

# INSOLVENCY LAW JOURNAL

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## ARTICLES

### **Jurisdictional criteria and paradigms in international insolvency texts – *Paul J Omar***

The UNCITRAL Model Law on Cross-Border Insolvency, adopted in May 1997, is intended for the use of nations desiring to take on board a fully coherent system for the management of international insolvencies. In Australia, interest in this text can be dated back to a 1996 report by the Australian Law Reform Commission on Legal Risk in International Transactions, which recommended that a high priority be given to Australian participation in the UNCITRAL process. Australian proposals have also been instrumental in spurring UNCITRAL to produce a draft legislative guide on insolvency law with the aim of completing a comprehensive statement of key objectives and core features for a strong insolvency regime, which would form a template for States wishing to update their insolvency laws in line with internationally accepted criteria. The jurisdiction paradigm in the Model Law is adopted from European efforts in the field which have seen the production of a number of texts, including the European Regulation on Insolvency Proceedings 2000. It is the purpose of this article to look at the history behind the development of jurisdictional criteria in these international insolvency texts with a view to illustrating how the Model Law might work in practice. This may be of some utility given the Commonwealth Department of Treasury paper, released in 2002, on Cross-Border Insolvency: Promoting International Cooperation and Coordination, which has sought comments on the possible enactment in Australia of the Model Law. .... 7

### **Tensions between the public and private purposes of examinations under Pt 5.9 of the Corporations Act 2001 (Cth) – *Stewart Maiden***

Division 1 of Pt 5.9 of the *Corporations Act 2001* (Cth) enables the examination of persons concerned with the affairs of a company in liquidation. This article explains the current scope of the Pt 5.9 examination by analysing the nature of the powers it grants and judicial and extra-curial statements that indicate the appropriate method for the exercise of those powers. It illustrates the tensions that can arise between the “public” and “private” purposes for such examinations, and points out the dangers inherent in allowing examiners to use powers granted for public purposes for private ends. The article also exposes ways in which the application of the powers have departed from the intentions for which they were arguably granted, and suggests reforms which would make examination proceedings swifter, fairer and more tailored to the purpose of each individual case. .... 28

**Public policy: The law's guardian in the clash between insolvency and maintenance in the context of litigation funding arrangements – *Scott A Atkins***

Litigation funding arrangements enable litigation that may not otherwise proceed. However, the law has failed to develop a coherent and comprehensive policy response to such arrangements, in an insolvency context, which would otherwise contravene the rule against maintenance and champerty. In many instances, the statutory power of sale exception under the *Bankruptcy Act* and the *Corporations Act* rescues such transactions from illegality. But this is a fictional device and, in the absence of a cohesive and modern doctrine of maintenance and champerty, the precise status and extent of the statutory insolvency exception, which is so often critical to the validity of litigation funding arrangements, remains unclear. Recent decisions have reinforced the need to bring coherence to this aspect of the law by adopting a public policy based response which is transparently articulated, promotes access to justice, eschews the perpetuation of fictional exceptions and is embraced and supported by a comprehensive regulatory response. .... 41

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