 11 automatic stay. The court held that recognition of the Israeli receivership proceedings "would reward and legitimise [the petitioning bank creditor's] violation of both the automatic stay and this court's Orders regarding the stay."[34]

However, in *Re Creative Finance Ltd*,[35] the debtor had initiated insolvency proceedings in the British Virgin Islands ostensibly to hinder recovery of a US $5 million English judgment debt. The United States court found that bad faith actions by the insolvent company (described by the court as "the most blatant effort to hinder, delay and defraud a creditor this court has ever seen"[36]) did not enliven article 6 of the Model Law. The court stated:[37]

> While United States courts have scrutinised the goals of a party, or the fairness of a foreign judicial system or the substance of its laws, in considering the section 1506 public policy exception, the court has

29 *Idem*, [1], [17]-[18].
30 *Idem*, [60].
31 [2017] EWHC 3153 (Ch), [2018] Bus LR 789, [2017] WLR(D) 825.
32 *Idem*, [30]. Note that the United Kingdom Home Office had refused repeated requests for assistance in related Russian criminal proceedings on public policy grounds.
33 410 BR 357 (Bkrtcy EDNY 2009).
34 *Idem*, 371.
35 543 BR 498 (Bkrtcy SDNY 2016).
36 *Idem*, 502.
37 *Idem*, 515-516.

> seen no precedent applying that exception to the misbehaviour of a party alone. The court has been faced with bad faith filings in United States Chapter 11 cases as well, and while it has repeatedly taken action to deal with the abusers, it has not elevated its concerns as to the debtor misconduct to the level of public policy. It does not seem right to find a violation of United States public policy when United States debtors sometimes engage in the same or similar bad faith, under United States law.

In the recent case of *Re Black Gold SARL*,[38] the court similarly found that "a party's misconduct or bad faith is not a proper basis for invoking section1506 to deny recognition."[39] In that case, the debtor had filed an insolvency proceeding in Monaco and petitioned for recognition in the United States. Its largest creditor was a United States company that had obtained a judgment debt (via arbitration) against the debtor for theft of trade secrets. Enforcement of that judgment debt in the United States was thwarted by the filing of the Monegasque proceedings and application for Chapter 15 recognition. There were also allegations that the foreign insolvency representative was a puppet of the debtor and had not given full and frank disclosure to the court. The United States court found that "the conduct here, while objectionable, did not rise to the level of a violation of United States public policy, and certainly not 'manifestly' so."[40]

3.1.2 Telecommunications interception

Another example of cultural differences in public policy is in the field of telecommunications interception. German orders entitling an insolvency practitioner to mail and email interception were regarded as manifestly contrary to public policy in the United States, but not in England or Germany.[41]

In *Re Toft*,[42] a United States court declined an application from a German insolvency representative to enforce, on an *ex parte* basis, a German court order for access to emails of the debtor stored on servers of two United States internet service providers, and for the interception and redirection of any future emails. The order was found to be one of the "rare cases"[43] which fell within the public policy exception because it constituted relief that was banned in the United States and was contrary to privacy rights protected under United States law.[44]

The court stated that the fact United States law differed from German law did not by itself mean that the relief sought was manifestly contrary to public policy.[45] Rather, the critical issue for the court was that the relief sought: (a) would on a United States constitutional

38 635 BR 517 (9th Cir 2022).
39 *Idem*, 528.
40 *Idem*, 531.
41 *In re Toft* 453 BR 186 (Bkrtcy SDNY 2011) 188 (footnote 2); *Re a Bankrupt – Prager v Toft* [2012] BPIR 469.
42 453 BR 186 (Bkrtcy SDNY 2011).
43 *Idem*, 189, 196.
44 *Idem*, 196.
45 *Idem*, 198.

or statutory right protecting the secrecy of electronic communications (with possible criminal consequences); (b) went beyond the powers that have traditionally been afforded to a United States estate representative (although note this should not have been relevant to the application of article 6); and (c) was contrary to a fundamental principle of providing notice to an affected party.[46]

In the same case, the German order was recognised and enforced in England and was not there found to be contrary to public policy. This is unsurprising since the English court had power under local law to make a similar mail redirection order.[47] This demonstrates the extent to which public policy considerations can vary between jurisdictions.

3.2 Impact of cultural differences

The fact that different countries may have different views about what is important as a matter of public policy is not that surprising. Preservation of such cultural differences was, after all, a key reason for including article 6 in the Model Law in the first place.[48] Indeed, UNCITRAL has made it clear that:

> The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law.[49]

However, cultural differences in the application of the public policy exception make it difficult to predict the future application of article 6 of the Model Law across different jurisdictions. What is regarded as a fundamental issue of public policy (and impermissible) in one country may be permissible in another. This can undermine the purpose of the Model Law to provide a "modern, harmonised and fair framework" for cross-border insolvency[50] and creates uncertainty.

3.3 Inconsistent application within jurisdictions

If the differences in outcomes of decisions about the public policy exception could all be explained by cultural differences, this would not necessarily be problematic. However, not all divergence in the cases – particularly in the United States cases – can be explained on this level.

It is not always possible to ascertain a clear factual distinction between the cases where the public policy exception has been invoked and those in which it has not, even in the same country. That is, there is not always consensus on what matters are, in fact, "fundamental" elements of public policy.

Examples of the inconsistent application of the public policy exception by United States courts discussed in this paper include the much-vexed issue of third-party non-debtor releases, and the treatment of commercial interests as fundamental issues of public

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46 *Idem,* 198, 201.
47 *Idem,* 188 (footnote 2). See also *Re a Bankrupt – Prager v Toft* [2012] BPIR 469.
48 See n 3 above, 333.
49 Model Law Guide, 19 [3].
50 *Idem,* 19 [1].

policy. Different approaches to the impact of bad faith on public policy in the United States cases (as discussed above) are also examples in this category.

The United States Bankruptcy Appellate Panel of the Ninth Circuit recently commented:

> While courts agree that the public policy exception in section 1506 should be invoked only under exceptional circumstances concerning matters of fundamental importance for the United States, … few have addressed the question of when United States policy is indeed 'fundamental', thus warranting section1506 protection.[51]

3.3.1 Third party non-debtor releases

The approval of foreign reorganisation plans involving third party non-debtor releases is a good example of the inconsistent application of the public policy exception by United States courts. If such releases were inimical to the fundamental public policy of the United States, one would expect approval to be rejected in all cases on public policy grounds. Alternatively, if third party non-debtor releases were acceptable as a matter of public policy, one would expect approval to be granted consistently. Neither outcome has occurred in the cases decided to date.

In *Re Vitro SAB de CV*,[52] a United States court declined to enforce a Mexican reorganisation plan because of the inclusion of provisions releasing non-debtors. The court concluded that "the protection of third party claims in a bankruptcy case is a fundamental policy of the United States."[53] On appeal, the United States Appeals Court (Fifth Circuit) recognised that "section 1506 was intended to be read narrowly, a fact that does not sit well with the bankruptcy court's broad description of the fundamental policy at stake as 'the protection of third party claims in a bankruptcy case.'"[54] However, because the court had affirmed the judgment on other grounds, it was not necessary to reach a judgment on the public policy exception.

Contrast *Re Metcalfe & Mansfield Alternative Investments*,[55] which preceded *Vitro*, where the court recognised a Canadian plan despite the inclusion of third-party non-debtor release and injunction provisions. The court specifically rejected the argument that section1506 precludes granting third party releases in appropriate cases. It held that the foreign relief does not need to be identical to United States relief, and that United States courts are "not required to make an independent determination about the propriety of individual acts of a foreign court."[56] Rather, the key determination was "whether the procedures used in Canada meet our fundamental standards of fairness."[57]

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51 *In re Black Gold SARL* 635 BR 517 (9th Cir 2022), 528.
52 473 BR 117 (Bkrtcy NDTex 2012).
53 *Idem*, 132.
54 *In re Vitro SAB de CV* 701 F3d 1031 (5th Cir 2012), 1069-70.
55 421 BR 685 (Bkrtcy SDNY 2010).
56 *Idem*, 697.
57 *Ibid.*

As commentators such as Buckel[58] and Metreveli[59] have noted, the *Vitro* court's attempts to distinguish *Metcalfe* were unconvincing. *Re Sino Forest Corporation*[60] subsequently preferred the *Metcalfe* approach.

In *Re PT Bakrie Telecom TBK*,[61] the court recognised the foreign proceeding but declined to grant the additional relief sought because there was no clear and formal record of how the Indonesian court had decided to approve the third-party releases in the restructuring plan. However, the court stated that it had "not been presented with anything that would satisfy the high standard of section 1506" and declined to invoke the public policy exception.[62]

The court noted that third party releases are available domestically in some (but not all) jurisdictions in the United States. For example, the Second Circuit permits third party releases in specific circumstances whereas other courts such as the Fifth, Ninth and Tenth Circuits do not.[63]

This may well explain the different approach in *Vitro*. While differences between the approach of United States Court Circuits *domestically* may be acceptable, the author's view is that such differences are inappropriate when considering cases under the Model Law, where an internationalist approach is required.[64] In any event, mere difference in insolvency laws ought not to invoke the public policy exception.[65] If even different courts within the same country take differing approaches to third party non-debtor releases, can recognition of a foreign insolvency which permits such releases under the laws of that foreign jurisdiction really be a matter that is manifestly contrary to the public policy of the United States?

3.3.2 Commercial interests

A further example of the inconsistent application of the public policy exception arises in *Re Qimonda AG*,[66] where a United States court declined to grant relief which would enable a German foreign representative to terminate United States patent licenses, finding it manifestly contrary to United States law and a fundamental United States public policy of promoting technological innovation.[67] On appeal, the decision to decline relief was upheld based only on the balancing of interests under article 22 of the Model Law (section 1522 of the United States Bankruptcy Code). The United States Court of Appeals (Fourth Circuit) did not consider it necessary to rule on the public policy arguments, although it recognised that, by affirming the Bankruptcy Court's decision on section 1522, it was indirectly furthering the underlying public policy.[68]

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58 See n 11 above, 1306-7.
59 L Metreveli, "Toward Standardised Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL's Recent Amendment to its Model Law on Cross-Border Insolvency" (2018) 51(2) *Columbia Journal of Law and Social Problems* 315, [339-340.
60 501 BR 655 (Bkrtcy SDNY 2013).
61 628 BR 859 (Bkrtcy SDNY 2021).
62 *Idem,* 891.
63 *Idem,* 881.
64 Model Law Guide, 52 [103].
65 *In re Qimonda AG Bankruptcy Litigation* 433 BR 547 (Bkrtcy ED Va 2010), 570.
66 462 BR 165 (Bkrtcy ED Va 2011).
67 *Idem*, 185.
68 *Jaffe v Samsung Electronics Co, Ltd* 737 F 3d 14 (4th Cir. 2013), 32.

While patent technology is undoubtedly a commercial interest of the United States, is protection of patent technology truly a "fundamental" US public policy?[69]

Even if so, is it anymore "fundamental" than other United States cases in which the public policy exception was not applied? Examples of United States cases where the public policy exception was not applied include:

- cases involving "bad faith" such as *Re Creative Finance Ltd*[70] and *Re Black Gold SARL,*[71] even where the debtor's conduct was described as "the most blatant effort to hinder, delay and defraud a creditor this court has ever seen";[72]

- *Re Ephedra Products Liability Litigation*,[73] where the court found that the absence of a jury trial was not manifestly contrary to United States public policy, as long as the foreign procedure plainly afforded the claimants a fair and impartial proceeding;[74]

- *Re Rede Energia SA*,[75] where the court recognised and granted enforcement relief in relation to a Brazilian reorganisation plan notwithstanding that it had been implemented in a manner involving cram down of the dissenting noteholders;

- *Re Petroforte Brasileiro de Petrolea Ltda*,[76] which involved a Brazilian *ex parte* order pursuant to which two non-debtor companies that had common beneficial ownership with the debtor and were the recipients of fraudulent transfers were brought into the bankruptcy;

- *Re Ernst & Young Inc,*[77] where United States creditors received less in a foreign insolvency proceeding than they may have received in United States proceedings;

- *Re ABC Learning Centres Ltd*,[78] where secured creditors were not protected in the same way under Australian insolvency law as they would have been in the United States;

- *Re British American Isle of Venice (BVI) Ltd*,[79] which involved a conflict of interest on the part of a foreign insolvency practitioner;

- *Re Fairfield Sentry Ltd; Morning Mist Holdings Ltd v Krys*,[80] where the BVI bankruptcy proceedings were confidential and access to BVI court documents was restricted;

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69 See n 11 above, 1304-1306. cf J Chung, "In Re Qimonda AG: The Conflict between Comity and the Public Policy Exception in Chapter 15 of the Bankruptcy Code" (2014) 32 *Boston University International Law Journal* 89.
70 543 BR 498 (Bkrtcy SDNY 2016).
71 635 BR 517 (9th Cir. 2022).
72 *In re Creative Finance Ltd* 543 BR 498 (Bkrtcy SDNY 2016), 502.
73 349 BR 333 (SDNY 2006).
74 *Idem*, 337.
75 515 BR 69 (Bkrtcy SDNY 2014).
76 542 BR 899 (Bkrtcy SDFlor 2015), 904-5.
77 383 BR 773 (Bkrtcy D Colo 2008).
78 728 F 3d 301 (3rd Cir 2013), 310-11.
79 441 BR 713 (Bkrtcy SD Fla 2010), 717.
80 714 F 3d 127 (2nd Cir 2013).

- *Re Ashapura Minecham Ltd*,[81] where there was a lack of a formal statutory mechanism for unsecured creditor participation in Indian insolvency proceedings;

- *Re OAS SA*,[82] where the Brazilian insolvency proceedings involved substantive consolidation orders and *ex parte* meetings with the judge; and

- *Re Gerova Financial Group, Ltd*,[83] where the debtor had been wound up involuntarily on the petition of a single creditor (where United States law requires more than one creditor).

Is protection of patent technology a more fundamental United States public policy than these matters? Or is it (as Buckel suggests) "simple statutory manifestations of current United States policy"[84] and more of a matter of the protection of commercial interests rather than fundamental public policy?

3.3.3 Bad faith

As discussed above, *Re Gold & Honey, Ltd*[85] was a case where actions taken in violation of the United States automatic stay were found to invoke the public policy exception. However, *Re Creative Finance Ltd*[86] and *Re Black Gold SARL*[87] were both cases where the debtor's bad faith did not invoke the public policy exception.

If they are all classed as cases involving the extent to which it would be contrary to public policy to recognise a foreign insolvency proceeding where there has been an element of bad faith on the part of the debtor, it is difficult to reconcile the different approach taken. The different result in the cases may be explained as emphasising priority of the United States automatic stay over bad faith conduct of debtors (which the United States court acknowledged occurs in local, as well as international, proceedings). Nevertheless, from an outsider's perspective, it is hard to objectively reconcile one being a fundamentally more important matter of public policy than the other.

3.4 Impact of inconsistent application of the exception

Inconsistent application of the public policy exception weakens the argument for the existence of such an exception. If the exception is only intended to apply to exceptional cases involving fundamental issues of public policy, ought not such public policies be readily identified and consistently applied in all courts, at least within a jurisdiction, if not between jurisdictions?

The English High Court in *Re Agrokor DD*[88] put it well, noting that:

81 480 BR 129 (SDNY 2012).
82 533 BR 83 (Bkrtcy SDNY 2015).
83 482 BR 86 (Bkrtcy SDNY 2012).
84 See above, n 11, 1304.
85 410 BR 357 (Bkrtcy EDNY 2009).
86 543 BR 498 (Bkrtcy SDNY 2016).
87 635 BR 517 (9th Cir 2022).
88 [2017] EWHC 2791 (Ch), [2018] 2 BCLC.

> Where there is any doubt or any confusion as to whether it is contrary to or incompatible with public policy, there cannot be anything 'manifestly' contrary to public policy.[89]

Inconsistent application of the public policy exception leads to uncertainty of outcome.

3.5 Lack of transparency

Another practical issue that has emerged with the way the public policy exception has been used is that, where courts have a concern about public policy, they do not always expressly deal with this under article 6. Instead, they may use the background spectre of public policy to either attempt to find a way of curing the problem by granting tailored relief subject to conditions or may decline relief on separate discretionary grounds.

3.6 Conditions and tailored relief

Upon recognition of a foreign insolvency proceeding, a court has discretion to grant "any appropriate relief"[90] and it may also impose appropriate conditions on the relief granted,[91] which can include relief tailored to meet and overcome any public policy objections.[92]

In *Re Ephedra Products Liability Litigation*,[93] a United States court only approved a Canadian restructuring order after it had been amended to make it clear that the claims officer could not refuse to receive evidence or to liquidate claims without granting interested parties an opportunity to be heard, since these matters would cause "due process" concerns for the United States courts.[94]

In *Re Sivec Srl*,[95] a United States court recognised an Italian proceeding as a foreign main proceeding but declined to continue the automatic stay or direct a United States litigant to turn over funds because of a lack of due process in the Italian proceeding. This was regarded as manifestly contrary to United States public policy. Instead, the court lifted the stay so that existing United States litigation could proceed. Without resolution of the United States litigation, the United States party did not have an opportunity to file a claim in the Italian proceeding, object to the reorganisation plan, or resolve its dispute in the Italian proceeding.[96]

In *Akers (as joint foreign representative) v Saad Investments Company Ltd,*[97] the issue before the Australian court was whether an Australian tax debt (which was not provable in the Cayman liquidation) should be paid as a condition of releasing Australian assets to

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89 *Idem*, [109].
90 Model Law, art 21(1). Note that in the United States, "any appropriate relief" must also be "necessary to effectuate the purpose of this chapter": 11 United States Code § 1521(a).
91 Model Law, art 22(2).
92 *In re Tri-Continental Exchange Ltd* 349 BR 627 (Bkrtcy EDCal 2006), 638 ("… the public policy exception could be invoked as a rationale for imposing specific protections").
93 349 BR 333 (SDNY 2006).
94 *IIdem*, 335.
95 *Re Sivec SRL* 476 BR 310 (Bkrtcy Okla 2012).
96 *Idem*, 325.
97 [2013] FCA 738.

the Cayman insolvency representative. The court concluded that it was not necessary for it to consider public policy arguments because article 22(1) of the Model Law gave it jurisdiction to make orders enabling the payment of Australian taxation liabilities prior to remittal from Australia.[98] However, the court did observe (without deciding) that there was "considerable force" in the Australian Tax Commissioner's public policy arguments, as the requirement to pay tax is "fundamental to any society".[99] This provides an insight into what might constitute a fundamental Australian public policy for the purpose of article 6 of the Model Law, albeit one that is relatively protectionist in its outcome.

As mentioned above, in the Singapore case of *Re Zetta Jet Pte Ltd*,[100] the High Court of Singapore granted recognition to a United States Chapter 7 trustee for the limited purpose of discharging a Singapore injunction.

Re Toft[101] also discussed the possibility of "fashioning relief in a manner that 'sufficiently protects' all interested parties", although such relief was not possible on the facts of the case.[102]

3.7 Discretionary relief

On a related note, there is a somewhat blurred line between when relief should be declined on public policy grounds, compared with when relief should be declined on separate (but related) discretionary grounds under more specific articles of the Model Law, such as article 22, which requires the court to undertake a balancing test to "be satisfied that the interests of the creditors and other interested persons, including the debtor are adequately protected."[103]

Public policy considerations may implicitly be considered in the exercise of discretion without needing to resort to article 6. For example, in *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc,*[104] an Australian court did not invoke the public policy exception when it might have been expected to, and instead, declined recognition on COMI grounds.

The importance of reaching a finding on grounds *other* than public policy where possible, was also urged in *Re Toft*:[105]

> Sparing application of the provision would also indicate that the public policy exception should ordinarily be resorted to only if another, more specific provision of chapter 15 does not govern the dispute, consistent with the principle that more specific statutory provisions usually prevail over general provisions.

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98 *Idem*, [42]-[44]. See also *Kapila, Re Edelsten* (2014) 320 ALR 506.
99 *Akers (as joint foreign representative) v Saad Investments Company Ltd; In the matter of Saad Investments Company Ltd (in official liquidation)* [2013] FCA 738.
100 [2018] SGHC 16.
101 453 BR 186 (Bkrtcy SDNY 2011).
102 *Idem*, 196.
103 Model Law, art 22(1). In the United States, "adequately protected" is replaced with "sufficiently protected": USC, § 1522.
104 [2016] VSC 308, (2016) 113 ACSR 568, (2016) 52 VR 1.
105 453 BR 186 (Bkrtcy SDNY 2011), 195-6.

3.7.1 Tailoring relief

Tailoring relief can be an appropriate way to address a public policy issue because it embraces universalism and enables assistance to be fashioned in a way that is acceptable to the jurisdiction. Indeed, the use of article 6 in this manner is expressly contemplated in the Model Law Guide:[106]

> As a general rule, article 6 should rarely be the basis for refusing an application for recognition, even though it might be a basis for limiting the nature of relief accorded.

Further, the use of discretion and conditions can ensure that denial on public policy grounds under article 6 is saved for truly fundamental breaches of public policy, with other (less fundamental) breaches being dealt with under articles 21 or 22 of the Model Law. For example, this would have been a way of avoiding the inconsistent application of article 6 in relation to third party releases, commercial interests and bad faith described in section 3.2 above.

However, one problem with this approach in practice can be a lack of transparency, if conditions are imposed, or relief tailored (or denied) on discretionary grounds without explicating citing public policy factors as the reason. Public policy factors can become hidden if they are the underlying, but unexpressed, reason for a decision. This can lead to inconsistently reasoned decisions and unpredictable outcomes.

In *Jaffe v Samsung Electronics Co*,[107] the United States Court of Appeals (Fourth Circuit) recognised that, by the affirming the Bankruptcy Court's decision on its article 22 analysis, it was indirectly furthering the underlying public policy.[108] This lack of transparency can also lead to inconsistency of results (as discussed above).

4. Conclusion

Although the "public policy" exception appears to be used sparingly by most courts applying the Model Law, there remains scope for improvement in the transparency and consistency of its application. If the public policy exception is applied too often, the effect of the Model Law as an instrument of modified universalism may turn it into a tool of territorialism.

Cultural differences in what constitutes fundamental public policy in different countries are understandable and, to a certain extent, expected. However, such cultural differences do make it difficult to predict the future application of article 6 of the Model Law across jurisdictions. This can limit the utility of the Model Law as a method of providing certainty for parties and harmonised and unified cross border insolvency outcomes globally. The impact of these cultural differences could be minimised by ensuring that only matters of truly fundamental public policy invoke the exception and that parochialism and protection of purely commercial interests are not prioritised.

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[106] Model Law Guide, [161].
[107] 737 F3d 14 (4th Cir 2013).
[108] *Jaffe v Samsung Electronics Co, Ltd* 737 F 3d 14 (4th Cir 2013), 32.

There is less excuse for the inconsistent application of the public policy exception within countries. If courts within a country have differing views on whether a matter is a public policy of fundamental importance to the jurisdiction in question, it probably does not rise to the level required to invoke article 6.

Finally, while issues of public policy can (and often should) be neatly avoided by the imposition of conditions and tailored relief, or the exercise of discretions, courts around the world are urged to ensure that these public policy issues are considered and addressed head on so that they do not simply become the unspoken reason for decisions. A lack of transparency about the impact of public policy can lead to inconsistent and unpredictable results

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