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Grasping at Smoke: Identifying the Scope of the Public Policy Exception under the UNCITRAL Model Law on Cross-Border Insolvency

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ABSTRACT

The UNCITRAL Model Law on Cross-border Insolvency is founded on the principle of modified universalism, which gives significant but limited effect to the principle of comity. The public policy exception to the Model Law, which allows the courts of a state to refuse or limit recognition of a foreign insolvency proceeding and its effects based on local principles of public policy, encourages the adoption of the Model Law by reassuring enacting states that its adoption does not require the surrender of sovereignty in favour of comity. But just as public policy means different things in different contexts, so the public policy exception has been interpreted in varied ways across different states that have enacted the Model Law. This article demonstrates that it is difficult to find a common thread which binds the public policy exception across the various enactments of the Model Law, making it difficult to draw on the jurisprudence of one jurisdiction in attempting to predict the application of the exception in another.

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I. INTRODUCTION

The United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on Cross-Border Insolvency (**Model Law**) is designed to assist states in more effectively addressing cross-border insolvency proceedings by encouraging and facilitating cooperation and coordination between jurisdictions. The Model Law does not interfere with local substantive insolvency laws and respects the differences in local procedural laws.[1] This is essential because local insolvency laws are shaped by states' varying policy objectives, and a model law that had the effect of displacing those objectives would be less likely to be adopted.

A key provision of the Model Law that protects the sovereignty of local insolvency regimes and the application of local law more generally is the public policy exception in Article (**Art**) 6, which provides:

> "*Nothing in the present Law prevents the court from refusing to take an action governed by the present Law if the action would be manifestly contrary to the public policy of this State.*"[2]

After describing the role of the public policy exception and the varying means by which it has been 'domesticated' by enacting states, this article looks at cases from six common law jurisdictions: Australia, Singapore, Great Britain, the United States of America, Canada, and Kenya, in an attempt to identify any common ground between the authorities which

[1] UNCITRAL, 'Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency' (UN Doc No A/CN9/442 (1997)) para 3.
[2] UNCITRAL Model Law on Cross-Border Insolvency 1997, art 6.

might guide practitioners as to how the exception might be applied in future matters.

The analysis of the authorities demonstrates that it is difficult to precisely define the circumstances required to meet the threshold of 'contrary' or 'manifestly contrary' to public policy. Each case needs to be assessed on its merits. While it is apparent that courts across the world have tended to adopt a restrictive approach to the scope of the public policy exception, aside from that narrowness (which is common to all jurisdictions surveyed in this article and consistent with the aims of the Model Law's drafters), it is difficult to discern any common themes in the various approaches to Art 6 of the jurisdictions surveyed by this article. It follows that individual fact patterns and local laws will need to be analysed carefully in any individual case to demonstrate that the action sought to be impugned for public policy reasons would offend some matters that are fundamentally important to the enacting state.

II. THE ROLE OF THE PUBLIC POLICY EXCEPTION IN MODEL LAW POLICY

The Model Law is based on the concept of 'modified universalism'. Universalism, in the context of cross-border insolvency, applies the insolvency law of the debtor's domicile to all of the assets and relationships of the debtor around the world.[3] At the other end of the spectrum is territorialism, where each relevant country exercises jurisdiction over a debtor through separate insolvency proceedings.[4]

[3] Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 *Cornell Law Review* 696, 699.
[4] ibid 701-702.

'Modified universalism' under the Model Law occupies a middle ground between those two extremes. It recognises that in respect of each debtor, there is a primary insolvency proceeding (referred to as the 'main proceeding'), usually in the place of incorporation, and 'secondary' or 'ancillary' proceedings in other jurisdictions. Secondary proceedings facilitate the collection of assets and payment of creditors in jurisdictions other than the primary jurisdiction. As the Singapore International Commercial Court recently observed:

> "*[M]odified universalism recognises that there are differences in the insolvency laws and procedures of each State but takes the view that such differences should not stand in the way of the recognition of foreign insolvency proceedings and the benefits that would accrue to creditors as a collective whole through a global effort to coordinate the distribution of assets in a cross-border collapse*."[5]

Underpinning modified universalism is the concept of comity, famously described by the United States Supreme Court as 'the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens…'[6]

Within a framework of modified universalism, the public policy exception is the primary means by which the court can have due regard to the rights of its own citizens when called upon to make decisions under

[5] *Re Pt Garuda Indonesia (Persero) Tbk and another* [2024] SGHC(I) 1, [69] (Sontchi IJ).
[6] *Hilton v Guyot* 159 US 113 [1895], 163-164.

the Model Law. As the Court of Appeal of the Republic of Singapore recently observed, 'the very existence of the public policy exception acknowledges the limits of comity because it creates a legitimate, albeit no doubt limited, sphere within which a recognition court is entitled to prioritise a competing interest over international cooperation.'[7]

Kristen Van Zweiten argues that, consistent with the theme of modified universalism, the public policy exception is one of a suite of protective provisions[8] that encourage states to take up the Model Law by reassuring governments that they will have a degree of control over foreign proceedings consistent with their local substantive and procedural laws and policies.[9] Yiannis Bazinas and Katerina Fanouraki provide implicit support for that view by describing the exception as an 'escape clause' which, by ensuring a 'residual measure of control by the receiving court', encouraged the adoption of the Model Law in Greece.[10] Nevertheless, Van Zwieten points out (by reference to reports of the UNCIRAL Working Group on Insolvency Law) that 'widespread and regular invocation of the provision would undo the gains expected to flow from

[7] *Re Fullerton Capital Limited* [2025] SGCA 11, [126].
[8] Others include Art 22.
[9] Kristen Van Zwieten, 'Article 6: Public Policy Exception' in Reinhard Bork and Michael Veder (ed), *The UNCITRAL Model Laws on Cross-border Insolvency and on the Recognition and Enforcement of Insolvency-related Judgments: an Article-by-Article Commentary* (2025) 48, 50-51, A J Barends 'UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 *Tulane Journal of International and Comparative Law* 309, 373-374 and Irit Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 EMOR 517, 527, Ian Fletcher, *Insolvency In Private International Law* (2nd ed, 2005) 487 [8.74],
[10] Yiannis Bazinas and Katerina Fanouraki, 'The UNCITRAL Model Law on Cross-Border Insolvency: A View from Greece' (2025) II (1) Solventia 46, 64.

the harmonisation of some 'basic principles' on access, recognition and cooperation in cross-border insolvencies.'[11]

Notably, the public policy proviso was deliberately framed to be available in respect of relief under all parts of the Model Law, not just recognition[12] and it has been found to operate in that way.[13]

III. EXPLANATORY GUIDANCE ON THE PUBLIC POLICY EXCEPTION

The public policy exception in the Model Law was enacted without a definition of 'public policy', because the meaning of that concept is likely to differ from state to state.[14] In determining the scope of Art 6, courts have had the benefit of UNCITRAL's Guide to Enactment and Interpretation (**Guide to Enactment**), which contains background and explanatory information directed to executive branches of governments, as well as judges and other users of the text, including practitioners and academics.[15]

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[11] Van Zwieten (n 9) 49.
[12] Van Zwieten (n 9) 52, citing UNCITRAL, 'Report of the Working Group on Insolvency Law on the work of its 20th Session' (Vienna, 7-18 October 1996) (A/C9/433, 24 October 1996) [158].
[13] *Fibria Celulose S/A v Pan Ocean Co Ltd & Anor* [2014] EWHC 2124 (Ch), [2014] WLR(D) 288, [104].
[14] UNCITRAL, 'Report of the Working Group on Insolvency Law on the work of its 18th Session' (Vienna, 30 October – 10 November 1995) (A/CN9/419, 1 December 1995) [40].
[15] UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* (UN Doc No A/CN9/442 (1997)) The Guide to Enactment was first published in 1997, and that original version has been referred to in the text of at least one local implementation of the Model Law (Great Britain's): Cross-Border Insolvency Regulation, reg 2(2), and in the legislative history of at least one other (the United States'): House Report No 109-31, Pt 1 at 106. A revised version of the Guide to Enactment was published in January 2014

The Guide to Enactment observes that '[t]he Model Law preserves the possibility of excluding or limiting any action in favour of the foreign proceeding, including recognition of the proceeding, on the basis of overriding public policy considerations, although it is expected that the public policy exception will rarely be used.'[16] It then explains the specific operation of Art 6 in the following terms, suggesting that it is intended to operate flexibly but exceptionally:

> "*As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 6.*
>
> *In some States the expression "public policy" may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when that would contravene those fundamental principles.*
>
> *For the applicability of the public policy exception in the context of the Model Law it is important to note that a*

(**Revised Guide to Enactment**). There is some controversy over which version can legitimately be used in interpreting various enactments of the Model Law, given their respective dates of operation: see Look Chan Ho, *Cross-border Insolvency: Principles and Practice* (2016), 7-035 - 7-046.

[16] Guide to Enactment (n 9) [21]; Revised Guide to Enactment (n 9) [21(e)].

> *growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, as well as the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if "public policy" were to be understood in an extensive manner.*
>
> *The purpose of the expression "manifestly", used also in many other international legal texts as a qualifier of the expression "public policy", is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.*" [17]

When first promulgated, the Model Law 'took into account the results of other international efforts', most importantly, the then European Union Convention on Insolvency Proceedings.[18] While that convention was never ratified, its terms lived on (almost unchanged) in European Council Regulation 1346/2000 on Insolvency Proceedings (the **European Regulation**).[19] In 2015, the Regulation was recast in revised

[17] Guide to Enactment (n 15) [86] – [89].
[18] Revised Guide to Enactment (n 15) [10].
[19] Ulrich Magnus and Peter Mankowski, *ECPIL European Commentaries on Private International Law, Vol 5, European Insolvency Regulation 2015* (2025), 26 [27]-[28].

terms as European Regulation 2015/848.[20] At the time it was first recognised, the European Regulation contained Art 26 as an exception to recognition and enforcement of judgments which was intended to involve '*constitutionally protected rights and freedoms, and fundamental policies of the [recognising] State, including those of the [European] Community*.'[21] That exception, which is continued as Art 33 of the recast regulation, reads as follows (in both versions):

> "*Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.*"[22]

The Court of Justice of the European Communities has determined that the public policy exception under the European Regulation is 'of limited scope' and reserved for 'exceptional cases'.[23] The court stated: "The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement

[20] Council Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings [2015] OJ L141/19.
[21] Miguel Virgós and Etienne Schmit, *Report on the Convention on Insolvency Proceedings (Brussels, 3 May 1996)* [205]. The courts treat that report as an influential interpretative guide to the European Regulation: *In Re Stanford International Bank Ltd* [2011] Ch 33, [36]. See generally Magnus and Mankowski (n 19) 26.
[22] Reg 1346/2000, art 26; Reg 2015/848, art 33.
[23] Case C-341/04 *Eurofood IFSC Ltd* [2006] Ch 58, [133].

was sought or of a right recognised as being fundamental within that legal order."[24]

IV. ENACTMENT OF THE PUBLIC POLICY EXCEPTION

Since the Model Law was adopted by UNCITRAL on 30 May 1997, it has been enacted in whole, in part or in a modified form in 62 States and 65 jurisdictions.[25] The public policy exception in Art 6 has not been uniformly adopted. Many implementing countries, including Canada, Chile, Greece, Japan, Mexico, Poland, Serbia, and Singapore, have omitted the qualifying adjective 'manifestly' from their respective versions of Art 6.

UNCITRAL's *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* states that:

> "*Decisions in a number of cases reinforce the notion that the use of the word "manifestly" reflects the intent of the drafters of the MLCBI that article 6 should only be invoked in exceptional circumstances concerning matters of fundamental importance for the enacting State, and that the public policy exception should be construed narrowly or restrictively, consistent with international standards.*"[26]

[24] *Eurofood* (n 23) [63].
[25] UNICITRAL, *Model Law on Cross-Border Insolvency* [1997] <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> accessed 22 December 2025.
[26] UNCITRAL, *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* [2021] 20.

However, there is some judicial disagreement as to whether the inclusion or exclusion of the term alters the scope of the public policy exception.

In *Re Agrokor*, Judge Paul Matthews observed that:

> "*The inclusion of the word "manifestly" must mean something more than mere contrariness or incompatibility. So, it should be harder to demonstrate that something is manifestly contrary to public policy than that it is simply contrary to it. What is not clear is how much harder. One view is that "manifestly" means "more serious", rather like "gross" in the phrase "gross negligence". Another view is that "manifestly" does not add any further depth to the requirement. It is still the standard for being "contrary to public policy" after all. But it does add the need for clarity. Where there is any doubt or any confusion as to whether it is contrary or incompatible with public policy, there cannot be anything "manifestly" contrary to public policy.*"[27]

Less reservedly, in a recent Australian decision, the Full Federal Court observed that "the use of the word 'manifestly' adds something to the exception and so only matters of fundamental importance to a State fall within Art 6".[28]

In *Zetta Jet Pte Ltd & Ors* (***Zetta Jet***), Justice Abdullah considered that the omission of the term 'manifest' by the Singaporean legislature meant

[27] *Re Agrokor DD* [2017] EWHC 2791 (Ch) (Re Agrokor).
[28] *IREN Ltd v PricewaterhouseCoopers Inc [*2025] 307 FCR 467, [27].

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*".[29] But in a more recent decision, the Singapore International Commercial Court in *Re Pt Garuda Indonesia (Persero) Tbk and another* (***PT Garuda***) disagreed. In that case, Sontchi IJ (with whom Ramesh JAD and Reyes IJ agreed) observed: "*[w]hile we agree with the court in Zetta Jet that the word "manifestly" may be regarded as a deliberate omission, that alone is insufficient to conclude that a lower threshold for finding a breach of public policy was intended.*" His Honour went on to say that to apply a low threshold to Art 6 would:

> "*[A]llow a convenient escape route from recognition which would only serve to defeat modified universalism and is detrimental to the fair and efficient administration of cross-border insolvencies, the protection of creditor interests, the protection and maximisation of value, the protection of investment and the preservation of jobs*."[30]

Although judicial opinion varies as to whether the exclusion of the word 'manifestly' alters the threshold of the public policy exception, there is universal acceptance that the exception is to be narrowly construed. Furthermore, by its very nature, public policy will pertain to matters of fundamental importance to a state in most instances. For that reason, as the case law applying the public policy exception develops, the debate as to the role of the word 'manifestly' may become academic.

[29] *Re Zetta Jet Pte Ltd & Ors* [2018] SGHC 16 [23].
[30] Garuda Indonesia (n 5) [94].

Other jurisdictions have enacted a different version of Art 6 altogether. For example, New Zealand included the following additional sub-paragraph (2):

> "*Before the Court refuses to take an action under paragraph (1) of this article, the Court shall consider whether it is necessary for the Solicitor-General to appear and be heard on the question of the public policy of New Zealand*."[31]

Similarly, in Kenya, para 8 of the fifth schedule to the *Insolvency Act 2015* reads:

> "*(1) Nothing in this Schedule prevents the Court from refusing to take an action governed by this Schedule if the action is manifestly contrary to the public policy of Kenya.*
>
> *(2) Before refusing to take an action under subparagraph (1), the Court shall consider whether it is necessary for the Attorney-General to appear and be heard on the question of the public policy of Kenya*."[32]

While the public policy exception appears to have received no judicial attention in New Zealand, the Kenyan provision was the subject of consideration by Tuiyott J in *In the matter of Cooperativa Muratori & Cementisti* (KLR). There, in light of the inclusion of the word 'manifest', his Honour found that to invoke the exception, the relief would have to be "clearly or plainly contrary to the public policy of Kenya … the public

[31] Insolvency (Cross-border) Act 2006, art 6.
[32] Insolvency Act 2015 (Kenya) para 8.

exception clause was intended to be invoked in exceptional and limited circumstances."[33]

The inclusion or exclusion of the concept of 'manifestly contrary' and bespoke provisions such as those enacted by New Zealand and Kenya mean that courts must be careful when considering foreign decisions despite Art 8 of the Model Law, which requires courts to have regard to the international origin of the Model Law and the need to promote uniformity in its application.

V. AUTHORITIES

The brief survey of cases from several jurisdictions which follows demonstrates that the public policy exception appears to have been applied only rarely.

A. Australia

In Australia, Art 6 of the Model Law has been implemented without amendment. There are relatively few Australian decisions addressing the public policy exception, and none that have found it to apply. The following extra-curial observations made by then-Justice Robert McDougall in 2018 remain an accurate reflection of the position adopted by Australian courts:

[33] *Re Cooperativa Muratori & Cementisti* [2020] KEHC 10264 (KLR), [33]. His Honour's decision was applied in *Re Zarara Oil and Gas Company Limited* [2021] KEHC 191, [24] and considered with apparent approval in *Re HP Gauff Ingeniure GMBH & CO KG –JBG* [2021] KEHC 9722 (KLR) (in each case by Majanja J).

> "*Australian case law is, to date, relatively light on this public policy exception. This is likely because of the difficulty that parties seeking to resist recognition perceive in running such an argument. Indeed, it appears that no Australian court has ever declined to recognise a foreign insolvency proceeding on this basis. This judicial caution is one imbued in Australian law, and it aligns with the Australian treatment of foreign arbitral awards under the New York Convention,*[34] *and of judgments of foreign courts.*[35] *What the jurisprudence in those areas shows (and I suggest that it is applicable by analogy to our present discussion)*[36] *is that essential principles of justice or morality generally need to be at stake before an Australian court will refuse recognition on public policy grounds*."[37]

The first Australian case which addressed Art 6 substantively (albeit in obiter dicta) was *Akers v. Deputy Commissioner of Taxation*. In that case, the Deputy Commissioner of Taxation (**DCT**) sought to prevent the remittal of funds from an Australian bank account to a liquidation in the

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[34] International Arbitration Act 1974 (Cth) ss 7, 7A; New York Convention, art V(2)(b); *Traxys Europe SA v Balaji Coke Industry Pvt Ltd [No 2]* [2012] 291 ALR 99 [105].

[35] *Jenton Overseas Investment Pty Ltd v Townsing* [2008] VSC 470, [6]-[22] (Whelan J).

[36] *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* [2016] 52 VR 1, 15 [53] (Randall AsJ).

[37] Robert McDougall, *Recognition of Foreign Insolvency Proceedings – An Australian Perspective*, Paper prepared for the 31st LAWASIA Conference on 3 November 2018, 11 [36] (footnotes from original text, but emphasis added), Cited by Markovic J in *PricewaterhouseCoopers Inc in its capacity as Foreign Representative of IE CA 3 Holdings Ltd v IE CA Holdings Ltd* [2024] FCA 1208, [98].

Cayman Islands after that liquidation had been recognised under the Model Law, on the basis that the DCT would not be entitled to a distribution in the Cayman liquidation. Neither the trial judge nor the Full Federal Court on appeal determined the case on the basis of Art 6. Although the trial judge stated there was considerable force in the argument that the public policy exception ought to preclude remittal of the funds, on appeal, Allsop CJ considered that:

> "*[I]f the operation of the Model Law and the CBI Act (as laws of the parliament) otherwise would see the funds remitted to the Cayman Islands, I see no basis to conclude that such would be contrary to a matter of fundamental importance to Australia.*"[38]

In *Indian Farmers Fertiliser Cooperative Ltd v. Legend International Holdings Inc.*, the plaintiffs in Australian winding up proceedings of a corporation incorporated in the United States sought to prevent recognition of subsequently commenced US Chapter 11 proceedings on the basis that those proceedings had been initiated to avoid the Australian winding up and were therefore contrary to public policy. The debtor had informed the United States court that an object of the Chapter 11 proceeding was to protect it against the Australian proceedings. Associate Justice Randall determined that seeking Chapter 11 protection and recognition in those circumstances was not contrary to public policy, on the basis that the 'concept and goals' of Chapter 11 are not far removed from those under the Australian insolvency legislation.[39] His Honour

[38] *Akers v Deputy Commissioner of Taxation* [2014] 223 FCR 8, 43 [147].
[39] *Indian Farmers Fertiliser* (n 33) 14 [49].

adopted in a cross-border context the policy of courts being 'slow' to invoke public policy to refuse to recognise judgments.[40] Ultimately, the Chapter 11 proceeding was not recognised because the company had neither a 'centre of main interests' nor an establishment in Australia, and the public policy argument was not re-agitated on appeal.

The public policy exception was recently considered by Markovic J in *PricewaterhouseCoopers Inc in its capacity as Foreign Representative of IE CA 3 Holdings Ltd v IE CA Holdings Ltd,*[41] and by the Full Federal Court of Australia on appeal: *IREN Ltd v PricewaterhouseCoopers Inc*.[42] That case involved the recognition in Australia of the Canadian bankruptcy proceedings of two Canadian subsidiaries of an Australian parent. The Canadian bankruptcy trustee sought the grant of Australian examination powers for the purpose of investigating the bankrupts' affairs. The trustee had already conducted limited examinations in Canada. The bankrupts' parent company opposed recognition on the basis that further examinations in Australia would be an abuse of process and manifestly contrary to Australian public policy. Justice Markovic found that:

> "*[M]erely expanding on public examinations already conducted in Canada, or making further application for examinations which were sought but not granted in Canada, does not go to matters fundamental to Australian public policy. Such examinations, if granted and*

[40] *Indian Farmers Fertiliser* (n 33) 7 [53].
[41] *Foreign Representative of IE CA 3 Holdings Ltd v IE CA Holdings Ltd* [2024] FCA 1208.
[42] *IREN Ltd v PricewaterhouseCoopers Inc* [2025] 307 FCR 467.

> *undertaken, do not interfere with any constitutional rights, or amount to a contempt of an Australian court. At their highest the allegations made by [the parent] might provide grounds for the court ruling on an examination summons or affect or guide a court's supervision of an examination. But the mere intention to undertake and, if applied for, undertaking a public examination, having regard to the Examination Orders and the examinations undertaken to date, falls far short of the high bar required to meet the test in Art 6 as enacted by Parliament.*" [43]

On appeal, the court found that the primary judgment was not attended by sufficient doubt to warrant its reconsideration. So far as Art 6 was concerned, the Court found that nothing in the trustee's purpose was illegitimate, because: (1) it accorded with one of the objects of the Model Law, i.e. the protection and maximisation of the value of the debtors' assets; and (2) the trustee's express intention was to seek assistance in Australia in connection with the foreign proceedings, as provided for under Model Law Art 1(1)(a).[44]

B. Singapore

Singapore is an example of a jurisdiction that opted to omit the word 'manifestly' from its version of Art 6 when enacting the Model Law.

[43] *PricewaterhouseCoopers Inc in its capacity as Foreign Representative of IE CA 3 Holdings Ltd v IE CA Holdings Ltd* [2024] FCA 1208, [27].
[44] *IREN Ltd v PricewaterhouseCoopers Inc* (n 41) 467, 474 [33].

In *PT Garuda*,[45] the foreign representatives sought recognition of Indonesian insolvency proceedings concerning Indonesia's national airline, Garuda Indonesia, an order recognising and enforcing a restructuring plan approved by the Jakarta Commercial Court, and other ancillary relief. The application was opposed by two aircraft lessors, who were owed money under various leasing arrangements. The restructuring plan was supported by creditors representing 97.46% of the total value of the debt, and the restructuring was unsuccessfully challenged by the lessors in the Indonesian courts. In Singapore, the lessors argued that recognition of the Indonesian proceeding ought to be denied on the basis of public policy, for two reasons. First, the restructuring plan involved inequitable and differing treatment of unsecured creditors, but was voted on by all unsecured creditors as a single class. Second, the voting occurred without adequate disclosure of information, as it released the debts of Garuda France without disclosing information as to the financial position of Garuda France. Upon a close analysis of the facts, the application was dismissed on the basis that "the challenges raised are primarily on the merits disguised as public policy objections".[46]

In contrast, *Zetta Jet*[47] is one of the few cases where a court has refused recognition on public policy grounds. In that case, the High Court of Singapore refused an application for recognition of proceedings under Chapter 7 of the US Bankruptcy Code in circumstances where those

[45] Garuda Indonesia (n 5)
[46] ibid [103].
[47] Zetta Jet Pte Ltd (n 29).

proceedings had been pursued in defiance of an injunction granted by the Singapore court. Justice Abdullah observed:

> "*I cannot on this occasion lay down specifically what would trigger the public policy bar in Singapore. But at the very least, I would interpret it as requiring denial of an application for recognition by foreign insolvency representatives appointed under proceedings enjoined by a Singapore court. Ignoring an injunction granted by a Singapore court undermines the administration of justice. Orders issued by a court are to be complied with. Those who do not comply are rightly subject to penalties. In particular, they cannot generally seek the assistance of the courts unless the non-compliance is rectified or purged. While the court's power to refuse recognition under Article 6 of the Singapore Model Law is discretionary, it would be rare for the court not to refuse recognition where there has been non-compliance with a Singapore court order.*"[48]

His Honour granted 'limited recognition' to the Chapter 7 trustee only for the purposes of applying to set aside or appeal the Singapore injunction. Without deciding, he found a basis for that as "either a form of modification of recognition under Art 17.4 or … a manner of relief under Art 21.1."[49] The injunction was then discharged, and the trustee sought and obtained recognition of the Ch 7 proceedings.[50] As will be

[48] Zetta Jet Pte Ltd (n 29).
[49] Zetta Jet Pte Ltd (n 29) [34].
[50] Zetta Jet Pte Ltd (n 29), Recognition was resisted on public policy grounds again, on the basis that although discharged, the trustee had committed a contempt which he had not purged. The Court dismissed that argument.

seen below, at least one court in the United States has refused recognition in similar circumstances, despite the inclusion of the term 'manifestly contrary to public policy' applying under United States law.

In *the matter of Fullerton Capital Limited* (***Fullerton***), the Singapore Court of Appeal held that bad faith and material non-disclosure by a foreign representative fall within the scope of the public policy exception under Singapore's enactment of the Model Law.[51] On the basis of this principle, bad faith and material non-disclosure are recognised categories of abuse of process under Singapore law.[52] As the court puts it:

> "*If a foreign proceeding and recognition application have been animated by an improper or collateral purpose, a recognition court ought to feel no diffidence in refusing to aid such purpose. The Model Law is intended to promote cooperation in cross-border insolvency in order to realise better outcomes for creditors based on the principle of modified universalism. A recognition court is thus justified in ensuring that it is to this purpose that the Model Law's apparatus is applied.*
>
> …
>
> *Put another way, comity, which pulls towards recognising and assisting foreign insolvency proceedings, cannot*

[51] *Fullerton Capital* (n 7) [123].
[52] *Fullerton Capital* (n 7) [124].

> *displace the imperative of safeguarding the court's process from abuse*." [53]

On the basis of precedent, the court found that such an interpretation of the public policy exception was consistent with decisions of the English High Court in *Re OGX Petróleo e Gás SA (Practice Note)*,[54] and *Cherkasov & Ors v Olegovich*,[55] discussed further below.

Notwithstanding its exposition of the relevant principle, on the facts of the case, the Court of Appeal in *Fullerton* upheld the first instance finding that the application was not made in bad faith.

C. Great Britain

Great Britain[56] also implemented Art 6 in a substantially unchanged form. Whilst there are relatively few cases addressing the scope and application of the public policy exception, the available authorities demonstrate that the public policy exception will be invoked in only exceptional circumstances.

In *Re Agrokor DD and in the matter of the Cross-Border Insolvency Regulations*, the English High Court found that the fact that the priorities applicable in Croatia in reorganising or liquidating the company were different from those that apply or would apply under English law was 'simply not enough' to deny recognition.[57] Similarly, in *Luc A. Despins (as Foreign Representative of Ho Wan Kwok) v Ho Wan*

[53] *Fullerton Capital* (n 7) [125]-[126].
[54] *Re OGX Petróleo e Gás SA (Practice Note)* [2016] Bus LR 121.
[55] *Cherkasov & Ors v Olegovich* [2017] EWHC 3153 (Ch).
[56] England, Scotland and Wales.
[57] *Re Agrokor DD* [2017] EWHC 2791 (Ch) [131].

Kwok,[58] an alleged conflict on the part of the applicant's firm was not sufficient to establish the public policy exception.

An example of a case where the public policy exception was successfully invoked is *Cherkasov & Ors v Olegovich*.[59] In that case, a Mr Nogotkov was appointed by a Russian court as the official receiver of a Russian company, Dalnyaya Step LLC (**DSL**). He obtained recognition of the Russian proceedings in the English High Court and sought orders under the *Insolvency Act 1986* (UK) for the production of documents and information from English parties concerning the tax affairs of DSL. The applicants (collectively, the 'Hermitage Parties') successfully brought proceedings seeking rescission of the recognition orders, claiming breach of the duty of full and frank disclosure.

Hermitage was a Guernsey investment trust which bought shares in state-owned or partially state-owned Russian companies, then exposed corruption by shareholder activism and profited from the resulting increase in the value of the shares. They alleged that the Russian state began a campaign of retaliatory action against them, including via a tax audit and criminal proceedings against their CEO, Mr Browder, and their lawyer, Mr Sergei Magnitsky (who died in police custody). They also alleged that the Russian authorities, including the finance regulator, sanctioned and assisted a fraud against some of DSL's subsidiaries. The criminal proceedings against Browder and Magnitsky involved an

[58] *Luc A Despins (as Foreign Representative of Ho Wan Kwok) v Ho Wan Kwok* [2023] EWHC 74 (Ch).
[59] *Cherkasov* (n 55).

alleged tax fraud in relation to DSL. It was the financial regulator who caused the liquidation of DSL and the appointment of Mr Nogotkov.

Russian authorities had made at least 12 separate requests to the UK authorities for mutual legal assistance in relation to the criminal proceedings against Browder and Magnitsky. The UK Home Office refused, the Secretary of State claimed that the assistance was "likely to prejudice the sovereignty, security, *ordre public*, or other essential interests of the United Kingdom."[60] Mr Nogotkov then obtained recognition, disclosing his intention to bring proceedings for disclosure or examinations, but failed to name the intended respondents and failed to provide the relevant background to the court.

The obligation to provide full and frank disclosure to the court, when making an application for recognition, was discussed by Snowden J in *Re OGX Petróleo e Gás SA (Practice Note)* (now published as a practice note by the High Court).[61] His Honour observed that full and frank disclosure is required on a recognition application 'in relation to the consequences that recognition of the foreign proceeding may have upon third parties who are not before the court. In particular, the court should be told of any points that could be raised in relation to the modification or termination of the automatic stay and suspension which will come into effect upon recognition.'[62]

In his judgment in *Cherkasov*, the Chancellor Sir Geoffrey Vos extended the practice note as follows:

[60] *Cherkasov* (n 55) [7].
[61] R*e OGX Petróleo e Gás SA (Practice Note)* [2016] Bus LR 121.
[62] ibid.

> "*When seeking recognition, full and frank disclosure must be made to the court in relation to the consequences for third parties that are not before the court that may flow from the recognition of the foreign proceeding, including from intended future applications enabled by the recognition order*."[63]

His Honour went on to observe:

> "*The history of the Russian state's actions against the Hermitage Parties were material facts of which the English court needed to be fully and fairly informed, in order to allow it to decide whether or not article 6 was engaged. Mr Nogotkov has been coy in his various affidavits and statements as to precisely what he personally knew. But that is not the relevant issue. The duty of disclosure applies not only to material facts known to Mr Nogotkov, but, as Ralph Gibson LJ said, "to any additional facts which he would have known if he had made such inquiries". Mr Nogotkov anyway knew that the actions he was taking were highly charged politically. That was enough to make it incumbent upon him to tell the English court that political issues involving the Russian state might arise. He failed to do so.*
>
> *…My summary of the facts makes it abundantly clear that the English court ought to have been told that public policy*

[63] *Cherkasov* (n 57) 86.

> *issues might be engaged as a result of the political background I have described.*" [64]

On that basis, his Honour set aside the recognition order *ab initio*.

D. United States

In enacting the Model Law for inclusion as part of the United States Bankruptcy Code (**Bankruptcy Code**), the United States adopted Art 6 without substantial amendment. At that time, Congress stated that *"the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States*".[65] There is a significant volume of United States case laws that address public policy issues, but as a Bankruptcy Appeals Panel observed in *Re Black Gold S.A.R.L.* (***Re Black Gold***), *"few [courts] have addressed the question of when US policy is indeed 'fundamental', thus warranting § 1506 protection."*[66]

In *Re Qimonda AG*, the United States Bankruptcy Court for the Eastern District of Virginia identified three guiding principles arising from the case law on § 1506:

> "*(1) The mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy exception.*
>
> *(2) Deference to a foreign proceeding should not be afforded in a Chapter 15 proceeding where the procedural*

[64] *Cherkasov* (n 57) 88-89.
[65] HR Rep No 109-31(1) [2005] 109th Cong 1st Sess.
[66] *Re Black Gold S.A.R.L.* 635 BR 517 [2022] 528.

> *fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections.*
>
> *(3) An action should not be taken in a Chapter 15 proceeding where taking such action would frustrate a U.S. court's ability to administer the Chapter 15 proceeding and/or would impinge severely a U.S. constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding."* [67]

Re Creative Finance (***Creative Finance***) demonstrates the narrow scope of the public policy exception in the United States.[68] There, it was argued that the BVI proceedings for which recognition in the United States was sought had been commenced in bad faith. The application was for recognition of a voluntary liquidation proceeding of two companies in the British Virgin Islands (**BVI**) in circumstances where a USD 5.6 million judgment had been awarded against the companies in the United Kingdom (**UK**) and the companies' available USD 9.5 million in cash had been transferred out of the UK post judgment. The companies had valuable claims in a Ch 11 case in the United States, and the judgment debtor domesticated its UK judgment in the New York Supreme Court in order to capture distributions from the Ch 11 proceeding. The BVI liquidator filed a Ch 15 recognition proceeding seeking provisional and permanent relief to stay the judgment debtor from enforcing its judgment. The Court found that it was 'offended' by the liquidators'

[67] *Re Qimonda AG* [2011] 433 B.R. 547, 570; Kirsty Zander, '*Application of the Public Policy Exception in the UNCINTRAL Model Law on Cross Border Insolvency: Issues and Challenges*' (INSOL Technical Paper Series No 54) [2.3.1].
[68] *Re Creative Finance* 543 BR 498 Bankr SDNY [2016]

conduct, and that the case was 'the most blatant effort to hinder, delay and defraud a creditor this Court has ever seen'; but refused to invoke the public policy clause.[69] Judge Gerber emphasised the narrow reading required by 'manifestly' and found that bad faith conduct of foreign debtors, which was sometimes engaged in by local debtors, offered no justification for declining recognition if it were otherwise suitable.

In *Re Black Gold*, the debtor sought recognition of an insolvency proceeding filed in Monaco after a United States company obtained a judgment against the debtor for the theft of trade secrets. The purpose of the proceeding and the recognition was to thwart the enforcement of the judgment debt, but there was no evidence of any fraudulent transfers, as there had been in *Creative Finance*. In seeking recognition, the court found that the debtor had failed to make full and frank disclosure, but considered that that fact alone 'is not enough'.[70]

In both *Creative Finance* and *Re Black Gold*, the courts observed that there are post-recognition tools available to deal appropriately with misconduct and cases filed in bad faith. In *Creative Finance*, Judge Gerber did not rule out the use of the § 305 'bad faith' section to terminate proceedings in an appropriate case and observed that the relief from the stay over assets situated in the United States could be granted under § 362 'for cause'.[71] Judge Brand in *Re Black Gold* also referred to § 305 and §362 and stated that "US courts are not completely helpless to deal with instances of bad faith".[72]

[69] ibid 516.
[70] Re Black Gold (n 66) 531.
[71] Re Creative Finance (n 68) 501.
[72] Re Black Gold (n 66) at 533.

In *Re Millennium Global Emerging Credit Master Fund Ltd*,[73] an appeal was brought against recognition of Bermudan insolvency proceedings, on the grounds that the judge hearing the recognition application had failed to allow detailed questioning about arbitration proceedings, involving the funds and thereby contravened United States public policy favouring openness and transparency in court proceedings. The appeal was unsuccessful, with the appeals court observing that the policy favouring openness in the courtroom was not among "*the most fundamental policies of the United States.*"[74]

Even in circumstances where the relief effected by the foreign proceedings is specifically prohibited in United States proceedings, the courts have declined to apply the public policy exception to refuse recognition. For example, in *Harrington v Purdue Pharma L.P.*, the Supreme Court of the United States determined that the United States bankruptcy courts do not generally have the power to approve plans which would discharge claims against parties other than the debtor, without the consent of the relevant claimants[75] (third party releases are available under statute, in a narrow category of cases related to debtors whose liabilities arose from asbestos exposure).[76] But in *Re Crédito Real S.A.B. de C.V., SOFOM, E.N.R.*,[77] Judge Horan found that the presence of such third-party releases in a Mexican concurso plan did not justify refusing to recognise the Mexican proceedings on the basis of public

[73] *Re Millennium Global Emerging Credit Master Fund Ltd* 474 BR 88 [2012].
[74] *Re Millennium Global Emerging Credit Master Fund Ltd* 474 BR 88 [2012] 95.
[75] *Harrington v Purdue Pharma LP* 603 US 204 [2024].
[76] See USC §524(g)(4)(A)(ii).
[77] *Re Crédito Real SAB de CV, SOFOM, ENR* 670 BR [2025].

policy. His Honour found that procedural fairness had been observed in the Mexican court,[78] and that the plan impinged on no 'constitutional or statutory right',[79] and went on to state that *"[l]ack of specific availability [of third party releases] in U.S. courts does not equate to manifest contrariness to U.S. public policy, especially where, as here, the contested relief is available in other contexts and could be made available more broadly by a simple act of Congress."*[80] At the time of writing, an appeal from the decision was pending,[81] but in the interim, at least one other case has reached an equivalent finding.[82]

An example of a United States court denying recognition on public policy grounds is *Re Gold and Honey Ltd*, in which the United States Bankruptcy Court of the Eastern District of New York denied recognition of an Israeli receiver appointed in the face of a Ch 11 automatic stay in the United States. There, Judge Trust stated:

> "*A petition for recognition should be denied if recognition would be manifestly contrary to the public policy of the United States. 11 U.S.C § 1506. Recognition of the Israeli Receivership Proceeding as a foreign proceeding would be manifestly contrary to the public policy of the United States because such recognition would reward and*

[78] *Re Crédito Real SAB de CV, SOFOM, ENR* 670 B.R. [2025] 150, 171-172.
[79] *Crédito Real* (n 77) *173*.
[80] *Crédito Real* (n 77) 150, 173-174.
[81] *United States District Court for the District of Delaware*, Case 1:25-cv-00371-CFC.
[82] George W Shuster Jr and Benjamin W Loveland, 'Recognition of Nonconsensual Third-Party Releases in Ch. 15 after Purdue' [2025] 44(10) *American Bankruptcy Institute Journal*, 20, 81, describing *Re Odebrecht Engenharia e Construção SA – Em Recuperação Jud* 669 BR 457 [2025] (Bankr SDNY).

> *legitimize [sic] [the] violation of both the automatic stay and this Court's Orders regarding the stay. While the legislative history of Section 1506 demonstrates that this exception should be applied narrowly, it should be invoked when fundamental policies of the United States are at risk*." [83]

Two years later, in *Re Toft*, Judge Gropper refused to grant the foreign representative of an individual bankrupt estate relief to give effect to German orders which would allow the trustee access to the bankrupt's emails, principally on the basis that:

> "*[T]he relief sought by the Foreign Representative is banned under U.S. law, and it would seemingly result in criminal liability under the Wiretap Act and the Privacy Act for those who carried it out. The relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States.*" [84]

E. Canada

Despite the Canadian implementation of the Model Law omitting the adjective 'manifestly' from its public policy provision, the courts have given the provision a restricted operation. In *Re Hartford Computer*

[83] *Re Gold and Honey Ltd* 410 BR 357 [2009] 371-372.
[84] *Re Toft* 453 BR Bankr SDNY [2011] 186, 198.

Hardware, Inc, Morawetz J of the Ontario Superior Court of Justice relied on the Guide to Enactment in finding that the relevant section should be interpreted restrictively.[85] His Honour noted that approach again in *Re YRC Freight Canada Company*.[86] At the appellate level, in *Marciano (Séquestre de)*, the Court of Appeal of Quebec applied the Canadian Supreme Court decision of *Beals v Saldanha* (***Beals***) to an application for the recognition of an American personal bankruptcy. *Beals* was concerned about the enforcement of a Florida judgment for damages. The judgment creditor raised public policy arguments to resist enforcement. The Supreme Court held that the public policy 'defence' turned on whether the foreign law was contrary to 'the Canadian concept of justice' or 'our view of basic morality' and should 'continue to have a narrow application.'[87] Applying those statements in *Marciano*, the Quebec court found that Canadian public policy did not require recognition to be denied on grounds that the foreign court had refused to hear the debtor because of his abusive behaviour, nor because the foreign judgments against the debtor were for sums which would not have been awarded in Canada.[88] Consistent with those interpretations, in *Re Pelletier*, the Alberta Court of Appeal described public policy as a 'fairly narrow exception'.[89]

[85] *Re Hartford Computer Hardware, Inc* [2012] ONSC 964 [17]-[18].
[86] *Re YRC Freight Canada Company* [2023] ONSC 5513 [12].
[87] *Beals v Saldanha* [2003] 3 SCR 416, [71], [75] (McLachlin CJ and Gonthier, Major, Bastarache, Arbour and Deschamps JJ).
[88] *Marciano (Séquestre de)* [2012] QCCA 1881, [71]-[76] (Dalphond JA, Rochon and Kasirer JJA agreeing).
[89] *Re Pelletier* [2021] ABCA 264 (McDonald, O'Ferrall and Veldhuis JJA).

F. Kenya

In the Kenyan case of *Cooperativa Muratori & Cementisti*, Tuiyott J adopted the following statement in reference to the public policy exception:

> "*[P]ublic policy, in my view, generally refers to the set of socio-cultural, legal political and economic values, norms and principles that are deemed so essential that no departure therefrom can be entertained. Public policy acts as a shield for safeguarding the public good, upholding justice and morality and preserving the deep-rooted interest of a given society.*"[90]

In that case, creditors contested the Kenyan recognition of Italian voluntary agreement proceedings, arguing that the recognition would not protect local creditors' interests, and would put those creditors to the 'substantial and unnecessary expense' of submitting to the foreign proceeding.

Mr Justice Tuiyott stated that it was 'critical' that recognition should not compromise creditors' rights to equal protection of the law or access to justice – otherwise, it would be inimical to the public policy of Kenya as a *"direct affront to the rights provided by the Constitution."*[91] But that did not mean that relief which might risk such consequences ought simply be refused: 'other provisions of the Model Law would allow such

[90] *Re Cooperativa Muratori & Cementisti* [2020] KEHC 10264 (KLR) (High Court of Kenya at Nairobi), [29]; The original statement comes from the judgment of Onguto J in *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited* [2017] KEHC 6835 (KLR).
[91] *Cooperativa Muratori* (n 90) [45].

concerns to be addressed by restricting the relief or imposing conditions.'[92] While his Honour opined that if the foreign proceedings were auxiliary to a scheme involving criminal activities, then it would be against public policy to recognise the proceedings, but there was no evidence that that was the case.[93] Consequently, the court granted recognition subject to conditions, including a restriction on the expatriation of assets from Kenya without leave of the court, and a requirement that local creditors be given meaningful and affordable access to and participation in the administration.[94]

VI. CONCLUSION

In the 28 years since UNCITRAL published the Model Law, there have been relatively few decisions dealing with the scope of the public policy exception. It is searchingly difficult to lay down general rules about what is likely to satisfy the exception in any given case. There are a few grounds of commonality amongst the approaches of the various jurisdictions analysed above: First, regardless of whether or not the enacting legislation adopted the adjective 'manifestly' in implementing Art 6, the public policy exception is generally construed narrowly and applied only in exceptional circumstances. Second, an act that would contravene an order of the court being petitioned (or an application which itself contravenes such an order) seems likely to attract the exception. Beyond those limited observations, it is impossible to derive any general principles that courts in all implementing states are likely to apply. While the lack of overarching principles is initially surprising, particularly given

[92] *Cooperativa Muratori* (n 90) [47].
[93] ibid.
[94] *Cooperativa Muratori* (n 90) [58].

the universalist aims of the Model Law and the effect of Art 8, it is readily rationalised on the basis that Art 6 is a protective provision specifically included in the Model Law to give enacting states the flexibility to apply local principles of fundamental importance, despite the universalist intentions of the regime. In light of all that, parties seeking to resist Model Law relief on the basis of the public policy exception will need to carefully scrutinise the text of the relevant local legislation, the policy positions which underlie those texts, and the principles of public policy which have been developed by local courts, in formulating arguments targeted at the essentiality of the principle said to be infringed in any given case. While foreign precedents will be of some assistance (particularly with the aid of Art 8), it is unlikely to provide a reliable guide to the application of the exception in all contexts.